SUBMISSION

TO: THE TRANSPORT AND INDUSTRIAL RELATIONS SELECT COMMITTEE

ON: THE HEALTH AND SAFETY IN EMPLOYMENT AMENDMENT BILL

DATE: 1 MARCH 2002

Introduction

1. This submission is from the Screen Producers and Directors Association of New Zealand (SPADA).

2. SPADA is the foremost screen production industry organisation representing film and television producers and directors in New Zealand. We have over 280 company and individual members. Our mission statement is to be *the leading advocate for a robust screen production industry which strives to enhance the diversity of screen culture in New Zealand.*

3. This submission has been approved by SPADA's Executive, a board annually elected by its members, and has been prepared with member consultation. We do not wish to appear before the Committee (but of course are happy to do so should the Committee require).

4. We acknowledge that the Government wishes to introduce a philosophical change to health and safety law. While we fully support health and safety provisions for the workplace, we oppose certain aspects of the Bill. We have not provided comments on every clause of the Bill but focus on :

    - Key issues which either have not been addressed or not addressed adequately;

    - Areas where provisions may have unforeseen circumstances.

Background

5. The film, television and commercials production industry is unusual in the extent to which it comprises independent contractors. In 2000/2001, the estimate of personnel employed was 29,589 independent contractor or freelancer positions, 540 part time employees and 1136 full time employees.[1]

6. Production companies are typically very small, with a tiny core staff (sometimes just the owner plus an assistant) augmented with contractors as productions are commissioned. There is only a handful of production companies (perhaps a dozen across New Zealand) with more than ten full time permanent staff.

7. The reason for this is the project-based, intermittent nature of screen production and the transferable skills of industry practitioners. People are usually hired specifically for the production of a particular film, programme or commercial. Almost all in the industry work on several projects for several different producers during the course of a year depending on their skill base and the availability of work. A production engagement can be as short as one day or as long as many months (but almost never longer than a year). This is the same as all screen production internationally. For example:

    - The producer of a one-hour documentary (of which perhaps 40 are made each year) will employ, on average, a researcher for four weeks, a director for eight weeks, an editor for four weeks etc. Even if that producer made two or three documentaries back-to-back, different personnel will usually be required on each production for creative reasons, given the unique nature of each production.
    - The producer of a feature film will be in a similar situation to the above, with a longer production period (eg. an editor would normally be employed for around 16-18 weeks)
    - The producer of a television commercial will also be in a similar situation to the above, with a much shorter production period (eg. an editor would normally be employed for one - two weeks)
    - The producer of a longer-running drama or magazine series may well employ a core staff for the period but will have no guarantee from year to year that the series will be renewed by the network.
    - Most producers are unlikely to have projects which dovetail neatly into a 48-week working year and which provide continuity of employment.

Why Does This Matter?

8. The screen production industry has been identified as an emerging key source of foreign exchange by central and local government and a key creative industry employer. In 2000/2001, the industry earned $486 million in foreign exchange and spent $572 million on production.[2]

[1] Source: *Survey of Screen Production in New Zealand 2001*. Colmar Brunton. p19
[2] Ibid p6

9. In addition, one of the key marketing planks in the very competitive world of international locations marketing is the comparative lack of employment barriers. Other countries offer significant tax breaks and employment deductions which can compensate in part for a high level of red tape. In the absence of this type of incentive New Zealand has to be able to offer, in addition to great scenery and a low dollar, a stable regulatory environment and simple employment and payroll procedures.

10. We submit that several provisions in the Bill provide the industry with an unnecessary threat. Whether or not a person is an independent contractor or an employee, the provisions of the Bill apply. The industry has a *Code Of Practice for Safety and Health* which all producers are required to adhere to as a condition of funding. We are unaware of any serious breach of this Code since it was implemented in late 1995.

Comment on the Bill

11. CLAUSES 4(5) and 6 - MENTAL HARM AND HAZARDS ARISING THROUGH PHYSICAL OR MENTAL FATIGUE

Lack Of Clarity

11.1 Clause 4(5) extends the definitions of “harm” and “hazard” to cover mental harm caused by work-related stress. However, "work-related stress" is not defined anywhere in the Bill. Unlike other forms of harm governed by the Health and Safety in Employment Act 1992 (the “Act’), stress is a highly subjective condition, brought about by a number of intangible factors.

11.2 Stress is difficult to define, as it varies widely from individual to individual, can arise as a result of a number of factors, and can have many origins. Stress will not usually arise from one single event, and there is a lack of objectivity and accuracy in diagnosing such a syndrome or the underlying causes.

11.3 The Bill is silent on whether the stress occurred at work, at home, or from some other cause, and to what extent these combinations can be accounted for. Different people have varying thresholds to stress before health and safety issues arise. Life events and other personal factors such as the employee's personality, age, health status and social status will affect people's reactions and coping abilities.

11.4 Employers will need to know what mental harm is, how it will be measured, and what the boundaries for liability are. We do not know how an employer could reasonably take adequate steps to take account of such variables.

11.5 It is useful to consider the realities of much of business life today. Any industry or position that deals with the public, employs staff, has peaks and troughs in its work flow, must be responsive to its clients requirements, operates in a highly competitive environment, has to work under deadlines or budgetary constraints, is vulnerable to the weather or equipment failures, relies on third parties for the provision of key raw materials or services, and a wide range of other factors not within the control of the employer, will involve certain times and situations when employees are placed under stress.

11.6 For example:

- A receptionist having to handle 10 calls, 3 visitors and 2 couriers that all arrive at the same time and must be attended to immediately;
- A sales representative trying to close a major sale with a new client;
- A storeperson filling a large order at the last minute because the stock was late arriving;
- A shop assistant dealing with a difficult or angry customer;
- Bar staff dealing with people who have had too much too drink;
- A manager having to replace a key person who has resigned;
- Accounting staff struggling to get the accounts on time because the computer system crashed;
- Occupations such as police and nursing by their very nature have times of considerable stress.
- Any employee facing redundancy is vulnerable to stress.
- Any employee keen to do well in a new position will face the stress of trying perform to the very best of their ability.

11.7 In our particular industry of screen production:

- Producers, directors, script writers, editors, etc. all have the stress associated with being responsible for the spending of large sums of money in the hope of producing something an audience wants to watch;
- Wardrobe personnel, set builders, props buyers, etc. have the stress of having to meet production schedules and requirements that can change at the last minute;
- On-screen personnel have the stress of dealing with the public scrutiny of not just their public performances but also their private lives.
- Wet weather, sick performers, equipment failures and a myriad of other unforeseen events can all add considerable stresses on everyone to complete a project on time and on budget.

11.8 There is virtually no industry or employment position in which an employer can offer an employee a stress-free environment.

Concern about introducing a cause of action that already exists

11.9 Employees already have the right to bring personal grievances under the Employment Relations Act 2000 if they believe they have suffered harm as a result of stress.

11.10 We understand that no prosecution has to date been made for mental injury under the Act, despite it being recognised that prosecutions for this cause of action have always been available. The Act's *Register of Accidents and Notification of Harm Form* specifically provides a clause for mental injury.

11.11 The common law is adequately developing this area of the law and we consider there is therefore no practical reason for introducing additional reasons for prosecution. The proposed amendments do not go any further than recognising the advances in the common law related to workplace stress.

11.12 It therefore seems unnecessary to amend the Act to specify that "work-related stress" falls within the definition of "harm" and "hazard".

Concern Regarding Stress and Strict Liability

11.13 The introduction of "work-related stress" into the Act, and therefore under the realm of strict liability, could have serious consequences for employers where, for example, they are unaware that employees are becoming stressed.

11.14 An employer should have the ability to look objectively at their workplace and consider that they have done all that they can to safeguard against injury. This is comparatively easy for physical hazards, but the concepts of *"stress"* and *"mental fatigue"* are abstract and there will be uncertainty as to how employers should provide a safe working environment without fear of being prosecuted for mental injury that they did not foresee, or could not have reasonably foreseen.

11.15 There is no clarity in the Bill as to what assumptions an employer is entitled to make about the employee's resilience, mental toughness and stability, given that people of clinically normal personality may have a widely differing ability to absorb stress attributable to their work.

11.16 It is arguably more difficult to prevent hazards which lead to psychological harm than physical hazards. The inclusion of stress and mental fatigue as a cause of action would leave the employer no defence to argue that the employee's action was a causative factor. An employer may be found liable for an employee who has done something irrational which causes mental harm.

11.17 Further, an employer would not be able to argue that they had instructed the employee not to do a certain task that led to a stress-related injury being sustained. For example, an employer could instruct an employee not to work long hours, but should that employee disregard the advice and persist to do so subsequently suffering a stress-related injury, an employer might still be liable under the strict liability provision.

11.18 With regard to prosecutions under the Act at present, following an accident the Department of Labour is advised of an accident through employers' reports of all work-place accidents. However, where employees claim to suffer from stress, there will rarely be a single incident or accident that triggers the process. There are therefore concerns regarding how the Department of Labour will be made aware of stress-related accidents to allow them to consider prosecutions.

Concern about Stress and Employers' Obligations under Clause 6

11.19 Clause 6 of the Act imposes a duty on employers to provide a safe working environment. The prevention of "*mental harm*" as a result of "*work related stress*" as a responsibility of employers will prove almost impossible to manage effectively.

11.20 When prosecuting a physical injury it is often possible to show the link between the breach of a duty, proof of causation and the subsequent harm that results. With mental injury, there is rarely a defining moment where causation can be objectively linked to the harm, as most stress injuries arise out of a series of work and/or non-work events occurring over a period of time.

11.21 The Bill provides no certainty as to what constitutes a mentally safe workplace or any guidelines as to the nature of the employer's duty in regard to mental injury, hazards and harm.

11.22 To include mental harm caused by work-related stress under the Act, with the associated penalty regime, is to put every business at risk for liabilities it has little or no means of avoiding, predicting or controlling.

RECOMMENDATIONS

11.23 Do not amend clause 4(5) and leave the existing definitions of "harm" and "hazard" as currently exist under the Act.

11.24 Or alternatively, amend clause 4 to provide a more specific definition of "work-related stress" as follows:

> *"harm –*
> *"(a) means illness, injury, or both; and*
> *"(b) includes physical or mental harm caused by work-related stress* ***as a result of an abnormal working environment****"*
> ***"(c) excludes an illness or injury arising out of:***
> ***(i) physical or mental harm caused wholly or substantially by stress that is not work-related.***
> ***(ii) reasonable action taken in a reasonable manner by the employer in connection with the worker's employment.***

12. PART 2A: EMPLOYEE PARTICIPATION

12.1 Clause 19B requires employee participation in health and safety matters. This is a good idea in principle but is impractical on individual film sets for example, as the concept does not fit adequately in situations where places of work are ever-changing and often of short duration. This is one of the reasons why our industry developed a generic Code Of Practice (negotiated by the producers organisation as the 'employer' and the NZ Film & Video Technicians Guild as the 'employee').

12.2 It is simply not reasonable to require this in a situation where the place of work changes frequently and where 'employees' are in reality self-employed contractors providing their services to production companies as a business.

RECOMMENDATION

12.3 Amend clause 19B(1) (plus other affected clauses) to include a new subclause (2). *This clause does not apply where an industry Code Of Practice has been negotiated which covers a variety of temporary workplaces.*

13. CLAUSES 19 AND 20 - INCREASED PENALTIES

Concern Regarding Increased Penalties

13.1 In a dramatic change from the Act, the Bill proposes in clause 19 that for offences likely to cause serious harm, the maximum fine level will be increased from $100,000 to $500,000, and the maximum term of imprisonment increased from one year to two years. Clause 20 provides that for other offences the maximum fine will be increased from $50,000 to $250,000. A fine of this magnitude would send any film and television production company out of business.

13.2 An increase in fines is unnecessary as the current fine levels are adequate, and their upper limits have yet to be reached. Fines for even the most serious of injuries resulting in loss of life do not attract the maximum penalties, with average fines ranging between $3,000 to $5,000.

RECOMMENDATION

13.3 Delete clauses 19 and 20.

14. CLAUSE 54A - PRIVATE PROSECUTIONS

Concern Regarding Private Prosecutions

14.1 Clause 54A allows persons other than inspectors to commence a prosecution for an offence under the Act. The Crown monopoly on prosecutions will therefore

be removed. Private prosecutions, for example by unions or individual employees, will be possible, but only once the Occupational Health and Safety Service has decided not to prosecute.

14.2 We consider it is completely unnecessary to introduce private party prosecutions, and that the Department of Labour should remain as the sole agency suitably qualified to do so.

RECOMMENDATION

14.3 Delete clause 54A.

15 CLAUSE 56I - INSURANCE AGAINST FINES UNLAWFUL AND OF NO EFFECT

Concern Regarding Inability of Employers to Insure

15.1 Clause 56I of the Bill introduces a provision deeming any insurance policy or contract of insurance that indemnifies a person for the person's liability to pay a fine to be of no effect.

15.2 No other similar non-criminal legislation prohibits the ability to insure against the cost of penalties.

15.3 Every well-run business has a duty to protect itself against unforeseen adverse events that could materially damage that business. Insurance for such eventualities protects not just the business concerned, but also the shareholders investment, the employees' jobs, and its creditors, clients and lenders from the consequences of business failure.

15.4 This unfairly penalises smaller employers who, unlike larger corporations, do not have the luxury of separate inhouse legal and human resources departments, and are less able to absorb or survive such penalties.

15.5 The inherent uncertainties in the Act, and the unavoidable or unpredictable nature of some types of harm (notably mental harm) coupled with the level of proposed fines which would be terminal to a most of this country's businesses, are exactly the sort of potential risk a prudent employer should insure against. To deny employers the right to arrange insurance cover is to deny them their right to manage their businesses in the best interests of all its stakeholders.

15.6 We find it difficult to understand why such an unreasonable clause is being considered at a time when the Government has clearly understood the pivotal role small businesses play in this country's economy and is doing its best in other areas of its activity to encourage growth.

RECOMMENDATION

15.7 Delete clause 56I.

16 Summary of Recommendations

16.1 We stress again that we are supportive of efforts to create and maintain a safe work environment. However some of the provisions will be crippling on small businesses as the Bill seems in many cases to be designed to address large industrial workplaces. We urge the Select Committee to think very carefully of the ramifications for small businesses and the imperative need to support such businesses wherever possible as part of the over-riding Government initiatives to grow the country's economy. We believe there are unintended side effects created by this Bill and we urge the Committee to make the following recommendations.

16.2 **Do not amend** clause 4(5) and leave the existing definitions of "harm" and "hazard" as currently exist under the Act.

16.3 Or alternatively, **amend** clause 4 to provide a more specific definition of "work-related stress" as follows: *"harm –*

> *"(a) means illness, injury, or both; and*
> *"(b) includes physical or mental harm caused by work-related stress* ***as a result of an abnormal working environment****"*
> ***"(c) excludes an illness or injury arising out of:***
> ***(i) physical or mental harm caused wholly or substantially by stress that is not work-related.***
> *(ii)* ***reasonable action taken in a reasonable manner by the employer in connection with the worker's employment.***

16.4 **Amend** clause 19B(1) (plus other affected clauses) to include a new subclause ***(2). This clause does not apply where an industry Code Of Practice has been negotiated which covers a variety of temporary workplaces.***

16.5 **Delete** clauses 19 and 20.

16.6 **Delete** clause 54A.

16.7 **Delete** clause 56I

Thank you for the opportunity to comment.

Yours sincerely

Jane Wrightson
Chief Executive