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Safety changes out of control, warns lawyer



Jodie Bradbrook ... people are made responsible for things they don't control. Photo: Nat Rogers/Indaily

Des Ryan

LANDLORDS could be hit with harsh criminal penalties for work by tradesmen that causes serious injury, an Adelaide lawyer warns in a scathing attack on workplace safety legislation currently before the SA parliament.

Jodie Bradbrook says the Work, Health and Safety Bill imposes increased penalties, including jail terms, on people who have no direct control over the work being done.

Ms Bradbrook, of Bradbrook Lawyers, says the legislation changes the long-standing "control test" that those who have no direct control over a safety risk cannot be held responsible for any breaches.

She says the Bill introduces the concept of third-party "influence" for the control of workplace safety.

The WHS Bill 2011 (SA) – part of a push for national workplace safety standards – has passed the Lower House and is expected to be debated in the Legislative Council next week.

Bradbrook says the legislation, by making everyone criminally responsible for workplace safety, has confused the situation about who properly has the responsibility for safety risks.

"Their theory is that if everybody is thinking about safety everybody is going to be safer at work. That's their theory. But when you look at that in practice it doesn't work," she told Indaily.

She was critical of the new term Persons Conducting a Business or Undertaking [PCBU], which extends the scope of those who are responsible for any risk associated with any work site.

The owner of an investment property with a tenant in it would be regarded as a PCBU, she said.

"You would have criminal responsibility for the electrical work, the plumbing work, everything.

"Under the current laws you can discharge your obligation by engaging a suitably qualified expert to do the job. Under the new laws, that is not an excuse; that is not a defence."

Bradbrook said potential PCBU problems would commonly arise on building sites where a head contractor engaged a whole range of sub-contracted tradespeople to build a house.

"The new laws will make that head contractor responsible for all the risks created by the

electrician, the plumber, the bricklayer, in circumstances where the head contractor has no particular expertise in those matters."

To confuse matters even more, she said, each sub-contractor would also be a PCBU. Every tradie would be responsible not only for what he or she did but for the things the people next to them were doing.

"The bricklayer is responsible for the electrician and the electrician is responsible for the plumber.

"All of a sudden they all have duties to ensure the safety of each other and everyone at or near that workplace with respect to risks that they don't have any understanding of, they don't create themselves and they don't have any expertise in eliminating.

"So that is where this control test has been abolished because those people are responsible for things they don't control."

Bradbrook said the government had provided no evidence that the change would make workplaces safer and it could even make them more dangerous.

"Because it will mean that Fred the plumber is interfering in Sam the electrician's work when he has absolutely no understanding of electrical work..."

"It's a concern when a plumber has a criminal responsibility to ensure that the electrician is working in accordance with regulations and codes of practice.

"Because all of a sudden he has a risk of going to jail or significant fines in the circumstances where he has had no control over what the plumber is doing.

"There is some suggestion by a lot of people that these laws will actually make workplaces less safe.

"You will have everybody running around trying to discharge their duties because they are scared they are going to go to jail if they don't, and interfering in everybody else's business.

"Utter confusion will result."

Bradbrook's other concerns with the legislation included a union right of entry to workplaces, powers enabling "The Regulator" to seize a workplace and hundreds of pages of complicated Regulations and Codes of Practice.

She said there were also strict consultation requirements whenever a safety problem arose on a work site.

"So if the plumber and the electrician have a barney about what the other is doing, the Act requires them to stop work.

"It requires everyone on site to stop work and have a meeting about it. But it's unclear what will happen if they can't resolve their dispute.

"They have to call in The Regulator. Well, there are not enough Regulators to deal with every building site, so they might have to wait days before someone comes to sort it out.

"In the meantime, the house doesn't get built."

The state Opposition will oppose the Bill, either by defeating it in the Upper House with the support of Independent MLCs or by amending it to remove the contentious clauses.

The government has indicated it will insert a new clause 17(2) regarding "control" to appease the critics but Bradbrook said it still contained the vexed "capacity to influence" element.

Should the Bill pass in its current form, she said appeals and test cases were inevitable.

"The problem is if you are prosecuted and you are at risk of going to jail, you are going to mortgage your house to defend yourself. You are going to borrow money, you are going to do everything you can.

"And even if you win and prove that they were wrong to prosecute you, you don't get your legal costs back. You get a portion of them back, maybe a third, not even that.

"It's very similar to being charged with murder and getting off. No one gives you your legal fees back."

Anticipating the Bill would pass through parliament intact, the SafeWorkSA website says the Act will commence next January 1.

In the meantime, SafeWork says the existing WHS rules apply.

"Most importantly no one can afford to be complacent about safety at work and the proposed move to a new legislative framework is not a reason to set aside thinking about workplace safety," the website says.

"Legal requirements continue to apply and workplaces must remain vigilant and are encouraged to work proactively in planning for a smooth transition to new national laws for workplace health and safety."