

April 15, 2011

Dr. Shafiq Qaadri MD, MPP, Chair and
Members of the Standing Committee on Social Policy

Dear Chair and Committee members:

Subject: Comments on Bill 160 – Amendments to the Occupational Health and Safety Act and Workplace Safety and Insurance Act

I have reviewed Mr. Dean's report and the proposed changes to the OHSA in Bill 160.

I have a number of general and specific reservations about the proposed changes to the OHSA. My comments come from my personal and work experiences in parks and public space and from the work of my colleagues at the Centre for Local Research into Public Space (CELOS).

In the course of CELOS researchers' efforts to experiment with what works to make parks and public spaces lively and welcoming, we have seen laws with good motives get in the way of lively, responsive, flexible neighbourhood projects. In our day-to-day experience, we have witnessed how some laws or changes to existing laws run into a number of key problems:

- the law-making "tool" fails to address the harms it is intended to remedy, because this tool may not be the best or appropriate tool in certain circumstances - especially as a response to tragic, highly public accidents or tragedies;
- the laws - designed for one purpose, and in response to a specific context - cause a great deal of unintended harm when they are applied across the board to circumstances and workplaces for which they were never designed;
- huge initial costs of establishing new institutional bureaucracies and the on-going, and future operational costs of sustaining them - all paid for by taxpayers.

In my view, the proposed changes to the OHSA would continue this trend.

In our work with neighbourhood groups across the city, we see far-reaching, unintended spin-off effects of laws made or changed in the wake of public tragedies. For example, some years ago a child was strangled by the drawstring on her jacket while coming down a slide in a playground. At the time, this dreadful accident understandably raised great fear of the same thing happening to other children - our kids, or kids we know.

However, instead of grappling with the question of how to best honour and mourn this loss and at the same time, do our best to make sure that other children are not harmed playing in a playground, this loss and fear led to millions of dollars being spent on tearing out interesting, lively playgrounds and the province-wide replacement with "safer" playground equipment - first in daycare facilities, and later, in schools and municipal parks and playgrounds.

This happened despite the fact that it was not the playground equipment, but the child's drawstring had led to the tragedy. The law and subsequent spending of millions of dollars on "safer" equipment happened without a basis of reliable, rigorously tested and evaluated data about the incidence and nature of playground injuries. And it has led to on-going costs - playground replacements each time new "standards" are issued, and a whole new "industry" for training and certification of playground inspectors, without informed public discussion about the best way to proceed.

Another example of the unintended effects of laws on public space happened in the wake of the amendments to the OHSA and the further criminalization of health and safety offences in the wake of the Westray mine disaster. As the training about this new law in the city of Toronto has trickled down to City of Toronto parks management and supervisory staff, it has fostered a culture of fear and "no" in response to permit requests to host lively, innovative and creative activities in parks. Parks supervisors and managers fear that they risk the possibility of criminal charges and/or losing their homes and possessions and if anything goes wrong in the parks they supervise.

Clearly, the changes to the OHSA and the Criminal Code were never intended to have this effect situation. But we have seen that law-making as a reaction to the very worthy and natural reactions of fear and sadness that most of us feel in the wake of a tragedy leads, in the public realm, to a pervasive atmosphere of generalized fear and the consequent dampening or shutting down of creative, engaged civic life and lively, welcoming public spaces. In this atmosphere, no one can define what the **actual, demonstrated risk of harm, or the potential problem is**. There are, instead, imaginings of worst case scenarios.

This kind of law-making is not based on publicly accessible evidence of what harm, if any, has actually happened, or based on reliably documented facts of what might reasonably happen. It is not based on public discussion about our goals for parks and public spaces. It ignores the reality that as individual people, families, and people at work or in neighbourhood communities, we are much better able to keep ourselves safe from serious harm if we know what that harm is, and where and how it is likely to happen.

Laws - by their very nature - are blunt and unwieldy tools that - when applied across the board to all workplaces in parks and public spaces - simply don't fit the context of the daily, lively, ever-changing world of parks and public spaces.

I would request that the Committee allow for further consideration of how the changes proposed in Bill 160 may adversely affect the public realm, and a detailed costing of the costs of the proposed new bureaucratic changes.

Thanks for your consideration of our comments below.

Yours truly,

Belinda Cole
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Comments on Bill 160 – Amendments to the Occupational Health and Safety Act and Workplace Safety and Insurance Act

1. The context for the proposed changes

As Mr. Dean states in his report, his panel's proposals were sought in the wake of the tragic collapse of a high-rise swing stage that resulted in the death of four people and the serious injuries suffered by a fifth man. He notes other workplace fatalities that happened during his panel's review.

I would like to propose a two pronged approach to these kinds of very tragic and public losses. Perhaps our first response to a tragedy that results in people being killed or seriously injured would be to publicly mark and honour these losses, and to do whatever we can to tell the story of the how these people died and/or were injured. Their deaths and these injuries matter. Clearly the goal of us all is to make sure that as many people as possible know the story of what happened, as this is one of the best ways to try to avoid the same kind of accident. One example might be to place a plaque at the site of the tragedy and to tell the story of what happened.

When these kinds of awful deaths and losses happen, people naturally feel sad and afraid that the same thing will happen again. At this second juncture, I would suggest that our goal is to collect all the available hard evidence that exists **to give us a clear picture of the exact nature and extent of the problem, and to precisely identify where the problem arises and under what circumstances**. This would help us all to understand the key facts - for example, is this a common type of occurrence or is it a "one off" or quite unusual? Where have these accidents happened, and under what circumstances? All of this information, including the background information about the source of the data, context in which it was gathered, etc. would ideally be made available, and easily accessible and give us the foundation for reasoned, thoughtful public debate about how to best respond to the situation.

This sharing of basic information would meet a number of important goals:

- publicly solicit all available information from workers, members of the public affected by the issue,
- publicly test the validity and reliability of available information
- get a true picture of the actual issue/situation and from there, determine if there is (at this point in time) a problem, and if so, map out the precise nature/circumstances\location and magnitude of the problem
- encourage transparency and sharing of all information at all stages of gathering, testing and public discussion
- allow for the influx of new information as it becomes available; the goal here is that we need to consider the best available information at any given time, and be continually open to new information.
- use this process of rigorous, open collection and grappling with all of the available information as the basis for all public discussion
- the public at large must be welcomed into this discussion for a few fundamental reasons:
 - the theory of social contract
 - it is the ordinary citizen who will pay for any measures we put in place to "remedy" any problem or ill

2. Unintended effects of legislation

In this case, Mr. Dean clearly states that "All of these incidents arose in the course of activities that are known to involve a high degree of risk."

However, key sections of the proposed Bill would affect all workplaces across the Province equally – whether people work as recreation staff in parks or on swing stages, in confined spaces or with potentially dangerous machinery. On the ground, this translates into additional across the board "training and education" – whether or not the jobsite is one in which serious injuries are common or likely.

As set out in the cover letter, the training to date in the wake of the OHS Act and criminal code provisions around the liability of supervisors for workplace injuries has generated considerable fear in parks supervisors who are concerned about their personal liability, and who fear the loss of their homes and livelihood. This has, in turn led to an atmosphere of fear and the shutting down of lots of fun and lively, creative activity in parks. It has also led to ever-increasing bureaucratization of simple, informal neighbourhood events.

3. Additional, costly bureaucracy

The proposed changes in Bill 160 would substitute the existing bureaucracy with a whole new, more centralized bureaucracy.

The changes propose delegating virtually limitless powers to the Minister:

Powers of Minister

(2) In administering this Act, the Minister's powers and duties include the following:

- 1. To promote public awareness of occupational health and safety.**
- 2. To educate employers, workers and other persons about occupational health and safety.**
- 3. To foster a commitment to occupational health and safety among employers, workers and others.**
 - 1. To make grants, in such amounts and on such terms as the Minister considers advisable, to support occupational health and safety.**

In our research at CELOS, we have seen a number of unintentional problems arise with the similar wide powers granted to the Minister under the Health Promotion and Protection Act. Our research has shown that once a bureaucracy builds structures around these kind of very wide powers, people's jobs and ways of doing things can easily become entrenched and impervious to a democratic process that seeks to limit these powers.

Further, Bill 160 proposes the establishment of a whole new bureaucracy - a "prevention council" of workers, employers, other health and safety "experts", who will advise the "chief prevention officer", whose job it is to come up with a "strategy", annual reports and advice to the Minister of Labour.

8. (1) The Act is amended by adding the following Part:

Part II.1

Prevention Council, Chief Prevention Officer and designated entities

Prevention Council

Prevention Council

22.2 (1) The Minister shall establish a council to be known as the Prevention Council in English and Conseil de la prévention in French.

Composition

(2) The Council shall be composed of such members as the Minister may appoint, and shall include representatives from the following groups:

- 1. Workers.**
- 2. Employers.**
- 3. Other persons with occupational health and safety expertise.**

Appointment of members

(3) The members of the Council shall be appointed for such term as may be determined by the Minister.

Chair

(4) The members of the Council shall choose a chair from among themselves by the date fixed by the Minister; if they fail to do so, the Minister shall designate a member as chair.

Same

(5) Subsection (4) applies on the first appointment of members and thereafter whenever the office of chair is vacant.

Functions

- (6) The Council shall,**
- (a) provide advice to the Minister on the appointment of a Chief Prevention Officer;**
 - (b) provide advice to the Chief Prevention Officer,**
 - (i) on the prevention of workplace injuries and occupational diseases,**
 - (ii) for the purposes of the provincial occupational health and safety strategy and the annual report under section 22.3, and**
 - (iii) on any significant proposed changes to the funding and delivery of services for the prevention of workplace injuries and occupational diseases;**
 - (c) provide advice on any other matter specified by the Minister; and**
 - (d) perform such other functions as may be specified by the Minister.**

Advice

(7) For the purposes of subsection (6), any advice provided by the Council shall be communicated by the chair of the Council.

Remuneration and expenses

(8) Any member of the Council who is not a public servant within the meaning of the Public Service of Ontario Act, 2006 may be paid such remuneration and expenses as may be from time to time fixed by the Lieutenant Governor in Council.

Chief Prevention Officer

Chief Prevention Officer

Functions

- 22.3 (1) The Minister shall appoint a Chief Prevention Officer to,**
- (a) develop a provincial occupational health and safety strategy;**
 - (b) prepare an annual report on occupational health and safety;**
 - (c) exercise any power or duty delegated to him or her by the Minister under this Act;**
 - (d) provide advice to the Minister on the prevention of workplace injuries and**

occupational diseases; and

(e) provide advice to the Minister on any proposed changes to the funding and delivery of services for the prevention of workplace injuries and occupational diseases.

Changes, funding and delivery of services

(2) The following rules apply to advice under clause (1) (e):

1. If the Chief Prevention Officer is considering providing advice about a proposed change to the funding and delivery of services for the prevention of workplace injuries and occupational diseases, the Chief Prevention Officer shall determine whether the proposed change is significant.

2. If the Chief Prevention Officer determines that the proposed change is significant, he or she shall,

i. ask the chair of the Prevention Council to state whether the Council endorses the proposed change, and

ii. include that statement in the advice to the Minister.

Appointment

(3) The Chief Prevention Officer may be appointed for a term not exceeding five years and may be reappointed for successive terms not exceeding five years each.

Occupational health and safety strategy

(4) The Chief Prevention Officer shall develop a written provincial occupational health and safety strategy that includes,

(a) a statement of occupational health and safety goals;

(b) key performance indicators for measuring the achievement of the goals; and

(c) any other matter specified by the Minister.

Advice of Prevention Council

(5) The Chief Prevention Officer shall consult with the Prevention Council and shall consider its advice in developing the strategy.

Strategy provided to Minister

(6) The Chief Prevention Officer shall provide the strategy to the Minister on or before a day specified by the Minister.

Minister's approval

(7) The Minister may approve the strategy or refer it back to the Chief Prevention Officer for further consideration.

Publication

(8) After approving the strategy, the Minister shall publish it promptly.

Annual report

(9) The Chief Prevention Officer shall provide an annual written report to the Minister on occupational health and safety that includes a measurement of the achievement of the goals established in the strategy, and that contains such other information as the Minister may require.

Advice of Prevention Council

(10) The Chief Prevention Officer shall consult with the Prevention Council and shall consider its advice in developing the report.

Report provided to Minister

(11) The Chief Prevention Officer shall provide the annual report to the Minister on or before a day specified by the Minister.

Publication

(12) The Minister shall publish the Chief Prevention Officer's report promptly.

- it provides for still more designations of: "safe workplace associations", according to more standards set by the Ministry

I have a number of questions around this.

1. How much will this new bureaucracy cost?
2. Is there any evidence to suggest that another substantial bureaucracy will substantially “fix” the existing problems? If so, what is this evidence and how was it collected?
3. Is this evidence publicly available for any member of the public to see and consider?
4. Has this evidence been opened to challenge?
5. What and where are the limits to the scope of “work” for this new bureaucracy. As we know, bureaucracies seek to maintain themselves and expand, and often the original reason for their existence becomes secondary.

4. The shift of decision-making responsibility from elected officials and a transparent process to non-elected, unaccountable public servants with no accountability to people affected by the decision-making.

The grant of virtually unlimited powers to the Minister in practice results in the transfer of these substantial powers - through delegation – to non-elected civil servants. In addition to the broad powers above, the proposed legislation explicitly delegates the power to Directors to make policies which must be followed by inspectors.

As we know, policies are not laws, because they are not made by our elected officials. However, the proposed law seeks to transfer the responsibility and accountability for law-making to unelected officials who have no obligation to an open, transparent public process of policy-making. Further, it raises additional questions about the legality of the law: For example, if a citizen refuses to abide by these mandatory actions by inspectors, does a Ministry official have the power to enforce these policies? If so, upon what authority?

3. Section 6 of the Act is amended by adding the following subsections:

Policies

(3) A Director may establish written policies respecting the interpretation, administration and enforcement of this Act.

1. **Same**
2. **An inspector shall follow any policies established by a Director under subsection (3).**