

## **BACKGROUND AS PUBLISHED BY DEL.**

1.1 *The Occupational Health and Safety Act predates the Constitution of the Republic of South Africa, which provides that any law or conduct inconsistent with the Constitution is invalid and any obligation imposed by the Constitution must be fulfilled. **The proposed amendment of the Act therefore became necessary to ensure consistency with the spirit and provision of the Constitution dealing with the right to life, human dignity, right to fair labour practice, access to information and lawful, reasonable and procedurally fair administrative decision making.***

1.2 *Over and above the fact that the current Occupational Health and Safety Act predated the Constitution, the legislation has not kept abreast with the legal landscape in the Republic of South Africa, technology and Occupational Health and Safety around the world.*

1.3 *The Act also does not address the Cabinet decision of 1999 in which it was envisaged that the Republic of South Africa moves towards an integrated Occupational Health and Safety framework for South Africa. Such integration was supposed to commence with the integration of the Department of Labour and the Department of Mineral Resources (formerly known as the Department Mineral and Energy). This process was stopped during 2009 on instruction of the Minister of Labour.*

1.4 *Occupation Health and Safety in South Africa therefore remains fragmented with various Government Departments claiming jurisdiction over various areas, leading to confusion at times for clients. The current Occupational Health and Safety Act therefore still crosses over into the jurisdiction of other Occupational Health and Safety legislation that is administered by other Government Departments.*

1.5 *The proposed Bill however, seeks to limit its reach in terms of occupational health and safety through its scope to those areas falling outside the jurisdiction of the Department.*

## **2. OBJECTIVES OF BILL**

2.1 ***The Bill seeks to align the Act with the Constitution of the Republic of South Africa** and other employment laws and to provide a common framework to guide prevention of accidents and ensure health and safety at the workplace; review and strengthen the enforcement provisions; ensure that the legislation is in line with current international and local industry developments; simplify the administrative system for issuing fines and shorten the enforcement procedures; reinforce the offences and penalties.*

2.2 *The Bill further seeks to provide a common framework by providing for—*

(a) *the revision and reviewing of the definitions in order to remove any ambiguities and align them with other employment laws;*

(b) *appointment of an independent person who is not an employee of the Department of Labour. It also addresses the concerns that were raised by the Portfolio Committee for Labour about the independent chairperson of the Council;*

(c) *the limitation of the term of office of the members of the Council to two terms in order to give opportunities to new members and prevent comfort zones which could give rise to mediocrity. There is also a restriction on the number of technical committees that members can serve on in order to ensure the effectiveness of committees;*

- (d) *the compulsory risk assessment to be conducted by the employer and a workplace specific risk management plan developed and implemented in order to minimise the exposure of employees to risk;*
- (e) *the development of a safety management system for workplaces by employers;*
- (f) *the conditions on any person who imports, sells or supplies any substances to ensure that an article is accompanied by precautionary measures to be adhered to; This area of the Bill is also expanded to include the current move afoot worldwide towards the implementation of the Globally Harmonised System legislation – currently this is not dealt with in the Act and has limited the Minister in relation to creating regulations protecting employees. The Hazardous Chemical Substances Regulation will be given the necessary legal framework that will allow for the incorporation of certain aspects in order to allow for the incorporation of the Globally Harmonised System;*
- (g) *the empowerment of the Council to play a major role in advising the Minister on listed work;*
- (h) empowerment of employees to leave a dangerous working place when their health and safety are in danger, without any fear of victimisation by the employer;**
- (i) *the responsibility on the chief executive officer to delegate duties in writing and be accountable for any duties that has been delegated;*
- (j) *self regulation (bargaining tool to engage) that allows employers and employees through a process of negotiation, consultation and appointment of health and safety representatives and health and safety committees. It also makes a provision for a dispute resolution when there are parties having a dispute through the general administrative regulations;*
- (k) *health and safety representatives are given greater responsibilities which they have to exercise – in the past this was optional;*
- (l) *a platform for employees to engage the employer on the health and safety committee and participate in decision making on important issues. The functions of the health and safety committee have always been key to ensuring that health and safety is properly managed. The health and safety committee is given more responsibilities in performing its functions which in the past created problems between the employer and employees;*
- (m) *a mechanism to ensure that the Council is consulted before any notice is published in the Government Gazette;*
- (n) *differentiation between health and safety standards;*
- (o) *the revision and strengthening of the enforcement provisions, simplification of the administrative system for issuing fines and empowers the inspector to issue administrative fines;*
- (p) *the reinforcement of the offences and penalties as a deterrent to other employers; and*
- (q) *the alignment of the period of appeal with other employment laws. The employers are given the right to appeal the decision of the chief inspector in compliance with the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000).*

### 3. BODIES CONSULTED

3.1 *The Department has already consulted with the Council and consensus has already been achieved on almost all issues. In principle, the content of the Bill reflects the views of the Council. Total consensus was not reached in the area of administrative fines as well as the proposed penalties.*

3.2 *The Department went through a process of consultation with other relevant organs of state, most of whom provided comments for consideration.*

#### 4. FINANCIAL IMPLICATIONS FOR STATE

4.1 *The implementation of the Bill will have financial implications for the Department, in that it will be responsible for the establishment of the sectoral advisory forums.*

4.2 *The Bill will be subjected to a Regulatory Impact Assessment (RIA) process.*

#### 5. PARLIAMENTARY PROCEDURE

5.1 *The Department of Labour and the State Law Advisers are of the opinion that this Bill must be dealt with in accordance with the parliamentary procedure prescribed by section 75 of the Constitution.*

5.2 *The State Law Advisers are of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it contains no provision pertaining to customary law or customs of traditional communities.*

### **Potential Constitutional challenges / Issues by Advocate Raynard Looch.**

#### **Sections 31 & 32 of the OHS Act / Amendment Bill.**

The draft OHS Amendment Bill does not cure the Constitutional requirement of **Just Administrative Action**.

The Constitution.

#### **Section 33 of the Bill of Rights.**

##### **Just administrative action.**

Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

**Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.**

An administrative action means any decision taken, or any failure to take a decision, by- a) an organ of state, when-

i) exercising a power in terms of the Constitution or a provincial constitution; or

ii) exercising a public power or performing a public function in terms of any legislation. (OHS & MHS Acts).

Section 33 of the Bill of Rights is reflected in the Promotion of Administrative Justice Act (PAJA) and both sections 31 and 32 of the current and Amendment Bill are in conflict with PAJA. The Courts have already pronounced on the matter.

How does PAJA impact on DEL?

Definitions

1. (i) “administrative action” means any decision taken, or any failure to take a decision, by an organ of state, when exercising a power in terms of the Constitution or a provincial constitution; or

**(ii) exercising a public power or performing a public function in terms of any legislation. (OHS Act) Investigations / Inquiries Inspector’s Report / Prohibition / Contravention / Improvement Notices!**

**Reasons for administrative action.**

5. (1) Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.

**(Inspector’s Report).**

The MHS Act, promulgated in 1996, obviously took cognisance of the Constitutional imperative to Just Administrative Action and provides for access to Inspectors Reports. The MHS Act also took cognisance of section 10 of the Bill of Right pertaining to **Human Dignity** and obliges a Formal Inquiry into any fatal mining accident where cross-examination takes place and family invited to participate.

Both the current OHS Act and Amendment Bill fail to consider **Human Dignity** since section 31 continues to provide for fatal workplace incidents to be concluded ‘informally’ with no consideration given to the **Human Dignity** of the family of a deceased who are left completely in the dark and unable to participate. (This even occurs at section 32 Formal Inquiries although the format of such Inquiries is in line with the Constitution). **Access to Information** is Constitutionally problematic where DEL refuses to provide the Inspector’s Report to the employer and Unions as per the MHS Act or to interested parties upon request.

**Access to information**

Section 32. (1) Everyone has the right of access to—

(a) any information held by the state; and

(b) any information that is held by another person and that is required for the exercise or protection of any rights.

(2) National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state. (PAIA)

Consideration must be given to the MHS Act requirement that all fatal workplace incidents be subject to a Formal Inquiry and the provisions in section 31(2) and 31(3) below to be removed.

**Section 31. Investigations**

(1) An inspector may investigate the circumstances of any incident which has occurred at or originated from a workplace or in connection with the use of plant or machinery which has resulted, or in the opinion of the inspector could have resulted, in the injury, illness or death of any person in order to determine whether it is necessary to hold a formal investigation in terms of section 32.

(2) After completing the investigation in terms of subsection (1) the inspector shall submit a written report thereon, together with all relevant statements, documents and information gathered by him, to the attorney-general within whose area of jurisdiction such incident occurred and he shall at the same time submit a copy of the report, statements and documents to the chief inspector.

(3) Upon receipt of a report referred to in subsection (2), the attorney-general shall deal therewith in accordance with the provisions of the Inquests Act, 1959 (Act No. 58 of 1959), or the Criminal Procedure Act, 1977 (Act No. 51 of 1977), as the case may be.

If this meets with resistance due to (DEL) competency challenges, an alternative must be considered to give a section 31 Investigation a prescribed format or structure. This could be done via an addition to the General Administrative Regulations or a DEL Guideline. This may still pose Constitutional challenges as provision must be made for the **audi alterem partem rule** which is essential for the administrative of justice. If families are invited to participate, oral questioning will be required as well. Testing of evidence is essential for the NPA to make a considered decision. If a party to a section 31 Investigation implicates another in a statement, the other party must be afforded an opportunity to counter it after disclosure by an inspector. The current practice is for inspectors to take statements in isolation and not disclose them to affected parties who must be afforded an opportunity to counter them.

### **Rationality.**

The Amendment Bill, in its current form will be set aside on review on the grounds of irrationality. Examples are the criminalising of **death, disability and illness** in terms of section 37B. Non disabling injury is not punishable although an inspector is obliged to investigate injuries in terms of section 31 of the Amendment Bill. (This is a departure from the current section 38(2) which punishes negligent injury).

Creating a statutory homicide offence (section 37B of the Bill) will meet with resistance from the courts as the common law crime of culpable homicide is long established as accepted as the standard for the negligent causing of death. It would be **irrational** and superfluous to introduce another negligent homicide offence – for the first time in SA's jurisprudence. Would it be a lesser (homicide) offence than the common law crime of culpable homicide?

**Stanfield v Minister of Correctional Services & others [2003] (C) 'Rationality** in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the executive and other functionaries. **Action that fails to pass this threshold is inconsistent with the requirements of our Constitution, and therefore unlawful.** The setting of this standard does not mean that the courts can or should substitute their opinions as to what is appropriate, for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of the public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a court cannot interfere with the decision simply because it disagrees with it, or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but if this does occur, a court has the power to intervene and set aside the irrational decision . . ."

### **Public Interest.**

The recent Constitutional case involving Zuma's Tax Records demonstrates that Reports on high profile workplace incidents will have to be released in the **Public Interest**. For this reason, the City Press and Johannesburg Development Agency released the Grayston Bridge Collapse Report –

despite DEL's refusal. If provision is made for the release of an Inspector's Report, **Public Interest** court challenges with resultant costs to taxpayers will be avoided.

### **Enforcement of rights**

**Bill of Rights. Section 38.** Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members

### **International Trends.**

The Amendment Bill is in conflict with International OHS legislation and the ILO Convention on Occupational Health and safety. The deliberate deletion of **reasonably practicable** as the standard to judge an employer's behaviour is rooted in all developed countries OHS legislation and well as the ILO Convention which SA has ratified. The removal of section 10(4) is potentially **irrational** and also in conflict with the ILO Convention and other OHS legislation. The Bill is also riddled with errors. See SAIOSH comments.

### **Solution.**

Push for the Amendment Bill to replicate the MHS Act.

In summary. The Constitutional issues relate to:

#### **Bill of Rights.**

Section 10. Human Dignity;

Section 33. Just Administrative Action read with PAJA;

Section 32. Access to Information read with PAIA.

Section 38. Enforcement of Rights;

Public Interest;

Rationality.

