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Enforcing the HSE Act

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believe employers have little to fear from recent changes to the HSE Act

The Health and Safety in Employment Amendment Act 2002, which came into force on 5 May 2003, lifts the monopoly formerly held by OSH inspectors to prosecute in respect of breaches of the Health and Safety in Employment Act 1992. The 1992 Act limited the ability to prosecute to inspectors appointed under the Act. Inspectors are appointed by the Secretary of Labour on the basis of experience and qualifications in the health and safety field.

Where OSH declined to prosecute, injured victims of breaches, victim's families, and unions had been frustrated by their inability to bring those they considered responsible to account. Granting other persons the ability to take private prosecutions could relieve that frustration. The monopoly was lifted as a response, in part, to criticism that OSH failed to take prosecutions where it could have.

OSH has criteria laid out for when a decision whether or not to prosecute needs to be taken. OSH's reasons for not taking a prosecution may be varied – including a lack of evidence, the defendant's straitened financial circumstances, or OSH's failure to pick up on the hazard in inspections. Some of those obstacles may also thwart a private prosecution. OSH's report on the submissions on the Bill noted that some unions expected that private prosecution taken where OSH has declined to prosecute because an inspector failed to notify an employer of a particular hazard would encourage greater accountability in OSH inspections and compliance practices.

The Act imposes general duties on both employers and employees. For example employers must take all practicable steps to ensure the safety of employees while at work (s 6); employers must ensure that all practicable steps are taken to ensure that all significant hazards are eliminated or, failing elimination, isolated, minimised, and monitored (ss 7-10); employees are required to take all practicable steps to ensure their own safety while at work, and that they do not cause harm to any other person (s 19) and other analogous duties.

These duties form the basis of the two types of offence under the Act. Where a person commits an act or omission knowing that it is reasonably likely to cause death or serious harm the Amendment Act imposes as a maximum penalty two year's imprisonment or $500,000 fine or both (s 50(1)). The second type of offence requires no intention on behalf of the offender; it is committed when a person fails to comply with the HSE Act and its regulatory provisions. In that instance the maximum fine that can be imposed is $250,000 (s 51A). The amendment entails a fivefold increase in the fine levels, and the term of imprisonment under s 50(1) is doubled.

The amendment to the Act removes the legal distinction between failures to comply which result in harm and those that do not. Nonetheless, the writers expect that where serious harm eventuates, the matter will be addressed using ss 50(1) and 51A but instances where harm does not result, which prior to the amendment attracted a lesser fine, will be addressed by the new infringement notices regime (s 56B). An infringement notice is an administrative penalty imposing a fee of at least $100 and up to a maximum of $3000 (s 56F).

WHO CAN PROSECUTE?

Under s 54A(2) a person other than an inspector may prosecute under the Act only if no other person or enforcement agency has taken enforcement action against the potential defendant in respect of the same matter; and the person seeking to prosecute has received notification, under s 54(2) from the Secretary that an inspector will not be laying an information in respect of the same matter.

Anyone can lay an information in respect of an offence under the Act. Any person wishing to lay an information can do so provided they have notified interest, and have had confirmed that no enforcement agency is taking a prosecution in respect of the same matter. The ability of any interested party to prosecute raised the issue of vexatious litigants when the Bill was before Parliament. However, the judicial system had methods of dealing with such litigants; in practical terms no new avenues of abuse of process have been created by the amendment (OSH Report on Submissions, 16 May 2001).

Section 54(1) allows for a person to notify the Secretary of an interest in knowing whether a particular matter has been, is, or is to be, subject to the taking of enforcement action by an inspector. The manner in which a person might "notify the Secretary", involves sending notification to a branch of OSH, and will necessarily include the interested person's name, postal address, and all details of the incident in question to enable OSH to identify and investigate whether enforcement action has been taken (Draft HSE (Prescribed Matters) Regulations).

Section 54(2) requires the Secretary to notify in reply whether an inspector has decided whether or not to take enforcement action, although reasons need not be given, and any information about whether any other enforcement agency is taking action in respect of the same matter.

This notification process removes the possibility of more than one prosecution being taken in respect of the same matter. Besides an OSH inspector, enforcement action could be taken by the Land Transport Safety Authority, the Police,

the Civil Aviation Authority, or Maritime Safety Authority. The notification process will also preclude prosecutions in instances where lesser enforcement action has been taken. "Enforcement action" is defined in the amendment and includes the issuing of an infringement notice, (s 56) and the making of an application for a compliance order (under s 137 of the Employment Relations Act 2002), but not an improvement notice or a prohibition notice.

"Matter" also requires definition. It may be unclear if a precluding enforcement action has been taken in respect of the same or similar matter. For instance if a potential hazard arises and is the subject of an infringement notice, but is never rectified, can an employee later take a private prosecution in respect of that hazard? As the Act defines a "matter" as a failure to comply with the Act's provisions or a series of such failures, it would appear that the employee would have to establish that the continuing hazard is separate from matter incurring the infringement notice.

If OSH declines to take enforcement action, the principle appears to be one of "first in, first served". Potential prosecutors would be wise to share the burden of taking a prosecution. A private prosecution, like an OSH prosecution, would be an action precluding parallel proceedings undertaken by family, union or affected workers.

That these powers are specifically granted to inspectors in the HSE Act makes it clear that an "interested party" is not at liberty to gather information in this way.

The defendant in this sort of case is typically the employer, but the HSE Act also imposes duties and creates offences in respect of employees, suppliers of plant, and those with possessory rights in the place of work. For example, in a situation where, in terms of s 19, an employee is deemed responsible for the death of a work colleague it will be open to the family of the victim or their union to prosecute the offending employee if OSH declines to do so.

LIKELIHOOD OF SUCCESS

Private prosecutions are rare in New Zealand. By way of illustration they do not warrant their own classification on the Courts computer system – they are simply classified as "Other" along with various other prosecutions taken by government departments and agencies. Accordingly it is impossible to quantify the proportion of private prosecutions that succeed.

Two obstacles that could foreseeably frustrate a private prosecution are the difficulties in respect of gathering evidence and the cost of hiring legal expertise in New Zealand's underdeveloped private prosecution field.

Presumably the private prosecutor will be able to have access to reports and evidence collected by the inspector through the Official Information Act 1982 (OIA). Under the OIA every New Zealander has a "right of access to reasons for decisions affecting that person" held by a government agency, which prima facie would include OSH's collected information in respect of an incident. But s 54(2) of the HSE Act states that no reasons need be given to "interested persons" in the case of a decision not to prosecute. One might argue that a person affected by such a decision would have an OIA right to those reasons, whereas a mere "interested person", having not been directly "affected" by the decision would be denied access by s 54(2).

Section 6 of the Victims of Offences Act 1987 requires the prosecuting party to "make available to a victim information about the progress of the investigation of the offence, the charges laid or the reasons for not laying charges". The OSH guidelines outlining to OSH staff their obligations to victims, consider "everybody" to be under an obligation to keep the victim informed. OSH's guidelines however recommend that victims be informed not with specifics, but in "generalities". If OSH were to decline to prosecute those "generalities" would not be adequate for the victim, or the victim's family, to take a prosecution themselves.

The Ombudsman would be unable to help in this situation. Section 7 of the HSE Act provides that nothing in the Ombudsmen Act 1975 shall authorise an Ombudsman to investigate:

> (c) Any decision, recommendation, act, or omission of any person acting as legal adviser to the Crown pursuant to the rules for the time being approved by the Government for the conduct of Crown legal business, or acting as counsel for the Crown in relation to any proceedings:

The powers of entry and inspection given to an inspector (s 31 HSE Act) are necessarily wide-ranging for the purposes of prosecution. The powers include requiring an employer to produce documents, "freezing" the work-site for a reasonable period for the purposes of examination or tests. Inspectors are empowered to take photos, bring in equipment and experts for investigatory purposes, or require any person involved to make a statement. Section 33 gives the inspector the power to take from the work-site any object or sample necessary for gathering evidence. That these powers are specifically granted to inspectors in the HSE Act makes it clear that an "interested party" is not at liberty to gather information in this way. Doing so with the employer's permission would be a rare incident; doing so surreptitiously could be fatal to a prosecution.

If a victim worked in a workplace with several other employees, some of whom had previously taken the matter up with the employer or their health and safety representative or union before the hazard claimed its victim, then evidence might not be a difficulty. An issue that may arise would be the reluctance of employees to jeopardise their employment. Ideally OSH would take the prosecution, but if OSH declined to prosecute, perhaps because it had not reacted adequately to the health and safety representative's concerns, again the victim or their union may have to take a private prosecution.

In a limited set of circumstances prosecutions will falter due to lack of evidence. Consider the family of a worker killed in a workplace accident. If the worker was working independently there may be no employees to provide evidence, and without the wide-ranging powers of an investigating inspector a prosecution could be frustrated by lack of evidence. Presumably an OSH inspector will have investigated and declined to take action. It would be vital to that family that they have access to the inspector's gathered evidence. It remains to be seen what degree of assistance and access OSH will grant in respect of gathered evidence.

The procedure of laying an information could not be easier. Approach the Deputy Registrar in any District Court, ask for a standard form and fill in the designated gaps, and a summons is generated and sent to the defendant. From here it gets more complicated and a lawyer with criminal experience would be indispensable to any private prosecution. Thus the problem would shift from lack of knowledge about the procedure of going to Court to the cost of employing someone who does have the requisite expertise.

The HSE Act is criminal legislation and terms of imprisonment can be imposed. As in any criminal prosecution the burden of proof is beyond reasonable doubt. Civil action requires a lower threshold, on the balance of probabilities, which is more suited to a situation where private parties, without the powers of search and arrest available to the state, are required to gather evidence and take an action.

REMEDY

The reasons for taking a private prosecution will be varied. A union might take an action on behalf of employees concerned about the employer's disregard for safety requirements. If the family of an employee killed at work or an injured employee were to lay an information it may be that they seek reparation at sentencing. Reparation is obviously the ideal for a private prosecution. Increasingly it appears to be the foremost consideration in imposing financial penalties.

Section 32 of the Sentencing Act 2002 allows Courts to "impose a sentence of reparation if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer: (a) loss of or damage to property; (b) emotional harm; (c) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property". Such reparation would be sought to redress emotional harm, the loss of ability to earn and/or loss of earnings, and any treatment or rehabilitative costs.

The Sentencing Act, whilst requiring Courts to consider reparation where appropriate, does not allow for "the making of reparation in respect of any consequential loss or damage for which the Court believes that a person has entitlements under the Injury Prevention, Rehabilitation, and Compensation Act 2001". More often than not an injury or a fatality occurring at the workplace will be covered by the ACC regime which is at its most inclusive in respect of illness and injury when applied in the workplace. The IPRC Act 2001 covers two types of harm in the work place: personal injury (including personal injury caused by an accident) and work-related gradual process, disease, or infection. This provision substantially limits the scope for reparation payments to be made in respect of work related injury or illness, even where they arise out of a employer's breach of HSE legislation, a criminal offence. However, reparations could be given for other losses sustained.

The HSE Act defines harm as illness, injury or both which is a far broader and a more comprehensive scope for workplace injury than the ACC scheme. An injury may fall within the jurisdiction of the HSE Act, but fall outside the jurisdiction of the ACC: stress being the best example of this. The coverage of the HSE Act extends to emotional harm in addition to physical injury. Nervous breakdowns, and stress related conditions are considered to be "harm" under the HSE Act. However, stress related injury is only covered under ACC legislation when it arises as a result of certain criminal acts or is a by-product of a physical injury.

Gradual process injuries also fall into this category. Even where an employee is able to demonstrate to an employer that the employee has a work related injury and OSH accepts notification for an occupational disease or asbestos related disease, it does not automatically follow that the worker will be accepted for cover for a gradual process injury as the tests for cover and for the standard of proof are different. A recent survey of people on the OSH administered asbestos related disease register, found that of 38 people surveyed only ten had claims accepted by ACC.

The Courts have shown that they are prepared to make reparations payable to the victim of breach of the HSE Act. Frequently, an offer to make reparations or ex gratia payments, will be a mitigating consideration for a Court in imposing a penalty, as it reflects remorse and an acceptance of responsibility for the harm (eg *Dept of Labour v de Spa & Co Ltd* [1994] 1 ERNZ 339).

Probably of more importance is the changes brought in by the 2002 amendment in respect of insurance against penalties. Under the Amendment, contracts purporting to insure employers against fines imposed under HSE legislation will be deemed to be of no effect. This codifies the common law in respect of insuring against criminal liability, and provides for full liability by the employer for all types of offence under the Act. What s 56I(1) does not prohibit are contracts that insure against the imposition of reparations or costs in such a prosecution. This being the case, insured defendants will be better off paying reparations to the injured person, or their family, rather than paying the same amount in fines. The prohibition of insurance in respect of fines, but not in respect of reparation could render the taking of a prosecution more likely to bear financial fruit.

LIKELY EFFECT OF AMENDMENT

The recent changes will be evident in an increasing frequency of infringement notices. Such an increase will curb the number of prosecutions taken by OSH, and preclude the possibility of private prosecutions being pursued. It would be an expedient manner in which to deal with failures to comply for OSH given the comparative ease with which infringement notices can be imposed and it could be favoured by employers as it indemnifies them from future prosecution in relation to that matter.

If in reviewing the effect of the recent amendment in years to come, no private prosecutions have been taken it will be apparent that one of three things are occurring. It could be that OSH diligently and decisively pursues every viable prosecution. It could be that the easier to dispense infringement fine is displacing prosecutions in general and private prosecutions in particular. Or thirdly, structural challenges, such as powers for collection of evidence, are proving insurmountable for would-be private prosecutors. It is expected that infringement notices, as prosecution precluding enforcement action, will block the deeper scrutiny attached to prosecution. OSH prosecution will most likely follow repeated failures to comply, and as such the threshold of offending will be lifted before a prosecution will be initiated by OSH.

The double jeopardy limitations on prosecution, private or otherwise, will potentially limit accountability and redress for those harmed in HSE breaches. This would be a perverse outcome of the amendments to the HSE which sought to increase accountability to those who fail to provide a safe workplace. ❐