

Health and Safety in Employment Amendment Bill

Government Bill

As reported from the Transport and Industrial Relations
Committee

Commentary

Recommendation

The Transport and Industrial Relations Committee has examined the Health and Safety in Employment Amendment Bill (the bill) and recommends that it be passed with the amendments shown.

Introduction

This commentary covers the main issues raised during the hearing of evidence and consideration phases. We have commented on some provisions where we have not recommended any changes because of concerns raised by some submitters. The commentary includes the views of Labour and Green members and separately the views of National and ACT New Zealand.

The bill amends the Health and Safety in Employment Act 1992 (the Act). The Act's current framework has gaps that restrict its effectiveness and the ability of employers, employees and the Occupational Safety and Health Service (OSH) to apply it appropriately. The intent of the bill is to address these gaps.

The bill is the result of a government review of New Zealand's workplace health and safety legislation. This review has been undertaken as part of the Government's wider labour market legislation reforms, and the bill complements the Government's legislative

initiatives in the Injury Prevention, Rehabilitation and Compensation Act 2001 and the Employment Relations Act 2000.

The bill intends to achieve comprehensive coverage of work activities and relationships, improved participation by employees in the management of health and safety at work, greater incentives for compliance, and for people at work to achieve positive health and safety outcomes in the workplace.

Definition of harm and hazard

In clause 4(5), which amends section 2(1) of the Act, the bill confirms that the definitions of 'harm' and 'hazard' cover, respectively, physical or mental harm caused by work-related stress and physical or mental fatigue. Labour and Green members note the Court of Appeal decision in *A-G v Gilbert*, released after the bill's introduction, does in fact confirm that these matters are already covered by the Act.¹ The bill reinforces this coverage.

A large number of submitters expressed their concern to us about the inclusion of stress in the bill. Common themes in these submissions include that: stress is medically difficult to define, its source is hard to determine, employers could be held liable for circumstances over which they have no control, and people have varied reactions to stress, what is motivational for one person may be considered stressful by another. Similar concerns are also raised about the inclusion of fatigue in the bill.

Definition of stress and fatigue

Labour and Green members do not consider that defining stress and fatigue is necessary, although a number of submitters are concerned that stress and fatigue are not defined in the bill. Labour and Green members believe that it is best to give guidance on stress and fatigue in OSH guidelines and publications and not in legislation.

Currently, definitions of 'occupational stress' and 'occupational fatigue' are included in OSH publications on stress and fatigue in the workplace. These publications also provide detailed descriptions of the interrelationship between work, stressors, stress and fatigue. The committee urges that OSH publications are updated as required and made available to employers so that they can recognise stress at work and understand what to do about it.

¹ *Attorney General v Gilbert* CA 141/00, 14 March 2002.

Labour and Green members accept that fatigue is only one type of temporary impairment that may affect behaviour so as to create a hazard. Therefore, we recommend that the definition of hazard be amended to include reference to other matters that may temporarily affect behaviour, in particular drugs, alcohol and traumatic shock.

The Government is presently undertaking a review of the Act's definition of 'serious harm', which will determine whether the definition of serious harm should be amended to explicitly include harm resulting from stress or fatigue.

Employers obligations regarding stress and fatigue

The committee recommends that an amendment be made to the definition of 'all practicable steps' (see new clause 4A) to confirm that obligations only arise, in relation to any type of harm or hazard, where the person concerned knew or ought reasonably to have known about the issue in question. This will address submitters' concerns that employers could be held liable for situations over which they had no knowledge or control.

The bill does not alter the standard of care that must be met by employers in their management of stress and fatigue. It is the same standard that must be met for any other hazard: i.e. 'all practicable steps'. Case law indicates that in relation to undue levels of stress and fatigue in the workplace (in fact in relation to any hazard), the obligation on employers is only in relation to 'known and unacceptable risks'.

Case law has also dealt with the concept of foreseeability of harm and the courts have never held employers liable for circumstances over which they have no control. The amendments are intended to make this transparent.

Inherently stressful work

The express inclusion of stress and fatigue does not mean that inherently stressful work can no longer be carried out, nor does it mean that fatigued workers must not carry out work. Rather, it highlights that the employer needs to manage stress and fatigue by taking account of, and addressing these matters. Any particular workplace with foreseeable hazards should already capture stress and fatigue as part of the hazard identification and management system.

A person as a potential hazard

Labour and Green members recommend an amendment to clause 4(5) in relation to the definition of hazard to clarify that it is how a person behaves that may be a source of harm, not the person himself or herself.

The current definition of hazard does not distinguish that it is a person's behaviour, not the person, which can create a hazard leading to potential harm.

Place of work to include vehicles

Clause 4(9) amends section 2(1) of the Act to confirm that workers who are mobile while they are working are covered by the Act. The committee notes the concern of many submitters that employers will be responsible for employee safety while they drive to and from work. The committee would like to clarify that employers do not owe duties to their employees while they are travelling to and from work and we are not recommending an amendment to this provision.

Other concerns of submitters include querying which legislation would take precedence in the case of a mobile employee having a road accident. The answer is that this would depend on the particular situation. A road may be a place of work in certain circumstances but that does not mean that every employer has responsibility for road hazards. Employers are required to adequately prepare their employees for hazards that the employer has knowledge of, or could reasonably expect to have knowledge of, for example dangerous animals on a postal worker's route.

Regarding an employer's responsibility for employee motor vehicles, the bill does not propose that an employer's responsibility should override a driver's personal responsibilities. However, an employer does need to be sure that an employee is capable of driving a particular type of vehicle, and needs to know about the capability of any vehicle supplied. Information about these matters is readily available from OSH.

Definition of employee

The committee recommends amending the definition of 'employee' in the Act so that it is consistent with the base definition in the Employment Relations Act. This will deal with confusion as to why

there is a difference between the Employment Relations Act's definition of employee and the definition in the Act.

Volunteers

Clause 4(11) amends section 2(1) of the Act to extend it to cover volunteers whose work provides gain or reward to an employer or self-employed person.

A number of submitters are concerned about employers' obligations to volunteers, such as employee participation, training and supervision requirements. To respond to these concerns Labour and Green members propose a number of amendments to clause 4(11) and clause 5 to clarify who is covered by the volunteer provisions and the extent of the duties required.

To deal with the issue of employers' obligations in respect of volunteers, Labour and Green members recommend that the obligations that should apply in respect of volunteers are the duties set out in sections 6 to 12 (general duties of employers), section 19 (employee obligation to take 'all practicable steps') and section 25 (reporting of serious harm) of the Act. In other words, obligations regarding supervision requirements, training and employee participation should not apply.

Labour and Green members recommend an amendment to clause 5, to insert a new section 3C into the Act, in order to clarify that the gain or reward to an employer or self-employed person from the work of a volunteer must be financial gain. We also recommend including a definition of financial gain so that volunteers whose sole activity is fundraising from the public through collecting donations or selling raffle tickets are excluded from the coverage of the bill. The definition of financial gain should also exclude situations where volunteers are involved in preventing financial loss in an emergency situation, despite the fact that the 'employer' may indirectly gain financially.

The New Zealand Federation of Voluntary Welfare Organisations and the Volunteering Auckland Trust submit that 'reward for work' in relation to a volunteer could include non-monetary rewards, for example benefits such as being of value to other people. Labour and Green members wish to point out that 'reward' in relation to a volunteer is considered to be monetary, and does not include intangible rewards and expense reimbursement.

The committee does not consider that persons in a place of work receiving ‘on the job’ training or gaining work experience should be treated as volunteers. We recommend that such persons be excluded from the definition of volunteer and dealt with separately. This will not change the level of protection for these persons.

The committee also considers that the employee participation provisions in Part 2A of the Act should not apply to persons receiving on the job training or gaining work experience.

Application of the Act to aircraft and ships

Aircraft

Labour and Green members believe that the Act should provide for the occupational safety and health of aircrew as currently there is no direct legislative occupational safety and health coverage for aircrew. We note that New Zealand is a signatory to International Civil Aviation Organisation conventions which together with Civil Aviation rules provide some protection for flight crew.

We received a number of submissions from organisations involved in the aviation industry. Some submitters argue that the Civil Aviation Authority (CAA) already adequately provides for health and safety matters, while others submit that OSH should administer health and safety issues in the aviation industry.

Under clause 14, which inserts new section 28B into the Act, provision is made for the Prime Minister, having regard to the specialist knowledge of relevant agencies, to designate other agencies, apart from the Department of Labour, to administer the Act for a particular industry, sector or type of work. Labour and Green members accept that the CAA is the most appropriate agency to administer occupational health and safety for aircrew while aircraft are in operation. We emphasise that aircraft safety is a separate issue still covered by the CAA.

Ships

Concerning the application of the Act to ships, we note that as against New Zealand’s international obligations in relation to the law of the sea, the bill is currently too expansive in its coverage. Accordingly, the committee recommends an amendment to clause 5, proposed section 3B, to provide coverage for employees employed or engaged to work aboard New Zealand ships or foreign ships

carrying New Zealand coastal cargo while on demise charter to a New Zealand-based operator, where those employees are employed or engaged under an employment agreement or contract for services governed by New Zealand law.

The committee also recommends an amendment so that clause 5, proposed section 3B, includes work on a foreign ship while it is carrying out petroleum operations in New Zealand continental waters.

In accordance with the provisions of clause 14, proposed section 28B, we believe that the Maritime Safety Authority is the most appropriate agency to administer the Act in the maritime sector and we expect that it will be designated accordingly. However, to ensure that there is continuity of administration of health and safety coverage in the maritime sector by the Maritime Safety Authority, the committee recommends a transitional provision for ships at sea, such that the Director of the Maritime Safety Authority is responsible for administering the Act for ships at sea until any designation regarding the maritime sector is made under section 28B of the Act.

Protective clothing and equipment

Clause 7, amending section 10(2)(b) of the Act, intends to clarify and confirm that an employer must provide and ensure the use of protective clothing and equipment. Under the present law employers are already required to meet this requirement and the amendment makes this completely clear. However, some further clarification is required regarding the rights and duties of employees and the obligations of employers.

Labour and Green members recommend the addition of a statement such that employees may provide their own clothing and equipment as a matter of comfort or convenience but employers may not require this as a precondition of employment, as a term of employment, or by paying an allowance in lieu.

Noting the concerns of some submitters that employees must also have a duty to use the protective clothing and equipment provided, the committee recommends an amendment to section 19(a) of the Act, inserted by new clause 10A, confirming that employees must use protective clothing and equipment supplied to them.

Provision of information

Clause 8, amending section 12 of the Act, relates to the provision of information for health and safety representatives to ensure that they are able to perform their functions effectively. The committee recommends an amendment to require that information supplied pursuant to section 12 be readily accessible and in a form and manner that is easily understood.

We also wish to emphasise that all employees must have sufficient information about health and safety systems and issues, and that the proposed amendment simply extends this requirement to specifically include health and safety representatives.

Hire, sale or supply of plant

Clause 10, inserting new section 18A in the Act, outlines the duties of persons selling or supplying plant for use in a place of work. Such persons must take all practicable steps to ensure that the plant is arranged, designed and made, and has been maintained, so that it is safe for its intended use.

The committee recommends an amendment so that ‘as is’ sales of second-hand equipment are excluded from clause 10. Otherwise, as the New Zealand Contractors’ Federation, the New Zealand Equipment Suppliers Association and the National Federation of Rail Societies submit, the proposed change would mean that old or obsolete equipment could not be sold.

A number of submitters are concerned about the extent of liability that would be imposed on suppliers in relation to the intended use of plant or equipment. Alternatively they consider that there should not be a duty on a seller/supplier who does not have knowledge that the goods are to be used in a place of work.

The clause as currently drafted does seem to suggest a wider responsibility for installation or ‘arrangement’ than might be justified by the commercial relationship. There is also a legitimate distinction between hire situations (and other non-sale supply, such as loans) and true sale situations.

Labour and Green members recommend that clause 10, which inserts new section 18A in the Act, be replaced with a clause that is divided into three requirements:

- for a hire or loan situation, the obligation should not deal with ‘arrangement’ but should include an obligation to ascertain the intended use
- for a sale situation, the general obligation should not deal with ‘arrangement’ and should only apply where the seller knows of the intended use or where there is an obvious expected use
- for a situation involving a contractual obligation to install or arrange plant etc, there should be an obligation to install or arrange the plant etc, so that it is safe for use.

Employee participation

In general, submitters support the principle of employee participation; however, there is concern over the way in which clause 11, which inserts new part 2A into the Act, achieves employee involvement. A number of submitters criticise the prescriptive nature of the clause, its apparent lack of flexibility, the seeming lack of recognition of existing systems, and conflict between employers’ duties and employee involvement in decision-making.

To address these concerns, and those over applying the employee participation requirements to multiple-site and small workplaces, Labour and Green members recommend the following amendments.

We propose retaining the core obligations in clause 11 and placing much of the material in the remaining detailed provisions in a schedule. These presentational changes will provide clarity to the fact that an employee participation system that favours a representative or committee system is not intended; instead this is a default structure for employee participation where an agreed approach is not achieved.

The meaning of employee involvement should be clarified by a purpose statement that clearly demonstrates that management prerogative is not usurped (i.e. it is to fully inform management decision-making). This will ensure that the employer has the optimum level and mix of information, including from employees, while maintaining accountability for decisions.

We seek to clarify that the requirement to ‘develop’ a system can be met by putting forward an existing system for agreement. This will ensure the clause is flexible and can accommodate current employee participation arrangements.

We propose placing an obligation on an employer who rejects a proposal, generated through employer/employee discussions on an employee participation system, to record the reasons for doing so.

Good faith requirements

Many submitters raise the issue that ‘good faith’ principles conflict with requiring employers, employees, and unions to reach agreement on a system. Labour and Green members recommend that proposed subsection 19B(2), inserted in the Act by clause 11, be amended to reflect that employers, employees and unions must cooperate in good faith to ‘seek to develop, agree, implement, and maintain a system’. This indicates that not reaching agreement is possible and the default arrangements, outlined in the recommended new schedule, can then be put in place in lieu of an agreed system.

Arrangements for seasonal workplaces and short-term or temporary employment arrangements

It is important that employers are able to agree with their employees on an employee participation system involving seasonal and temporary workers. The primary duty is to provide ‘reasonable’ opportunities for employee participation. Labour and Green members recommend that a new subsection be included in proposed section 19A, inserted in the Act by clause 11, which clarifies the meaning of ‘reasonable opportunities’. In determining reasonableness, regard should be had to relevant matters such as:

- the nature of the hazards in that workplace
- the nature of the work arrangements and the rate of change of these arrangements
- the number of employees and the nature of their employment.

In relation to the election of health and safety representatives, Labour and Green members recommend that a requirement for election as a representative should be that the employee works sufficiently regularly and for such duration to enable them to carry out their functions in an effective manner.

Labour and Green members recommend an amendment to clause 11, to insert section 19M in the Act, in order to define employee for the purposes of new sections 19B(1) and 19JA(1) as someone who has worked at least 180 hours over the previous 12-month period.

Training health and safety representatives

A number of submitters are concerned that the leave entitlements for health and safety representatives, along with unlimited numbers of these representatives, may create high compliance costs in terms of leave costs and replacement labour costs.

To help resolve the issue of training compliance costs Labour and Green members recommend:

- the introduction of a concept of work-related groupings providing for election of employee representatives or committees in relation to agreed designated work groups
- the number of employee committee members in the default provisions be limited to five (retaining the equal number employer representatives proposal)
- capping the employer obligation to allow leave in any one year by a formula similar to that in the employee relations education leave provisions of the Employment Relations Act 2000.

Union involvement

All submissions from small/medium employers express concern about the role of health and safety representatives and union involvement. Several submitters suggest that there is potential for the politicising of the health and safety representative role, and foresee that this would lead to health and safety becoming blurred with other employment relations issues.

These and other concerns are addressed by the recommendation above to insert 'seek to' in clause 11, proposed section 19B(2), regarding the good faith obligations of employers, employees, and unions; further, health and safety matters are simply aspects of the employment relationship and must be dealt with as such.

New Zealand Defence Force

The New Zealand Defence Force has requested that the Armed Forces be excluded from the coverage of clause 11 (new part 2A of the Act). The committee agrees and recommends that:

- the Armed Forces be excluded from clause 11
- a provision be inserted that requires the Chief of Defence Force to establish a participation system for the Armed Forces

that is not inconsistent with the obligations set out in clause 11 that inserts proposed new section 19A in the Act

- the Chief of Defence Force must consult with the Secretary of Labour on the development of this system
- this exclusion does not apply to the New Zealand Defence Force civilian staff.

Proposed new clause on data collection and reporting

Six submitters, including Interlock Group, Federated Farmers of New Zealand, and the Electricity Engineers' Association of New Zealand, state that it is vital for OSH to have access to and use of comprehensive disease and injury data in order to fulfil its injury prevention obligations effectively.

The committee agrees that the collection of such information should be comprehensive and the information should be of good quality. Currently, only employers are required to report and notify 'serious harm' accidents in the workplace. The committee recommends new clause 13A, to amend section 25 of the Act, be inserted to place recording and notification obligations on self-employed persons and principals.

Refusal to perform work likely to cause serious harm

The intent of clause 14, inserting new section 28A in the Act, is to ensure safety by highlighting an employee's right to refuse to perform work that has become 'dangerous'. This is intended to reflect the common law right. Under this proposed section, an employee is not required to consider if the employer has fulfilled his or her obligations under the Act, as the focus is the immediate prevention of injury.

The committee considers that a clear process should apply following an employee's subjective belief that he or she is at risk of serious harm. We recommend an amendment to clause 14 so that:

- the initial decision to stop work be based on the employee's subjective view of the situation, but that the employee be required to discuss with the employer, as soon as practicable, the reasons for refusing the work to ensure that the employee has a full understanding of the situation and to allow the employer to take any available steps to remove the risk of serious harm

- after the dialogue between the employee and the employer, the employee may still refuse to do the work if he or she believes on reasonable grounds that the risk of serious harm persists. ‘Reasonable grounds’ in this context includes the situation where an employee refuses to do work because he/she has been advised by an employee representative that the work the employee is required to perform is likely to cause serious harm to that employee.

The committee recommends an amendment so that subsection 28A(6)(b), inserted in the Act by clause 14, does not apply to the Armed Forces. This is because the Employment Relations Act does not apply to the Armed Forces, and including this amendment will ensure consistency between the Employment Relations Act and the bill.

Employees from occupations such as the police and firefighters raised their concerns with us that the provision might allow them to avoid their basic duties. However, we consider that proposed new section 28A(3) is adequate to recognise the situation of such inherently dangerous work.

Powers to take samples

The committee recommends an amendment to clause 17, which amends section 33 of the Act, to make clear that an inspector’s powers to take samples means that personal human samples cannot be taken without the informed consent of that person.

Fine levels

In clause 19, which amends section 49(3) of the Act, penalties are increased for offences likely to cause serious harm. The term of imprisonment increases from one year to two and the maximum fine level increases from \$100,000 to \$500,000.

Labour and Green members believe that current fine levels do not provide sufficient incentive for compliance with the Act. The new maximums are intended to highlight the seriousness of injury, illness and loss of life suffered in the workplace.

Present fine levels under the Act are inconsistent with other health and safety legislation administered by OSH in the workplace. OSH

inspectors are responsible for enforcing the provisions of the Hazardous Substances and New Organisms Act 1996 in workplaces and that Act provides a maximum fine of \$500,000.

The proposed increase in fine levels will only affect persons found guilty of an offence under the Act. In determining the penalty, the Court considers the sentencing principles set out in the leading decision on sentencing under the Act, *Department of Labour v de Spa & Co Ltd (de Spa)*.² These principles already include taking into account the financial circumstances of the offender to pay any fine imposed. Concerns, therefore, that the fines will put firms out of business, are unfounded.

The provisions of the recently passed Sentencing Act 2002, also make it clear that the financial circumstances of the offender must be taken into account when the Court orders an offender to pay reparation or a fine. In addition, the Sentencing Act no longer allows proportions of fines to be directly paid to victims; instead a separate reparation sentence can be made, based on demonstrable loss or damage to the victim.

Labour and Green members recommend the inclusion of clause 20A inserting new section 51A to make specific reference to the Sentencing Act 2002, the relevance of the financial circumstances of the offender, and other key de Spa principles.

Laying an information

Clause 22, which inserts section 54A in the Act, allows a person other than an inspector to lay an information in respect of an offence under the Act, thus removing the Crown's monopoly on prosecutions. Many submitters are concerned about this clause, especially the possibility of unions or individuals using private prosecutions for industrial reasons or to gain compensation.

There are a number of reasons for removing the Crown's monopoly on prosecutions. These include enhancing the deterrent effect of enabling a greater range of persons to enforce the Act; providing an alternative means of seeking justice for aggrieved parties where a case is not prosecuted by OSH; and providing a safeguard against potential official inertia, incompetence or biased reasoning. Private prosecutions can only be taken if OSH decides to take no action.

² [1994] 1 ERNZ 339.

Conversely should OSH decide to take a prosecution, no private prosecution is thereafter possible, allaying fears of double jeopardy.

The Department of Labour advises that the safeguards surrounding private prosecutions are robust and protect against inappropriate private litigation. Meanwhile, the provisions of the Sentencing Act reduce incentives to take private prosecutions for financial gain because victims can no longer be awarded part of a fine.

Infringement offences

Labour and Green members support the introduction of the proposed infringement offence regime. However, we recommend a number of amendments to clause 23, which we consider will enhance the effectiveness of this regime. Our recommendations include that:

- the inspector be given discretion as to the amount of the fee
- the distinction between ‘body corporate’ and ‘individual’ be removed
- the infringement fees provide for a range of fees (with \$100 increments) from a minimum of \$100 to a maximum of \$3,000 with specified factors for the inspector to take into account, e.g. level of actual harm, potential harm, size of business, financial circumstances, safety record
- the failure to ‘systematically identify hazards’ be retained as a separate infringement fee range, in \$100 increments from \$800 to \$4,000
- an inspector has the power to cancel an infringement notice.

Labour and Green members make these recommendations in light of submitters’ concern that the infringement notice regime is too inflexible and their suggestion that inspectors should have greater discretion when deciding the amount of the infringement fee.

Compliance orders

Labour and Green members support the inclusion of a power for an inspector or any other person to apply to the Employment Relations Authority for a compliance order for breach of the employee participation provisions. This is achieved through amendments in various places in the principal Act and amendments to the Employment Relations Act 2000.

Insuring against fines

Clause 23, which inserts section 56I in the Act, will make insurance against fines unlawful and of no effect. Many submitters oppose these changes. Arguments raised include that it is legitimate to insure against penalties in the same way as any other business risk can be insured against and that insuring against penalties does not mean that businesses are contracting out of their obligations under the Act.

The Insurance Council of New Zealand submits that the impact of the proposal on employees has been underestimated, as employees will be exposed to the liability of their actions if the ability to insure is removed.

Many submitters provide comment on the impact for business of the changes to insurance, including compliance costs, difficulties for small business, disincentives to investment and retaining key staff.

The proposed amendment ensures that the statutory standard set by Parliament in relation to occupational health and safety must be met by all, equally. Allowing for insurance against fines substitutes a lower standard for those carrying such policies. The concept of insurance against fines resulting from criminal offending is contrary to public policy, and money spent on premiums for such policies could be better spent on health and safety management.

Labour and Green members believe that misunderstandings on the part of submitters in relation to the nature of offending under the Act need to be addressed by OSH. Specifically, offending under the Act is criminal offending and the courts apply a range of established criteria when determining penalties, including the financial circumstances of the offender to pay.

Concerning the effect on employees, the prohibition on insurance does not cover insurance against a sentence of reparation, which is, under the Sentencing Act, the only way in which an employee victim can receive an award of money.

Employers can also still insure against legal costs. Labour and Green members do not agree with the idea that this will increase litigation, as it is the insurers who make the decision on whether or not to defend prosecutions. This is not the prerogative of the employer.

Codes of practice

A large number of submitters express opposition to clause 12, which amends section 20 of the Act to allow the Minister to direct the Secretary of Labour to prepare codes of practice on particular health and safety matters. This is a technical amendment and does not alter the current consultation requirements in the Act for the creation of codes of practice.

Conclusion

The bill focuses on improving injury prevention practice and outcomes, and is intended to complement legislative efforts in other relevant areas. One of the main contributions of the bill is to introduce provisions to ensure employee participation in health and safety matters. It also puts in place greater incentives for compliance to ensure that people at work have a healthy and safe environment.

National and ACT minority view

National and ACT New Zealand oppose this bill.

National and ACT support the principle of safer workplaces. However, this legislation will create severe problems for employers and employees.

The key problems are in six areas:

- definition of harm and hazard
- the increase in fine levels
- prohibition against insuring against fines
- giving groups other than OSH, the ability to prosecute
- application of the Act in relation to Aircraft
- concerns regarding coverage of volunteers

Harm and hazard

Of the 594 substantive submissions received, 409 of those submissions opposed the bill. Of the 375 submitters who had submissions about definition of harm and hazard, 286 opposed the proposed changes.

Whilst the bill highlights and makes explicit that stress and fatigue can be a workplace hazard, National and ACT believe that case law

has already dealt with this issue under the concept of foreseeability of harm and current case law.

Infringement offences and fines

National and ACT oppose proposals to increase offences and penalty from \$100,000 to \$500,000.

Whilst National and ACT take the issue of health and safety in workplaces very seriously, they have a view that the current fines regime is not being utilised at all with an average fine during the 2000/2001 year being only \$5,298 with the maximum fine awarded during that time being \$40,000.

National and ACT hold the view that the existing penalty regime should be used to its potential prior to increasing the maximum upper limits of those fines being proposed in the Health and Safety in Employment Amendment Bill.

National and ACT oppose the ability for OSH officers to be able to impose instant fines of up to \$4,000 under this legislation. National and ACT believe this will destroy the co-operative nature of the relationship, which many employers have had with OSH officials.

Insurance against fines unlawful and of no effect

Important issues of principle are raised with respect to this proposed clause. National and ACT are of the view that proposed new section 56I is to encourage compliance by threat of financial ruin. What the proposed clause does not take into consideration is the cost in economic terms, for not only the business itself but for the workers employed in that business.

National and ACT maintain that if a workplace is particularly unsafe in nature, then insurance will simply be unavailable for that workplace, or alternatively the nature of the premium will reflect that workplace's safety record.

Prosecutions

National and ACT oppose the bill allowing prosecutions under the Health and Safety legislation being able to be brought by groups other than OSH. This raises the spectre of prosecutions being used as an industrial weapon.

Application of the Act in relation to aircraft

National and ACT are concerned that the Civil Aviation Authority is being removed as the lead agency for aircraft staff safety and that the Occupational Safety and Health division of the Department of Labour will be assuming responsibility for safety in relation to staff on aircraft. We have heard evidence that this will place us in a unique position in the international airline industry and may compromise aircraft safety. National and ACT do not believe that the Government has considered this issue enough for its inclusion in this legislation.

Coverage of Volunteers

National and ACT strongly oppose the inclusion of volunteers in this legislation. Volunteerism is deeply imbedded in New Zealanders' way of life and this bill threatens to destroy this by placing huge financial risks on organisations that use volunteers. Given that volunteers keep many community organisations and sports clubs operating, the changes in this legislation will threaten the viability of these organisations and clubs. The bill applies to volunteers in an arbitrary manner with an organisation or club that employs a staff member being liable for volunteer coverage whilst a similar club or organisation that does not have anyone on the payroll is not liable. National and ACT believe that the changes in this legislation will lead to fewer people volunteering and fewer people being prepared to hold offices in clubs that organize volunteers.

Appendix**Committee process**

The Health and Safety in Employment Amendment Bill was referred to the committee on 31 October 2001. We received 7456 submissions on the bill, including 6862 form submissions. We heard 120 submissions. Hearing submissions took 44 hours and 40 minutes and consideration took 13 hours and ten minutes.

We received advice from the Department of Labour, the Ministry of Transport and the Maritime Safety Authority.

Committee membership in 46th Parliament

Harry Duynhoven (Chairperson)

Belinda Vernon (Deputy Chairperson)

Phil Heatley

Willie Jackson

Simon Power

H V Ross Robertson

Hon Tariana Turia (to 19 March 2002)

Penny Webster

Dianne Yates (from 19 March 2002)

Gerry Brownlee replaced Phil Heatley for most of this item of business.

Peter Brown was a member of the committee for the purpose of its consideration of the bill but without the right to vote on any question before the committee.

Committee membership in 47th Parliament

Helen Duncan (Chairperson)

Hon Roger Sowry (Deputy Chairperson)

Peter Brown

Deborah Coddington

Hon Harry Duynhoven

John Key

Lynne Pillay

Hon Judith Tizard

Mike Ward

**Health and Safety
in Employment Amendment**

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (majority)

Subject to this Act,

Text struck out by a majority

New (majority)

Subject to this Act,

Text inserted by a majority

~~<Subject to this Act,>~~

Words struck out by a majority

<Subject to this Act,>

Words inserted by a majority

Hon Margaret Wilson

Health and Safety in Employment Amendment Bill

Government Bill

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7	Significant hazards to employees to be minimised, and employees to be protected, where elimination and isolation impracticable	17A	Matters may be completed by different inspectors
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9	Section 14 repealed		
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	18A Duties of persons selling or supplying plant for use in place of work		
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**Health and Safety in
Employment Amendment**

	<i>Hazard notices</i>		
	46A Trained health and safety representatives may issue hazard notices		56C Prior warning of infringement offence
19	Offences likely to cause serious harm		56D Inspector may require information
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22	New sections 53 to 54E substituted		<i>Insurance against fines unlawful and of no effect</i>
	53 Proof of intention not required		56I Insurance against fines unlawful and of no effect
	54 Notification to Secretary of interest in knowing of enforcement action taken by inspector	23A	New Schedule 1A inserted
	54A Laying information	23B	General transitional provision
	54B Time limit for laying information	23C	Transitional provision for ships at sea
	54C Extension of time for person other than inspector to lay information		<i>Consequential amendments</i>
	54D Extension of time if inspector needs longer to decide whether to lay information	24	Employment Relations Act 2000 amended
	54E Continuing or repeated matters	25	Hazardous Substances and New Organisms Act 1996 amended
23	New headings and sections 56A to 56I inserted	26	Maritime Transport Act 1994 amended
	<i>Infringement offences</i>	27	Transport Services Licensing Act 1989 amended
	56A Infringement offences		—————
	56B Infringement notices		Schedule
			New Schedule 1A inserted in principal Act

The Parliament of New Zealand enacts as follows:

1 Title

- (1) This Act is the Health and Safety in Employment Amendment Act **2001**.
- (2) In this Act, the Health and Safety in Employment Act 1992¹ is called “the principal Act”.

¹ 1992 No 96

**Part 1
Preliminary provisions**

2 Commencement

This Act comes into force on **<2 September 2002>** **<5 May 2003>**.

3 Purpose

The purpose of this Act is to—

- (a) make the principal Act more comprehensive in its coverage, in particular by—
 - (i) including the maritime, rail, and air industries; and
 - (ii) confirming that persons who are mobile while they work are covered; and
 - (iii) providing protection to volunteers ~~<, persons receiving on the job training or gaining work experience,>~~ and employees on loan; and

Struck out (majority)

- (iv) confirming that fatigue and work-related stress are covered; and

New (majority)

- (iv) confirming that harm can be caused by work-related stress; and
 - (v) confirming that certain temporary conditions may cause a person's behaviour to be hazardous; and
- (b) include provisions in the principal Act requiring good faith co-operation between employers and employees in relation to health and safety; and
 - (c) provide for more effective enforcement of the principal Act; and
 - (d) prohibit persons from being indemnified and from indemnifying others against the cost of ~~<penalties>~~ <fines and infringement fees> for failing to comply with the principal Act; and
 - (e) promote compliance with International Labour Convention 155 concerning Occupational Safety and Health and the Working Environment.

Part 2

Amendments to principal Act

4 Interpretation

New (majority)

(1AA) Section 2(1) of the principal Act is amended by repealing the definition of the term **all practicable steps**.

(1AB) Section 2(1) of the principal Act is amended by inserting, after the definition of the term **approved code of practice**, the following definition:

“**Armed Forces** has the same meaning as in section 2(1) of the Defence Act”.

(1AC) Section 2(1) of the principal Act is amended by inserting, after the definition of the term **at work**, the following definition:

“**coastal cargo** has the same meaning as in section 198(6) of the Maritime Transport Act 1994”.

(1) Section 2(1) of the principal Act is amended by repealing the definition of the term **crew**⟨, and substituting the following definitions:⟩

New (majority)

“**compliance order** means an order made under section 137 of the Employment Relations Act 2000

“**demise charter** has the same meaning as in section 2(1) of the Ship Registration Act 1992”.

Struck out (majority)

(2) Section 2(1) of the principal Act is amended by omitting from the definition of the term **employee** the words “subsection (3) of this section”, and substituting the words “subsections (3) to **(3C)**”.

New (majority)

- (2) Section 2(1) of the principal Act is amended by repealing the definition of the term **employee**, and substituting the following definition:

“**employee**, subject to **sections 3C to 3E**, means any person of any age employed by an employer to do any work (other than residential work) for hire or reward under a contract of service and, in relation to any employer, means an employee of the employer”.

Struck out (majority)

- (3) Section 2(1) of the principal Act is amended by inserting, after the definition of the term **employee**, the following definitions:

“**employee committee member** means an employee described in **section 19B(3)(b)**

“**employee representative** means an employee described in **section 19B(3)(a)**”.

- (4) Section 2(1) of the principal Act is amended by inserting in the definition of the term **employer**, before the word “means”, the words “, subject to ~~subsections (3) to (3C)~~ **<sections 3C to 3E>**,”.

New (majority)

- (4A) Section 2(1) of the principal Act is amended by inserting, after the definition of the term **employer**, the following definition:

“**enforcement action** means,—

“(a) in relation to an inspector,—

“(i) the laying of an information under this Act; or

“(ii) the issuing of an infringement notice under this Act; or

“(iii) the making of an application for a compliance order; and

“(b) in relation to a person other than an inspector,—

“(i) the laying of an information under this Act; or

New (majority)

“(ii) the making of an application for a compliance order”.

(4B) Section 2(1) of the principal Act is amended by inserting, after the definition of the term **fail**, the following definition:

“**financial gain** does not include—

- “(a) indirect financial gain through prevention of financial loss in an emergency; or
- “(b) the receipt of money through collecting donations or the sale of raffle tickets”.

(5) Section 2(1) of the principal Act is amended by repealing the definitions of the terms **harm** and **hazard**, and substituting the following definitions:

“**harm**—

- “(a) means illness, injury, or both; and
- “(b) includes physical or mental harm caused by work-related stress

Struck out (majority)

“**hazard**—

- “(a) means an activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation, or substance (whether arising or caused within or outside a place of work) that is an actual or potential cause or source of harm; and
- “(b) includes a situation where, for example, because of physical or mental fatigue, a person may be an actual or potential cause or source of harm

New (majority)

“**hazard**—

- “(a) means an activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation, or substance (whether arising or caused within or outside a

New (majority)

place of work) that is an actual or potential cause or source of harm; and

“(b) includes—

“(i) a situation where a person’s behaviour may be an actual or potential cause or source of harm to the person or another person; and

“(ii) without limitation, a situation described in **subparagraph (i)** resulting from physical or mental fatigue, drugs, alcohol, traumatic shock, or another temporary condition that affects a person’s behaviour

“**hazard notice** has the meaning set out in **section 46A(1)**

“**health and safety committee** means a committee <described in **section 19B(3)(b)**> <established to support the ongoing improvement of health and safety in a place of work>

“**health and safety representative** means an employee <committee member or employee representative> <elected, as an individual or as a member of a health and safety committee or both, to represent the views of employees in relation to health and safety at work>”.

(6) Section 2(1) of the principal Act is amended by inserting, after the definition of the term **improvement notice**, the following definition:

“**infringement notice** means a notice given under **section 56B**”.

(7) Section 2(1) of the principal Act is amended by inserting, after the definition of the term **machinery**, the following definition:

Struck out (majority)

“**matter**, in **sections 54, 54A, 54C, and 56H**, means a failure or a series of associated failures to comply with this Act or regulations made under this Act that arise out of, or relate to, the same incident, situation, or set of circumstances”.

New (majority)

“**matter**, in sections 54, 54A, 54C, 54E, and 56C, means—

- “(a) a failure to comply with this Act or regulations made under this Act; or
- “(b) a series of such associated failures arising out of, or relating to, the same incident, situation, or set of circumstances”.

- (8) Section 2(1) of the principal Act is amended by inserting, after the definition of the term **Minister**, the following definitions:
- “**New Zealand** includes all *<waters and>* airspace within the territorial limits of New Zealand

New (majority)

“**New Zealand ship** has the same meaning as in section 2(1) of the Ship Registration Act 1992”.

- (9) Section 2(1) of the principal Act is amended by omitting from the definition of the term **place of work** the words “or structure”, and substituting the words “, structure, or vehicle”.
- (10) Section 2(1) of the principal Act is amended by inserting, after the definition of the term **serious harm**, the following definition:

Struck out (majority)

“**ship** means every description of boat or craft used in navigation, whether or not it has any means of propulsion; and includes—

- “(a) a barge, lighter, or other like vessel:
- “(b) a hovercraft or other thing deriving full or partial support in the atmosphere from the reaction of air against the surface of the water over which it operates:
- “(c) a submarine or other submersible”.

New (majority)

“**ship** has the same meaning as in section 2(1) of the Ship Registration Act 1992”.

- (11) Section 2(1) of the principal Act is amended by adding the following definitions:

“**trained health and safety representative** has the meaning set out in **section 46A(1)**

“**union** *⟨means a union registered under⟩* *⟨has the same meaning as in section 5 of⟩* the Employment Relations Act 2000

“**volunteer**—

“(a) means a person who—

“(i) does not expect to be rewarded for work to be performed as a volunteer; and

“(ii) receives no reward for work performed as a volunteer; and

Struck out (majority)

“(b) includes a person who is required to be in a place of work for the purposes of training or gaining work experience.”

New (majority)

“(b) does not include a person who is in a place of work for the purpose of receiving on the job training or gaining work experience.”

- (12) Section 2 of the principal Act is amended by repealing subsection (3), and substituting the following subsections:

“(2A) To avoid doubt, a person is in a place of work whenever and wherever the person performs work *⟨for gain or reward,⟩* including in a place that—

“(a) the person moves through; or

“(b) itself moves.”

Struck out (majority)

- “(3) **Subsection (3A)** applies when—
- “(a) a volunteer does work for another person (being an employer or a self-employed person) with the knowledge or consent of the other person; and
 - “(b) the work produces gain or reward for the other person.
- “(3A) For the purposes of this Act,—
- “(a) a volunteer must be treated as an employee of the other person; and
 - “(b) the other person must be treated as the volunteer’s employer; and
 - “(c) the volunteer must be treated as at work when doing the work for the other person.
- “(3B) **Subsection (3C)** applies when—
- “(a) an employer or principal (**person A**) places an employee (the **loaned employee**) at the disposal of another person (**person B**, being an employer or a self-employed person) to do work for person B; and
 - “(b) there is no contractual relationship between person A and person B.
- “(3C) For the purposes of this Act, a loaned employee must be treated also as an employee of person B, and person B must be treated as another employer of the loaned employee.”

New (majority)**4A New section 2A inserted**

The principal Act is amended by inserting, after section 2, the following section:

“2A All practicable steps

- “(1) In this Act, **all practicable steps**, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to—
- “(a) the nature and severity of the harm that may be suffered if the result is not achieved; and

New (majority)

- “(b) the current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
 - “(c) the current state of knowledge about harm of that nature; and
 - “(d) the current state of knowledge about the means available to achieve the result, and about the likely efficacy of each of those means; and
 - “(e) the availability and cost of each of those means.
- “(2) To avoid doubt, a person required by this Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.”

5 New sections 3A <and 3B> <to 3E> inserted

The principal Act is amended by inserting, after section 3, the following sections:

“3A Application of Act to aircraft

- “(1) This Act applies to—
- “(a) a person employed or engaged to work on board an aircraft; and
 - “(b) the person who employs or engages the person specified in **paragraph (a)**; and
 - “(c) the aircraft as a place of work.
- “(2) However, this Act applies only while an aircraft is—

New (majority)

“(aa) operating on a flight beginning at a place in New Zealand and ending at that same place; or

- “(a) operating between 2 places in New Zealand (not as part of a flight beginning or ending outside New Zealand); or
- “(b) operating outside New Zealand, and the person is <working> <employed or engaged> under an employment agreement or contract for services governed by New Zealand law.

- “(3) For the purposes of **subsection 2(b)**, an aircraft operating in New Zealand as part of a flight beginning or ending outside New Zealand must be treated as operating outside New Zealand.
- “(4) Section 16 does not apply to an aircraft while it is taking off, flying, or landing.
- “(5) To avoid doubt, where this Act applies outside New Zealand, the provisions relating to offences apply even though an act or omission that constitutes an offence occurred in respect of an aircraft outside New Zealand.

“3B **Application of Act to ships**

- “(1) This Act applies—

Struck out (majority)

- “(a) to a person employed or engaged to work on board a ship under an employment agreement or contract for services governed by New Zealand law; and

New (majority)

- “(a) to a person—
- “(i) employed or engaged under an employment agreement or contract for services governed by New Zealand law to work on board a New Zealand ship or on board a foreign ship carrying coastal cargo while the foreign ship is on demise charter to a New Zealand-based operator; or
- “(ii) performing work on a foreign ship while it is carrying out petroleum operations in New Zealand continental waters (as defined in section 222(1) of the Maritime Transport Act 1994); and
- “(b) to the person who employs or engages the person *<specified>* *<described>* in **paragraph (a)**; and
- “(c) to the ship as a place of work.

Struck out (majority)

“(2) This Act applies whether the ship is operating inside or outside New Zealand.

New (majority)

“(2) Where this Act applies in respect of a New Zealand ship, it applies whether the ship is operating inside or outside New Zealand.

“(3) Section 16 does not apply to a ship while it is at sea.

“(4) To avoid doubt, where this Act applies outside New Zealand, the provisions relating to offences apply even though an act or omission that constitutes an offence occurred in respect of a ship outside New Zealand.

New (majority)

“3C Application of Act to volunteers

“(1) Sections 6 to 12, 19, and 25 apply when—

“(a) a volunteer does work for another person (being an employer or a self-employed person) with the knowledge or consent of the other person; and

“(b) the work produces financial gain for the other person.

“(2) For the purposes of those sections,—

“(a) a volunteer must be treated as if the volunteer were an employee of the other person; and

“(b) the other person must be treated as if the other person were the volunteer’s employer; and

“(c) the volunteer must be treated as if he or she were at work when doing work for the other person.

“3D Application of Act to persons receiving on the job training or gaining work experience

“(1) This Act, except for **Part 2A**, applies when a person who is not an employee is in a place of work for the purpose of receiving on the job training or gaining work experience (**person A**).

New (majority)

- “(2) For the purposes of this Act,—
- “(a) person A must be treated as if he or she were an employee of the person who has agreed to provide the on the job training or work experience (**person B**); and
 - “(b) person B must be treated as if that person were person A’s employer; and
 - “(c) person A must be treated as if he or she were at work when in the place of work for the purposes set out in **subsection (1)**.

3E Application of Act to loaned employees

- “(1) This Act, except for **Part 2A**, applies when—
- “(a) an employer or principal (**person A**) places an employee (the **loaned employee**) at the disposal of another person (**person B**, being an employer or a self-employed person) to do work for person B; and
 - “(b) there is no contractual relationship between person A and person B regarding the work to be performed by the loaned employee.
- “(2) For the purposes of this Act,—
- “(a) a loaned employee must be treated as if he or she were an employee of person B (instead of person A) while the loaned employee is working for person B; and
 - “(b) person A has a duty to ensure that the loaned employee is capable of doing the proposed work safely and that person B is aware of person B’s duties under this Act; and
 - “(c) person B must be treated as if person B were the employer of the loaned employee (instead of person A) while the loaned employee is working for person B; and
 - “(d) the loaned employee must be treated as if he or she were at work when doing work for person B.”

6 New section 5 substituted

The principal Act is amended by repealing section 5, and substituting the following section:

“5 **Object of Act**

The object of this Act is to promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work by—

Struck out (majority)

- “(a) promoting the systematic management of hazards; and
- “(b) defining hazards and harm in a comprehensive way so that all hazards and harm are covered, including those associated with fatigue and work-related stress; and

New (majority)

- “(a) promoting excellence in health and safety management, in particular through promoting the systematic management of health and safety; and
- “(b) defining hazards and harm in a comprehensive way so that all hazards and harm are covered, including harm caused by work-related stress and hazardous behaviour caused by certain temporary conditions; and
- “(c) imposing various duties on persons who are responsible for work and those who do the work; and
- “(d) setting requirements that—
 - “(i) relate to taking all practicable steps to ensure health and safety; and
 - “(ii) are flexible to cover different circumstances; and

Struck out (majority)

- “(iii) promote excellence in health and safety management; and

- “(e) recognising that successful management of health and safety issues is best achieved through <good faith> co-operation in the place of work and, in particular, through the input of the persons doing the work; and
- “(f) providing a range of enforcement methods, including various notices and prosecution, so as to enable an appropriate response to a failure to comply with the Act depending on its nature and gravity; and

“(g) prohibiting persons from being indemnified or from indemnifying others against the cost of *<penalties>* *<fines and infringement fees>* for failing to comply with the Act.”

7 Significant hazards to employees to be minimised, and employees to be protected, where elimination and isolation impracticable

- (1) Section 10(2)(b) of the principal Act is amended by omitting the words “To ensure that there is provided for, accessible to, and used by the employees”, and substituting the words “to provide, make accessible to, and ensure the use by the employees of”.

New (majority)

- (2) Section 10 of the principal Act is amended by adding the following subsections:

- “(3) An employer does not comply with subsection (2)(b) by—
- “(a) paying an employee an allowance or extra salary or wages instead of providing the protective clothing or equipment; or
- “(b) requiring an employee to provide his or her own protective clothing or equipment as a pre-condition of employment or as a condition of an employment agreement.
- “(4) However, an employer does not have to comply with subsection (2)(b) in relation to protective clothing if—
- “(a) an employee genuinely and voluntarily chooses to provide his or her own protective clothing for reasons of his or her comfort or convenience; and
- “(b) the employer is satisfied that the protective clothing is suitable in terms of subsection (2)(b).
- “(5) An employee who has chosen to provide his or her own protective clothing under **subsection (4)** may, after giving reasonable notice to the employer, choose that the employer provide protective clothing under **subsection (2)(b)** instead of providing it himself or herself.”

8 Information for employees generally

- (1) The heading to section 12 of the principal Act is amended by adding the words “**and health and safety representatives**”.

New (majority)

(1A) Section 12 of the principal Act is amended by omitting the words “in such a form and manner that the employee is reasonably likely to understand it, information”, and substituting the words “and is provided with ready access to, information in a form and manner that the employee is reasonably likely to understand”.

- (2) Section 12 of the principal Act is amended by adding, as subsection (2), the following subsection:

“(2) An employer must ensure that all health and safety representatives in a place of work have ready access to sufficient information about health and safety systems and health and safety issues in the place of work to enable the representatives to perform their functions effectively.”

9 Section 14 repealed

Section 14 of the principal Act is repealed.

10 New section 18A inserted

The principal Act is amended by inserting, after section 18, the following section:

Struck out (majority)

“18A Duties of persons selling or supplying plant for use in place of work

A person who sells or supplies to another person plant to be used in a place of work must take all practicable steps to ensure that the plant is arranged, designed, and made, and has been maintained, so that it is safe for its intended use.”

New (majority)

“18A Duties of persons selling or supplying plant for use in place of work

- “(1) A person who hires, leases, or loans to another person plant that can be used in a place of work must—
- “(a) ascertain from the other person (so far as is practicable) before hiring, leasing, or loaning the plant—
 - “(i) whether the plant is to be used in a place of work; and
 - “(ii) if so, the intended use of the plant; and
 - “(b) if he or she ascertains that it is to be used in a place of work, take all practicable steps to ensure that the plant is designed and made, and has been maintained, so that it is safe for its intended use.
- “(2) A person who sells or supplies (other than in a situation covered by **subsection (1)**) to another person plant that can be used in a place of work must take all practicable steps to ensure that the plant is designed and made, and has been maintained, so that it is safe for any known intended use or any use of that plant that the person could reasonably expect.
- “(3) In addition to the other obligations in this section, if a person who hires, leases, sells, or otherwise supplies to another person plant to be used in a place of work agrees to install or arrange the plant, the person must install or arrange the plant so that it is safe for its intended use.
- “(4) This section does not apply to the sale of plant, whether or not in trade, if the plant—
- “(a) is secondhand; and
 - “(b) is sold as is.
- “(5) In **subsection (4)(b)**, **as is** means that the plant is sold without any representations or warranties about its quality, durability, or fitness, and with the entire risk in those respects to be borne by the buyer.
- “(6) This section does not limit the Consumer Guarantees Act 1993.”

New (majority)

10A Duties of employees

Section 19(a) of the principal Act is amended by inserting, after the word “work”, the words “(including by using suitable protective clothing and suitable protective equipment provided by the employer or, if **section 10(4)** applies, suitable protective clothing provided by the employee himself or herself)”.

11 New Part 2A inserted

The principal Act is amended by inserting, after section 19, the following Part:

**“Part 2A
“Employee participation**

New (majority)

“19AA Purpose of Part 2A

The purpose of this Part is to require the participation of employees in processes relating to health and safety in the place of work so that—

- “(a) all persons with relevant knowledge and expertise can help make the place of work healthy and safe; and
- “(b) when making decisions that affect employees and their work, an employer has information from employees who face the health and safety issues in practice.

“19A General duty to involve employees in health and safety matters

- “(1) Every employer must provide reasonable opportunities for the employer’s employees to participate effectively in *<the ongoing management and>* *<ongoing processes for>* improvement of health and safety in the employees’ places of work.

Struck out (majority)

“(2) Without limiting **subsection (1)**, the management of health and safety includes the matters referred to in sections 6 to 13.

New (majority)

“(2) Without limiting **subsection (1)**, ongoing processes for improvement of health and safety include the matters referred to in sections 6 to 13.

“(3) In complying with **<subsection (1)>** **<this Part>**, an employer must take into account any approved code of practice for employee participation in workplace health and safety.

New (majority)

“(4) If a health and safety committee or, if there is no health and safety committee for the place of work, a health and safety representative makes a recommendation regarding health and safety in a place of work, the employer must either adopt the proposal or provide a written statement to the health and safety committee or health and safety representative setting out the reasons for not adopting the proposal.

“(5) In **subsection (1)**, **reasonable opportunities** means opportunities that are reasonable in the circumstances, having regard to relevant matters such as—

“(a) the number of employees employed by the employer;
and

“(b) the number of different places of work for the employees and the distance between them; and

“(c) the likely potential sources or causes of harm in the place of work; and

“(d) the nature of the work that is performed and the way that it is arranged or managed by the employer; and

“(e) the nature of the employment arrangements, including the extent and regularity of employment of seasonal or temporary employees.

“19B Development of employee participation system

- “(1) This section applies if an employer employs—
- “(a) fewer than 30 employees, whether or not at a single location, and 1 or more of the employees <, or a union representing them,> requires the development of a system for employee participation; or
 - “(b) 30 or more employees, whether or not at a single location.
- “(2) The following persons must co-operate in good faith to <seek to> develop, agree, implement, and maintain a system that sets out the ways in which the employer must seek to comply with **section 19A(1)**:
- “(a) the employer;
 - “(b) the employees who wish to be involved;
 - “(c) a union or unions representing any of the employees.

Struck out (majority)

- “(3) A system comprises matters that the employer and the employees, and any union representing them, agree on and may include, for example,—
- “(a) electing employees to have particular responsibilities in respect of health and safety by carrying out the functions set out in **section 19H(a) to (d) and (f)**;
 - “(b) electing employee members of a health and safety committee established to support the ongoing management and improvement of health and safety in the place of work;
 - “(c) processes for reviewing and improving the system;
 - “(d) other processes for ensuring regular and co-operative interaction between representatives of the employer and employees on health and safety issues generally or on particular issues.
- “(4) A system must specify a date on which it expires or an event on the occurrence of which it expires.
- “(5) If a system includes a health and safety committee, the committee must—
- “(a) comprise—
 - “(i) employee committee members; and

Struck out (majority)

- “(ii) committee members who represent the employer;
but
- “(b) not include more committee members representing the employer than employee committee members.
- “(6) In developing a system, any approved code of practice for employee participation in workplace health and safety must be taken into account.

New (majority)

- “(3) A system must specify a process by which it must be reviewed but otherwise may include any matters on which the employer, employees, and any union representing them agree. Examples of matters that they may wish to consider including in the system are set out in **Part 1 of Schedule 1A** and possible functions of health and safety representatives are set out in **Part 2 of Schedule 1A**.
- “(4) A system may include a provision increasing or decreasing the maximum—
- “(a) number of days’ paid leave that the employer is required to allow a health and safety representative to take for health and safety training under **section 19J(1)**;
- “(b) total number of days’ paid leave that the employer is required to allow health and safety representatives to take for health and safety training under **sections 19J(1A) and 19JA**.
- “(5) A system may allow for more than 1 health and safety representative or health and safety committee and, in that case, each representative or committee may represent a particular type of work, or place of work of the employer, or another grouping.
- “(6) **Subsection (2)** is complied with if a system of employee participation in health and safety in the place of work is in existence that was implemented before the commencement of this section and if—
- “(a) it complies with **section 19A** or is amended to comply with **section 19A**; and

New (majority)

- “(b) it specifies a process for its review or is amended to specify a process for its review; and
- “(c) it is acceptable to the persons referred to in **subsection (2)**.
- “(7) If a system is no longer in place, or functioning, a new system must be developed, agreed, implemented, and maintained in accordance with this section.

Struck out (majority)

- “19C Effect of failure to develop system if fewer than 30 employees**
- “(1) This section applies if—
- “(a) 1 or more employees require the development of a system for employee participation under **section 19B(1)(a)**; and
- “(b) a system is not agreed and implemented within 6 months after the employees require it to be developed.
- “(2) The employees, together with any unions representing them, must hold an election for at least 1 employee representative.
- “(3) This section is subject to **sections 19F and 19G**.

New (majority)

- “19C Provisions that apply if employer and employees fail to develop system for employee participation**
- Part 3 of Schedule 1A** applies if an employer is required to seek to develop a system for employee participation under **section 19B** and a system is not developed within the relevant time period set out in **Part 3 of Schedule 1A**.

Struck out (majority)**“19D Effect of failure to develop system if 30 employees or more**

- “(1) This section applies if—
- “(a) the development of a system for employee participation is required under **section 19B(1)(b)**; and
 - “(b) a system is not agreed and implemented within 6 months after the later of—
 - “(i) the date of the commencement of this Act; or
 - “(ii) the date when the employer first employs 30 or more employees.
- “(2) The employees, together with any unions representing them, must hold an election for—
- “(a) at least 1 employee representative; or
 - “(b) employee committee members.
- “(3) This section is subject to **sections 19F and 19G**.

“19E Filling vacancy for health and safety representative

- “(1) The employees, together with any unions representing them, must hold an election if a vacancy arises in a position of health and safety representative.
- “(2) This section is subject to **sections 19F and 19G**.

“19F Employees or union may require employer to hold election for health and safety representative

- “(1) Instead of holding an election as required by **section 19C, section 19D, or section 19E**, the employees, together with any unions representing them, may notify the employer that they require the employer to hold the election.
- “(2) The employer must hold the election within 2 months of receiving notification.
- “(3) This section is subject to **section 19G**.

“19G Method of electing health and safety representatives

- “(1) An election for a health and safety representative must—
- “(a) involve candidates who are willing to take on the position; and
 - “(b) be conducted through a secret ballot; and

Struck out (majority)

- “(c) give all employees a reasonable opportunity to vote; and
 - “(d) be determined by the wishes of the majority of those who vote.
- “(2) An election is not required if—
- “(a) there is only 1 candidate for a position, in which case the candidate automatically fills the position; or
 - “(b) there are no candidates for a position, in which case the position is not filled.

“19H Functions of health and safety representatives

The functions of a health and safety representative are—

- “(a) fostering positive health and safety management practices in the place of work; and
- “(b) identifying and bringing to the employer’s attention hazards in the place of work and discussing with the employer ways that the hazards may be dealt with; and
- “(c) consulting with inspectors on health and safety issues; and
- “(d) promoting the interests of employees who have been harmed at work, including in relation to arrangements for rehabilitation and return to work; and
- “(e) participating in health and safety committees if they are established in the place of work; and
- “(f) any functions conferred on the representative by—
 - “(i) a system under **section 19B**; or
 - “(ii) the employer with the agreement of the representative, or a union representing the representative, including any functions referred to in a code of practice.

“19I No discrimination against health and safety representatives

For the purposes of section 107(g) of the Employment Relations Act 2000, a health and safety representative must be treated as a delegate of other employees.

“19J Training of health and safety representatives

“(1) An employer must allow a health and safety representative 2 days’ paid leave each year to attend health and safety training approved under **section 19K**.

New (majority)

“(1A) The number of days’ paid leave that an employer must allow a health and safety representative to take in a year is subject to the maximum total number of days’ paid leave that that employer is required to allow under **section 19JA**.

“(2) Sections 78 and 79 of the Employment Relations Act 2000 apply when a ~~health and safety~~ representative is proposing to take, and is taking, the leave as if—

“(a) the representative were an eligible employee; and

“(b) the leave were employment relations education leave.

“(3) In this section ~~and section 19JA~~, year—

“(a) means a period of 12 months beginning on 1 ~~September~~ ~~April~~ and ending on the close of 31 ~~August~~ ~~March~~; and

“(b) includes the period beginning on ~~the commencement of this Act~~ ~~5 May 2003~~ and ending on the close of ~~31 August 2003~~ ~~31 March 2004~~.

New (majority)

“(4) **Subsections (1) and (1A)** are subject to **section 19B(4)**.

“19JA Calculation of maximum total number of days’ paid leave for health and safety training

“(1) The maximum total number of days’ paid leave that an employer is required to allow in a year under **section 19J** is based on the number of employees employed by the employer as at the specified date in the year, and is determined in accordance with the following table:

New (majority)

Employees as at the specified date in a year	Maximum total number of days' paid leave that employer is required to allow to be taken
1-5	2
6-50	6
51-280	1 day for every 8 employees or part of that number
281 or more	35 days plus 5 days for every 100 employees or part of that number

“(2) In this section, **specified date**—
“(a) means 1 April; and
“(b) for the period beginning on **5 May 2003** and ending on the close of **31 March 2004**, includes **5 May 2003**.

“(3) This section is subject to **section 19B(4)(b)**.

“19K Minister may approve occupational health and safety training

- “(1) The Minister may approve, by notice in the *Gazette*, courses of occupational health and safety training ⟨to be carried out at a place of work or elsewhere⟩.
- “(2) The Minister may approve a course only if he or she is satisfied that the course is—
“(a) consistent with the object of this Act; and
“(b) relevant to the role of a health and safety representative.
- “(3) The Minister may delegate his or her power under **subsection (1)** to 1 or more persons.
- “(4) To avoid doubt, a course approved under this section may be a course that is also approved under section 72 of the Employment Relations Act 2000.

New (majority)

- “19L System for employee participation in Armed Forces**
- “(1) This Part does not apply to members of the Armed Forces.
- “(2) The Chief of Defence Force must develop and implement a system for employee participation in workplace health and safety for members of the Armed Forces.

New (majority)

- “(3) The system must be consistent with **section 19A**.
- “(4) The Chief of Defence Force must consult with the Secretary when developing the system.

“19M Meaning of employee in sections 19B(1) and 19JA(1)

In **sections 19B(1) and 19JA(1)**, an **employee** means an employee who has worked for his or her employer for at least 180 hours over the previous 12-month period.”

12 Codes of practice

- (1) Section 20 of the principal Act is amended by inserting, before subsection (1), the following subsection:

“(1AA) The Minister may direct the Secretary to prepare, and submit for the Minister’s approval in accordance with this section, a statement, amendment, or revocation referred to in subsection (1) that relates to a particular health and safety issue.”

New (majority)

- (2) Section 20(1) of the principal Act is amended by inserting, after paragraph (ac), the following paragraph:

“(ad) a statement of preferred practices or arrangements relating to employee participation in health and safety in the place of work; or”.

13 Regulations

Section 21(1)(a) of the principal Act is amended by adding the following subparagraph:

“(iv) principals, or self-employed persons.”

New (majority)

13A Recording and notification of accidents and serious harm

(1) Section 25 of the principal Act is amended by inserting, after subsection (1), the following subsections:

“(1A) Every self-employed person must maintain (in the prescribed form) a register of accidents and serious harm, and must record in the register the prescribed particulars relating to—

“(a) every accident that harmed (or, as the case may be, might have harmed) the self-employed person at work; and

“(b) every accident resulting from the work of the self-employed person that harmed (or, as the case may be, might have harmed) any person; and

“(c) every occurrence of serious harm to the self-employed person—

“(i) while at work; or

“(ii) as a result of any hazard to which the self-employed person was exposed while at work.

“(1B) Every principal must maintain (in the prescribed form) a register of accidents and serious harm, and must record in the register the prescribed particulars relating to—

“(a) every accident that the principal becomes aware of that harmed (or, as the case may be, might have harmed) a self-employed person while at work and contracted to the principal; and

“(b) every accident that the principal becomes aware of—

“(i) resulting from the work of a self-employed person while at work and contracted to the principal; and

“(ii) that harmed (or, as the case may be, might have harmed) any person; and

“(c) every occurrence of serious harm to a self-employed person—

“(i) while at work and contracted to the principal, or

“(ii) as a result of any hazard to which the self-employed person was exposed while at work and contracted to the principal.

New (majority)

- “(1C) **Subsection (1B)** does not require the occupier of a home to maintain a register or record accidents or serious harm that occur to self-employed persons at work in the home.”
- (2) Section 25(2)(a) of the principal Act is amended by omitting the words “is required by subsection (1)(b) of this section”, and substituting the words “, self-employed person, or principal is required by this section”.
- (3) Section 25 of the principal Act is amended by repealing subsection (3), and substituting the following subsections:
- “(3) If there occurs any serious harm or accident to which this subsection applies, the employer, self-employed person, or principal concerned must,—
- “(a) as soon as possible after the occurrence becomes known to the employer, self-employed person, or principal, notify the Secretary of the occurrence; and
- “(b) within 7 days after the occurrence, or, if the occurrence is not known to the employer, self-employed person, or principal within that period, as soon as possible after it becomes known, give the Secretary written notice, in the prescribed manner, of the circumstances of the occurrence.”

14 New headings and sections 28A and 28B inserted

The principal Act is amended by inserting, after section 28, the following headings and sections:

“Right of employees to refuse to perform work likely to cause serious harm

“28A Employees may refuse to perform work likely to cause serious harm

- “(1) An employee may refuse to do work *⟨and may continue to refuse to do work⟩* if the employee believes *⟨on reasonable grounds⟩* that the work that the employee is required to perform is likely to cause serious harm to him or her.

New (majority)

- “(1A) An employee who, under **subsection (1)**, is refusing to do work may continue to refuse to do the work if—
- “(a) the employee attempts to resolve the matter with the employer as soon as practicable after first refusing to do the work; and
 - “(b) the matter is not resolved; and
 - “(c) the employee believes on reasonable grounds that the work is likely to cause serious harm to him or her.

Struck out (majority)

- “(2) Without limiting **subsection (1)**, reasonable grounds exist for the purposes of that subsection if a health and safety representative believes on reasonable grounds that the work that the employee is required to perform is likely to cause serious harm to him or her and the representative advises the employee accordingly.
- “(3) Despite **subsection (1)**, an employee may not refuse to do work that, because of its nature, inherently or usually carries a risk of serious harm unless the risk has materially increased beyond the inherent or usual risk.

New (majority)

- “(2) Without limiting **subsection (1A)(c)**, reasonable grounds exist for the purpose of that paragraph if a health and safety representative has advised the employee that the work that the employee is required to perform is likely to cause serious harm to the employee.
- “(2A) A health and safety representative must not give advice under **subsection (2)** unless he or she has reasonable grounds for believing that the work that the employee is required to perform is likely to cause serious harm to the employee.

New (majority)

“(3) An employee may not refuse to do work that, because of its nature, inherently or usually carries an understood risk of serious harm unless the risk has materially increased beyond the understood risk.

“(4) *<While **subsection (1)** applies, an>* *<An>* employee who refuses to do work must do any other work within the scope of the employee’s employment agreement that the employer reasonably requests.

“(5) This section does not limit an employee’s right to refuse to do work under another enactment or the general law.

“(6) To avoid doubt—

“(a) in situations to which this section applies, the employer, employee, and health and safety representative must deal with each other in good faith; and

“(b) a question about the application of this section to a particular situation is an employment relationship problem for the purposes of the Employment Relations Act 2000.

New (majority)

“(7) **Subsection (6)(b)** does not apply to members of the Armed Forces.

“Enforcement by other agencies

“28B Enforcement by other agencies

“(1) The Prime Minister may, <having regard to the specialist knowledge of relevant agencies,> by notice in the *Gazette*, designate *<another>* *<an>* agency to administer this Act for a particular industry, sector, or type of work.

“(2) In carrying out functions under this Act, the chief executive of the agency must comply with policy directions on occupational safety and health given to him or her and signed by the Minister and the Minister responsible for that agency.

- “(3) A copy of the policy direction must be tabled in the House of Representatives within 10 working days after the date that it is given to the chief executive.
- “(4) This Act applies as if references to the Secretary were references to the chief executive of the agency.
- “(5) In this section,—
- “**agency** means—
- “(a) a government department:
- “(b) a Crown entity within the meaning of section 2(1) of the Public Finance Act 1989:
- “(c) the New Zealand Police:
- “(d) the New Zealand Defence Force
- “**chief executive** includes the Commissioner of Police and the Chief of Defence Force.”

15 Functions of inspectors

Section 30(b) of the principal Act is amended by omitting the words “is being and will”, and substituting the words “has been, is being, or is likely to”.

16 Powers of entry and inspection

- (1) Section 31 of the principal Act is amended by inserting, after subsection (1), the following subsection:
- “(1A) An inspector may do any of the things referred to in **subsection (1)**, whether or not—
- “(a) the inspector or the person whom the inspector is dealing with is in the place of work; or
- “(b) the place of work is still a place of work; or
- “(c) the employer’s employees work in the place of work; or
- “(d) the person who was in control of the place of work is still in control of it; or
- “(e) the employer’s employees are still employed by the employer; or
- “(f) in respect of a document or information, the document or information is—
- “(i) in the place of work; or
- “(ii) in the place where the inspector is; or
- “(iii) in another place.”

- (2) Section 31(2) of the principal Act is amended by inserting, after the expression “subsection (1)”, the words “or **subsection (1A)**”.

17 Powers to take samples and other objects and things

- (1) Section 33 of the principal Act is amended by repealing subsection (1), and substituting the following subsection:

- “(1) An inspector who enters a place of work or a former place of work under section 31 may take or remove a sample of a substance or thing for analysis, or seize and retain any material, substance, or thing, for the purpose of—
- “(a) monitoring conditions in the place; or
 - “(b) determining the nature of any material or substance in the place; or
 - “(c) determining whether or not this Act has been, is being, or is likely to be complied with; or

Struck out (majority)

- “(d) gathering evidence to support the issuing of an infringement notice or for a prosecution for an offence against this Act.”

New (majority)

- “(d) gathering evidence to support the taking of enforcement action.”

- (2) Section 33 of the principal Act is amended by adding the following subsection:

- “(3) This section does not allow an inspector to take a sample from a person’s body unless the inspector has that person’s informed consent to the taking of the sample.”

17A Matters may be completed by different inspectors

Section 45 of the principal Act is amended by adding, as subsection (2), the following subsection:

- “(2) This section does not apply to an infringement notice.”

18 New heading and section 46A inserted

The principal Act is amended by inserting, after section 46, the following heading and section:

“Hazard notices

“46A Trained health and safety representatives may issue hazard notices

“(1) In this section,—

“hazard notice means a notice that—

“(a) describes a hazard identified in a place of work; and

“(b) is in the prescribed form; and

“(c) may set out suggested steps to deal with the hazard

“trained health and safety representative means a health and safety representative who has achieved a level of competency in health and safety practice specified by the Minister by notice in the *Gazette*.

“(2) Subsection (3) applies if a trained health and safety representative—

“(a) believes on reasonable grounds that there is a hazard in the place of work of the representative’s employer; and

“(b) has brought the hazard to the attention of the employer; and

“(c) has discussed or attempted to discuss with the employer steps for dealing with the hazard.

“(3) The trained health and safety representative may give the employer a hazard notice if—

“(a) the employer refuses to discuss, or take steps to deal with, the hazard; or

“(b) the employer and representative do not agree on the steps that must be taken or the time within which the steps must be taken to deal with the hazard; or

“(c) the representative believes on reasonable grounds that the employer has failed to meet the requirements of section 6 in relation to the hazard within a time agreed during the discussion.

“(4) If a hazard notice has been given by a trained health and safety representative, the representative may notify an inspector of that fact.

“(5) To avoid doubt, where this section applies, the employer and <trained> health and safety representative must deal with each other in good faith.

New (majority)

“(6) In this section, **employer** includes a representative of the employer.”

19 Offences likely to cause serious harm

Section 49(3) of the principal Act is amended by repealing paragraphs (a) and (b), and substituting the following paragraphs:

- “(a) imprisonment for a term of not more than 2 years; or
- “(b) a fine of not more than \$500,000; or”.

20 Other offences

The principal Act is amended by repealing section 50(1), and substituting the following subsection:

- “(1) Every person commits an offence, and is liable on summary conviction to a fine not exceeding \$250,000, who fails to comply with the requirements of—
- “(a) a provision of Part II other than section 16(3); or

Struck out (majority)

- “(b) **section 19A, section 19F**, section 25, section 26, section 37(2), section 39(5), section 42(1), section 43, section 47, section 48, **section 56I(2)**, or section 58 of this Act; or

New (majority)

- “(b) **section 19A**, section 25, section 26, section 37(2), section 39(5), section 42(1), section 43, section 47, section 48, **section 56I(2)**, section 58, or **clause 6 of Schedule 1A**; or

- “(c) a provision of any regulations made under this Act, or continued in force by section 24, declared by the regulations to be a provision to which this section applies.”

New (majority)

20A New section 51A inserted

The principal Act is amended by inserting, after section 51, the following section:

“51A Sentencing criteria

“(1) This section applies when the Court is determining how to sentence or otherwise deal with a person convicted of an offence under this Act.

“(2) The Court must apply the Sentencing Act 2002 and must have particular regard to—

“(a) sections 7 to 10 of that Act; and

“(b) the requirements of sections 35 and 40 of that Act relating to the financial capacity of the person to pay any fine or sentence of reparation imposed; and

“(c) the degree of harm, if any, that has occurred; and

“(d) the safety record of the person (which includes but is not limited to warnings and notices referred to in **section 56C**) to the extent that it shows whether any aggravating factor is absent; and

“(e) whether the person has—

“(i) pleaded guilty:

“(ii) shown remorse for the offence and any harm caused by the offence:

“(iii) co-operated with the authorities in relation to the investigation and prosecution of the offence:

“(iv) taken remedial action to prevent circumstances of the kind that led to the commission of the offence occurring in the future.

“(3) This section does not limit the Sentencing Act 2002.”

21 Section 52 repealed

Section 52 of the principal Act is repealed.

22 New sections 53 to <54D> <54E> substituted

The principal Act is amended by repealing sections 53 and 54, and substituting the following sections:

“53 Proof of intention not required

In a matter involving an infringement notice or in a prosecution for an offence against section 50, it is not necessary to prove that the defendant—

- “(a) intended to take the action alleged to constitute the infringement offence or offence; or
- “(b) intended not to take the action, the failure *<or refusal>* to take which is alleged to constitute the infringement offence or offence.

“54 Notification to Secretary of interest in *<laying of information or issuing of infringement notice>* <knowing of enforcement action taken by inspector>

- “(1) A person may notify the Secretary in the prescribed manner that the person has an interest in knowing whether a particular matter has been, is, or is to be, subject to *<either the laying of an information or the issuing of an infringement notice under this Act>* <the taking of enforcement action by an inspector>.
- “(2) The Secretary must ensure that the person who sent the notice is notified of—
 - “(a) any decision already made, or subsequently made, by an inspector as to whether or not to take <enforcement> action in respect of the matter, but not the reasons for the decision; and
 - “(b) any information that the Secretary is aware of relating to whether an enforcement authority has taken prosecution action as described in **section 54A(2)(b)**.
- “(3) In this section and **section 54A**, **enforcement authority** includes the New Zealand Police, the Civil Aviation Authority, the Land Transport Safety Authority, and the Maritime Safety Authority.

“54A Laying *<an>* information

- “(1) An inspector may lay an information in respect of an offence under this Act <if an inspector or another person has not taken enforcement action against a possible defendant in respect of the same matter>.
- “(2) A person other than an inspector may lay an information in respect of an offence under this Act if—

- “(a) an inspector *⟨has not laid an information or issued an infringement notice⟩* *⟨or another person has not taken enforcement action⟩* against a possible defendant in respect of the same matter; and
 - “(b) an enforcement authority has not taken prosecution action under any *⟨other⟩* Act against a possible defendant in respect of the same incident, situation, or set of circumstances; and
 - “(c) any person has received notification from the Secretary under **section 54(2)** that an inspector has not and will not *⟨lay an information or issue an infringement notice⟩* *⟨take enforcement action⟩* against a possible defendant in respect of the same matter.
- “(3) Despite **subsection (2)(b)**, a person may lay an information even though an enforcement authority has taken prosecution action if—
- “(a) the person has leave of the Court to lay the information; and
 - “(b) **subsection (2)(a) and (c)** is complied with.

“54B Time limit for laying information

- “(1) An information in respect of an offence against this Act may be laid at any time within 6 months after the earlier of—
- “(a) the date when the *⟨offence⟩* *⟨incident, situation, or set of circumstances to which the offence relates⟩* first became known to an inspector; or
 - “(b) the date when the *⟨offence⟩* *⟨incident, situation, or set of circumstances to which the offence relates⟩* should reasonably have become known to an inspector.
- “(2) This section is subject to **sections 54C and 54D**.

“54C Extension of time for person other than inspector to lay information

- “(1) This section applies if—
- “(a) an inspector *⟨has not laid an information or issued an infringement notice⟩* *⟨or another person has not taken enforcement action⟩* in respect of a matter; and
 - “(b) the Secretary has notified relevant persons under **section 54(2)(a)** that an inspector has not and will not *⟨lay an information or issue an infringement notice⟩* *⟨take*

enforcement action) against a possible defendant in respect of the matter.

- “(2) On application, the District Court may extend the time for a person other than an inspector to lay an information.
- “(3) An application under **subsection (2)** must be made within 1 month after receiving notice from the Secretary under **subsection (1)(b)**.
- “(4) The Court must not grant an extension of time unless it is satisfied—
 - “(a) that another person wishes to decide whether to lay an information in respect of that matter; and
 - “(b) it is unreasonable, having regard to the time taken by an inspector to respond to the matter, to expect, or to have expected, the person to make that decision before the 6-month period referred to in **section 54B** expires; and
 - “(c) an application under **section 54D** has not been made.
- “(5) The Court must give the following persons an opportunity to be heard:
 - “(a) the person seeking the extension:
 - “(b) any proposed defendant:
 - “(c) any other person who has an interest in whether or not an information should be laid, being a person described in **section 54(1)**.

“54D **Extension of time if inspector needs longer to decide whether to lay information**

- “(1) This section applies if an inspector considers that he or she will not be able to lay an information by the end of the 6-month period referred to in **section 54B**.
- “(2) On application, the District Court may extend the time for laying an information.
- “(3) An application under **subsection (2)** must be made within the 6-month period.
- “(4) The Court must not grant an extension unless it is satisfied that—
 - “(a) an inspector reasonably requires longer than the 6-month period to decide whether to lay an information; and

- “(b) the reason for requiring the longer period is that the investigation of the events and issues surrounding the alleged offence is complex or time consuming; and
 - “(c) it is in the public interest in the circumstances that an information is able to be laid after the 6-month period expires; and
 - “(d) laying the information after the 6-month period expires will not unfairly prejudice the proposed defendant in defending the charge.
- “(5) The Court must give the following persons an opportunity to be heard:
- “(a) the person seeking the extension:
 - “(b) the proposed defendant:
 - “(c) any other person who has an interest in whether or not an information should be laid, being a person described in **section 54(1)**.

New (majority)

“54E Continuing or repeated matters

Nothing in this Act prevents the taking of enforcement action by an inspector or another person in respect of a matter, despite enforcement action having been taken in respect of the matter, if the matter is continuing or repeated.”

23 New headings and sections 56A to 56I inserted

The principal Act is amended by inserting, after section 56, the following headings and sections:

“Infringement offences

“56A Infringement offences

In **sections 56B to 56H**, an **infringement offence** means an offence described in section 50(1).

“56B Infringement notices

“(1) An inspector may issue an infringement notice if—

- “(a) the inspector believes on reasonable grounds that the person is committing, or has committed, an infringement offence; and**

- “(b) the person has had prior warning of the infringement offence under **section 56C**; and

New (majority)

- “(c) an inspector or another person has not taken enforcement action against a possible defendant in respect of the same matter.
- “(2) An inspector may revoke an infringement notice before the infringement fee is paid, or an order for payment of a fine is made or deemed to be made by a Court under section 21 of the Summary Proceedings Act 1957.
- “(3) An infringement notice is revoked by giving written notice to the person to whom it was issued that the notice is revoked.

“56C Prior warning of infringement offence

A person has had prior warning of an infringement offence if the person has been the subject of 1 or more of the following for an infringement offence arising out of, or relating to, the same or a similar matter:

- “(a) a written warning from an inspector:
- “(b) an improvement notice:
- “(c) a prohibition notice:
- “(d) an infringement notice:
- “(e) a conviction for an offence under this Act:
- “(f) a hazard notice:

New (majority)

- “(g) a compliance order.

“56D Inspector may require information

- “(1) If an inspector is considering issuing to a natural person an infringement notice, the inspector may require the person to provide all or any of the following details:
- “(a) the person’s full name:
- “(b) whether, in relation to the place of work, the person is 1 or more of the following:
- “(i) an employer:

- “(ii) an employee:
 - “(iii) a self-employed person:
 - “(iv) a principal:
 - “(v) a contractor:
 - “(vi) a subcontractor:
 - “(vii) a person who controls the place of work:
 - “(c) the person’s date of birth:
 - “(d) the person’s residential address and, if different, postal address.
- “(2) If an inspector is considering issuing an infringement notice to a person that is a body corporate, the inspector may require a person who appears to represent the body corporate to provide all or any of the following details:
- “(a) the body corporate’s legal name:
 - “(b) whether, in relation to the place of work, the body corporate is 1 or more of the following:
 - “(i) an employer:
 - “(ii) a principal:
 - “(iii) a contractor:
 - “(iv) a subcontractor:
 - “(v) a person who controls the place of work:
 - “(c) the postal address of the body corporate.
- “56E **Procedural requirements for infringement notices**
- “(1) An infringement notice may not be issued after the close of the 14th day after the inspector becomes aware of the alleged infringement offence.
- “(2) An infringement notice may be served on a person—
- “(a) by delivering it personally to the person who appears to have committed the infringement offence; or
 - “(b) by sending it by post, addressed to the person at the person’s last known place of residence or business.
- “(3) For the purposes of the Summary Proceedings Act 1957, an infringement notice must be treated as having been served on the person on the date it was posted.
- “(4) An infringement notice must be in the prescribed form and must contain—
- “(a) details of the alleged infringement offence that are sufficient to fairly inform a person of the time, place, and nature of the alleged infringement offence; and

- “(b) the amount of the infringement fee; and
 - “(c) an address at which the infringement fee may be paid; and
 - “(d) the time within which the infringement fee must be paid; and
 - “(e) a summary of the provisions of section 21(10) of the Summary Proceedings Act 1957; and
 - “(f) a statement that the person served with the notice has a right to request a hearing; and
 - “(g) a statement of what will happen if the person served with the notice does not pay the fee and does not request a hearing; and
 - “(h) any other prescribed matters.
- “(5) If an infringement notice has been issued, proceedings in respect of the infringement offence to which the notice relates may be commenced in accordance with section 21 of the Summary Proceedings Act 1957 and, in that case,—
- “(a) reminder notices may be prescribed under regulations made under this Act; and
 - “(b) in all other respects, section 21 of the Summary Proceedings Act 1957 applies with all necessary modifications.

Struck out (majority)

“56F **Infringement fees**

- “(1) The fee to be specified by an inspector in an infringement notice must be in accordance with the following table:

	Individual (\$)	Body corporate (\$)
No harm	100	500
Harm	300	1,500
Serious harm	600	3,000
Failure to comply with section 7(1)	800	4,000

- “(2) In **subsection (1)**,—

“**harm** means that the infringement offence has caused harm that is not serious harm to 1 or more persons

“**serious harm** means that the infringement offence has caused serious harm to 1 or more persons.

New (majority)

“56F Infringement fees

- “(1) The fee to be specified by an inspector in an infringement notice for any infringement offence except for a failure to comply with section 7(1) must be not less than \$100 and not more than \$3,000 (as a multiple of \$100).
- “(2) In determining the amount of a fee under **subsection (1)**, an inspector must take into account—
- “(a) whether or not harm resulted from the offence; and
 - “(b) if harm resulted from the offence, the extent of the harm; and
 - “(c) what potential harm could have resulted from the offence; and
 - “(d) in the case of an employer, principal, or contractor, the size of the business of the employer, principal, or contractor; and
 - “(e) the financial circumstances of the person; and
 - “(f) the safety record of the person (which includes but is not limited to warnings and notices referred to in **section 56C**).
- “(3) The fee to be specified by an inspector in an infringement notice for a failure to comply with section 7(1) must be not less than \$800 and not more than \$4,000 (as a multiple of \$100).
- “(4) In determining the amount of a fee under **subsection (3)**, an inspector must take into account—
- “(a) the size of the business of the employer; and
 - “(b) the financial circumstances of the employer; and
 - “(c) the safety record of the employer (which includes but is not limited to warnings and notices referred to in **section 56C**).

“56G Payment of infringement fee

The Secretary must pay all infringement fees received into the Crown Bank Account.

“56H Effect of infringement notice**Struck out (majority)**

- “(1) If an infringement notice has been issued in respect of a matter, no person may lay an information under this Act in respect of the matter.
- “(2) **Subsection (1)** does not prevent the laying of an information if the infringement offence is continuing or repeated.
- “(3) If an infringement notice is issued, a criminal record must not be created in respect of the infringement offence.
- “(4) **Subsection (3)** does not prevent a court being told, for the purpose of sentencing a person convicted of an offence under this Act, that the person has paid, or is obliged to pay, an infringement fee for a particular infringement offence.

*“Insurance against fines unlawful and of no effect***“56I Insurance against fines unlawful and of no effect**

- “(1) To the extent that an insurance policy or contract of insurance indemnifies or purports to indemnify a person for the person’s liability to pay a fine or an infringement fee under this Act,—
- “(a) the policy or contract is of no effect; and
- “(b) no court or tribunal has jurisdiction to grant relief in respect of the policy or contract, whether under section 7 of the Illegal Contracts Act 1970 or otherwise.
- “(2) A person must not—
- “(a) enter into, or offer to enter into, a policy or contract described in **subsection (1)**; or
- “(b) indemnify, or offer to indemnify, another person for the other person’s liability to pay a fine or an infringement fee under this Act; or
- “(c) be indemnified, or agree to be indemnified, by another person for that person’s liability to pay a fine or an infringement fee under this Act; or
- “(d) pay to another person, or receive from another person, an indemnity for a fine or an infringement fee under this Act.

- “(3) If an insurance policy or contract of insurance described in **subsection (1)** exists at the date of commencement of this *<Act>* *<section>*,—
- “(a) **subsections (1) and (2)(c) and (d)** apply to it from that date; and
- “(b) this section does not prevent the parties to it agreeing to the refund of an amount of the premium.”

New (majority)

23A New Schedule 1A inserted

The principal Act is amended by inserting, after the First Schedule, the **Schedule 1A** set out in the Schedule.

23B General transitional provision

The principal Act continues to apply as if this Act had not been passed in respect of an incident, situation, or set of circumstances occurring before the commencement of this section.

23C Transitional provision for ships at sea

- (1) The Director of the Maritime Safety Authority is responsible for administering the principal Act for ships at sea until any designation regarding the maritime industry is made under **section 28B** of the principal Act.
- (2) While **subsection (1)** applies, the Director must be treated as if he or she were an inspector appointed under section 29(1) of the principal Act.
- (3) This section is subject to **section 23C**.

Consequential amendments

24 Employment Relations Act 2000 amended

- (1) Section 104 of the Employment Relations Act 2000 is amended by inserting, after the words “indirectly of that employee’s”, the words “refusal to do work under **section 28A** of the Health and Safety in Employment Act 1992, or”.

New (majority)

- (2) Section 107 of the Employment Relations Act 2000 is amended by adding, as subsection (2), the following subsection:
- “(2) An employee who is representing employees under the Health and Safety in Employment Act 1992, whether as a health and safety representative (as the term is defined in that Act) or otherwise, is to be treated as if he or she were a delegate of other employees for the purposes of subsection (1)(g).”
- (3) Section 137(1)(a) of the Employment Relations Act 2000 is amended by adding the following subparagraph:
- “(xi) **Part 2A** (other than section 19K) and **Schedule 1A** of the Health and Safety in Employment Act 1992; or”
- (4) Section 137 of the Employment Relations Act 2000 is amended by repealing subsection (4), and substituting the following subsection:
- “(4) The following persons may take action against another person by applying to the Authority for an order of the kind described in subsection (2):
- “(a) any person (being an employee, employer, union, or employer organisation) who alleges that that person has been affected by non-observance or non-compliance of the kind described in subsection (1):
- “(b) a health and safety inspector appointed under section 29 of the Health and Safety in Employment Act 1992 who alleges that there has been non-observance or non-compliance of the kind described in subsection (1)(a)(xi).”
- (5) Section 138(1) of the Employment Relations Act 2000 is amended by repealing paragraph (b), and substituting the following paragraph:
- “(b) on the application of—
- “(i) any party to the matter; or
- “(ii) in the case of section 137(4)(b), a health and safety inspector.”

25 Hazardous Substances and New Organisms Act 1996 amended

Section 2(1) of the Hazardous Substances and New Organisms Act 1996 is amended by inserting in the definition of the term **place of work**, after the expression “2(1)”, the words “and **(2A)**”.

26 Maritime Transport Act 1994 amended

- (1) The Maritime Transport Act 1994 is amended by—
- (a) repealing paragraph (e) of the Title:
 - (b) repealing, from section 2(1), the definitions of the terms **all practicable steps** and **significant hazard**:
 - (c) repealing Part II:
 - (d) repealing sections 61 to 63:
 - (e) repealing section 72:
 - (f) repealing sections 80 and 81.

New (majority)

- (1A) Section 198(2) of the Maritime Transport Act 1994 is amended by inserting, after the word “appropriate”, the words “(including any conditions relating to occupational safety and health)”.

Struck out (majority)

- (2) Section 431(1)(h) of the Maritime Transport Act 1994 is amended by adding the words “in accordance with the Health and Safety in Employment Act 1992”.

New (majority)

- (2) Section 431(1)(h) of the Maritime Transport Act 1994 is repealed.

27 Transport Services Licensing Act 1989 amended

Section 6H of the Transport Services Licensing Act 1989 is repealed.

New (majority)

s 23A

Schedule
New Schedule 1A inserted in principal Act

ss 19B(3), 19C

Schedule 1A
Employee participation system

Part 1

Examples of matters that may be included in agreed system
for employee participation

**1 Examples of matters that may be included in agreed
system for employee participation**

The following matters are examples of matters that the parties
may wish to consider including in an employee participation
system developed under **section 19B**:

- (a) electing health and safety representatives, whether to
act independently or as members of a health and safety
committee:
- (b) processes for ensuring regular and co-operative interac-
tion between representatives of the employer and
employees on health and safety issues generally or on
particular issues.

Part 2

Functions of health and safety representatives

2 Functions of health and safety representatives

The following functions of health and safety representatives
are examples of functions that the parties may wish to con-
sider including in an agreed employee participation system
developed under **section 19B** but are mandatory functions for a
health and safety representative elected under **Part 3 of this
schedule**:

- (a) to foster positive health and safety management prac-
tices in the place of work:
- (b) to identify and bring to the employer's attention hazards
in the place of work and discuss with the employer
ways that the hazards may be dealt with:
- (c) to consult with inspectors on health and safety issues:

New (majority)

Schedule 1A—continued

Part 2—*continued*

- (d) to promote the interests of employees in a health and safety context generally and in particular those employees who have been harmed at work, including in relation to arrangements for rehabilitation and return to work:
- (e) to carry out any functions conferred on the representative by—
 - (i) a system of employee participation (if a system is developed under **section 19B**); or
 - (ii) the employer with the agreement of the representative or a union representing the representative, including any functions referred to in a code of practice.

Part 3

Provisions that apply if failure to develop system for
employee participation

3 Effect of failure to develop system if fewer than 30 employees

- (1) This clause applies if—
 - (a) 1 or more employees, or a union representing them, requires the development of a system for employee participation under **section 19B(1)(a)**; and
 - (b) a system is not agreed and implemented within 6 months after the employees request it to be developed.
- (2) The employees, together with any unions representing them, must hold an election for at least 1 health and safety representative to carry out the functions in **Part 2 of this schedule**.
- (3) This clause is subject to **clauses 6 and 7**.

4 Effect of failure to develop system if 30 employees or more

- (1) This clause applies if—

New (majority)

Schedule 1A—continued

Part 3—continued

- (a) the development of a system for employee participation is required under **section 19B(1)(b)**; and
- (b) a system is not agreed and implemented within 6 months after the later of—
 - (i) the date of the commencement of this schedule; or
 - (ii) the date when the employer first employs 30 or more employees.
- (2) The employees, together with any unions representing them, must hold an election for—
 - (a) at least 1 health and safety representative to carry out the functions in **Part 2 of this schedule** independently; or
 - (b) up to a maximum of 5 health and safety representatives to be members of a health and safety committee (and the representatives must comprise at least half of the committee).
- (3) This clause is subject to **clauses 6 and 7**.

5 Filling vacancy for health and safety representative

- (1) The employees, together with any unions representing them, must hold an election if a vacancy arises in a position of health and safety representative.
- (2) This clause is subject to **clauses 6 and 7**.

6 Employees or union may require employer to hold election for health and safety representative

- (1) Instead of holding an election as required by **clause 3, clause 4, or clause 5**, the employees, together with any unions representing them, may notify the employer that they require the employer to hold the election.
- (2) The employer must hold the election within 2 months of receiving notification.
- (3) This clause is subject to **clause 7**.

New (majority)

Schedule 1A—continued

Part 3—*continued*

7 Method of electing health and safety representative

- (1) An election for a health and safety representative must—
- (a) involve candidates who—
 - (i) work sufficiently regularly and for a sufficient duration to enable them to carry out their functions effectively; and
 - (ii) are willing to take on the position; and
 - (b) be conducted through a secret ballot; and
 - (c) give all employees, or all employees in a relevant grouping for the purposes of **section 19B(5)**, a reasonable opportunity to vote; and
 - (d) be determined by the wishes of the majority of those who vote.
- (2) An election is not required if—
- (a) there is only 1 candidate for a position, in which case the candidate automatically fills the position; or
 - (b) there are no candidates for a position, in which case the position is not filled.

Legislative history

31 October 2001	Introduction (Bill 163–1)
5 December 2001	First reading and referral to Transport and Industrial Relations Committee
