

7 September, 2000

MINISTER OF LABOUR

REVIEW OF THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992: ANALYSIS OF PACKAGE OF PAPERS

Executive Summary

Officials have prepared a package of papers for discussion with you on possible amendments to the Health and Safety in Employment Act 1992 (HSE Act) as part of the review of that Act. This paper summarises and briefly analyses the recommendations in those papers.

In particular this paper:

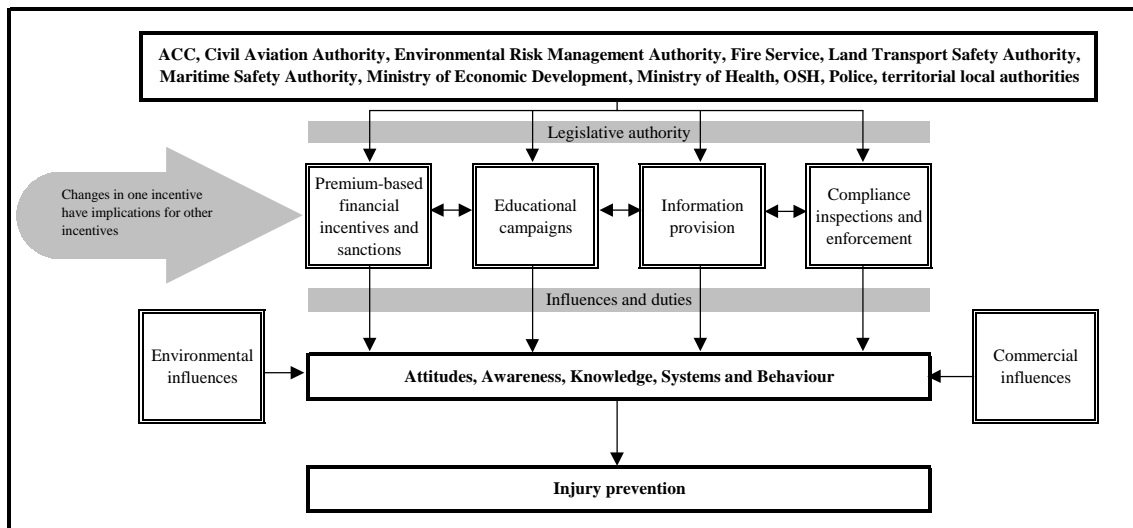
- summarises the recommendations in the package of the HSE Act review papers;
- identifies the cumulative effects of these recommendations and, in particular, the issues associated with implementing all the recommendations together; and
- discusses ways the Occupational Health and Safety Service (OSH) of the Department of Labour is able to manage these effects.

Background: the HSE Act and the health and safety system

1. The HSE Act is an enabling piece of legislation that assigns “ownership” of workplace health and safety (and other allocations of responsibility) to those that control places of work (primarily employers). Rather than establish (absolute) minimum standards in respect of workplace health and safety, the HSE Act imposes a standard of care (“reasonableness”) in respect of these obligations by requiring employers to apply a systematic approach to the management and workplace hazards.
2. The overview paper that you have received and discussed with officials on 25 July 2000 placed the Act within the context of the broader health and safety system and recent government initiatives, including the ACC reforms, the ERA and the Injury Prevention Framework (IPF). The IPF diagram (see below) provides a good summary of the participants, and the interrelationships between these participants in the system.
3. The HSE Act forms a major part of the legislative infrastructure of the health and safety system that deals with injury and occupational illness prevention in the workplace. Another major part of the legislative infrastructure is the Accident Insurance Act 1998 (AI Act). A myriad of other pieces of legislation, and legislative provisions, make up the rest of the system that deals with injury prevention in the workplace. The largest of these is

the class of transport legislation, including the Transport Act 1986, the Maritime Transport Act 1994, the Transport Accident Investigation Commission Act 1990, and the Civil Aviation Act 1990. The HSE Act is therefore only one mechanism for facilitating better health and safety outcomes in the workplace.

Injury Prevention Framework

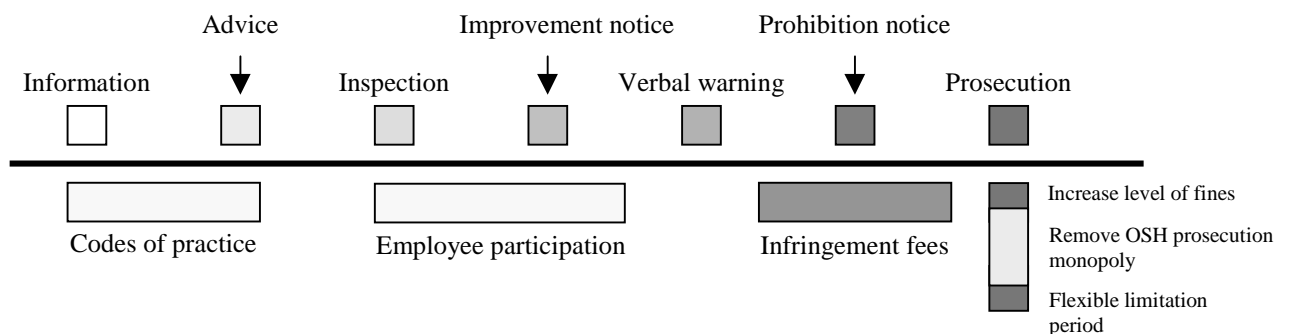


4. The incentive structure created by the legislative infrastructure was illustrated in the overview paper as operating on a continuum of employers. At one end are employers who have identified and put in place systems to address the health and safety risks in their workplaces; at the other end are employers who are aware of the risks but who have chosen not to address them.
5. The major gap in this incentive structure created by the HSE Act and the ACC requirements was identified as employers in the middle who are not aware of the health and safety risks or their responsibilities in their workplaces, and are not subject to any clear incentive to act. It is these employers that the IPF will focus on in particular. Under the Injury Prevention Framework (IPF) (refer ACR (00) M 12) the Department of Labour (including OSH) and the ACC, in conjunction with other agencies, are working on optimising Government incentives and information provision on health and safety (including workplace health and safety) across agencies. (This information will also improve employees' awareness of health and safety issues in their workplaces.)
6. It is the group of employers who is aware of the risks but who have chosen not to address them, however, that is of particular concern to OSH and is therefore the main focus of the HSE Act review. This is the group most likely to be affected by the certainty and severity of enforcement.

Problem Definition

7. Officials regard the principles of the HSE Act as generally sound and not in need of reform. Recently, however, OSH has recorded a static uptake of workplace health and safety systems by employers. Given the persistence of avoidable accidents, this implies less than optimal compliance with the Act.
8. Case studies indicate that while most employers already perceive the fines imposed to be substantial, this does not encourage HSE Act compliant behaviour because many employers perceive the risk of prosecution (“certainty of punishment”) to be low. In addition, it is also recognised that the level of fines (“severity of punishment”) is insufficient to influence changes in practices by larger employers who, even with complete certainty of punishment, are not deterred from non-compliance.
9. A more robust range of enforcement mechanisms that increase the probability (certainty) and severity of punishment for non-compliance with the HSE Act (combined with work that is currently underway on the IPF) should encourage greater compliance with the Act.
10. The HSE Act currently provides a range of tools to encourage compliance with the Act. The ultimate enforcement tool is prosecution. Less draconian enforcement tools include improvement notices and prohibition notices. OSH supplements these with verbal warnings. The HSE Act also provides for approved codes of practice, whereby OSH can provide more detailed advice and information to foster greater self-management and best practice and so reduce the need for “enforced compliance”. Information and advice is also provided directly by HSE inspectors to help foster self-management.
11. The following diagram illustrates this existing range of tools (above the line) and where the proposed tools, and enhancements of existing tools, (below the line) would fit.

Spectrum of tools to encourage compliance with the HSE Act 1992



Summary of proposed HSE Act mechanisms

12. The package of HSE Act review papers recommends a range of mechanisms, and enhancements to mechanisms already in the Act, which can be introduced to encourage greater compliance with the Act.
13. The following schema groups the proposed mechanisms (and enhancements of existing mechanisms) according to the relevant objective: to maximise coverage of the Act; to increase the severity of sanctions applying to non-compliance under the Act; and to increase the probability (certainty) of being sanctioned for non-compliance. The diagram

also illustrates which of the proposed mechanisms are designed to supplement OSH's enforcement tools and which are designed to open up enforcement outside OSH.

<i>Coverage</i>	<ul style="list-style-type: none"> • Definition of “place of work” • Coverage of aircrew • Coverage of railway workers • Coverage of maritime workers • Coverage of persons at place of work 	
<i>Severity</i>	<ul style="list-style-type: none"> • Increase level of fines 	} OSH enforcement tools
<i>Certainty</i>	<ul style="list-style-type: none"> • Infringement fees (spot fines) • Flexible limitation period • Working time and occupational stress code of practice 	
	<ul style="list-style-type: none"> • Employee representation • Provisional Improvement Notices (PINs) • Remove OSH monopoly on prosecution 	

Coverage

14. The review of the HSE Act provides an opportunity to resolve a number of deficiencies in the coverage of the Act, arising both from the interpretation and the explicit wording of current legislative provisions in the Act.

Definition of “place of work”

15. The definition of “place of work” in section 2(1) of the HSE Act has been interpreted by the District Court to exclude workers who are mobile in the course of their work from the protection of the HSE Act when they are moving outside their work site.

16. This interpretation is contrary to the usual interpretation of what constitutes a “place of work”. The usual interpretation is that any place where a person is “at work” at the time of their injury may constitute a “place of work” that would entitle the person to protection under the HSE Act. Amendment to the definition of “place of work” to include mobile workers is recommended to reflect this interpretation.

Coverage of Aircrew

17. There is currently no specific coverage for (domestic or international) aircrew under New Zealand legislation.

18. There are two primary reasons for extending health and safety protection to aircrew. First, there is evidence that aircrew suffer greater than average fatalities and work-related injury insurance claims. Second, aircrew lack the rights of other employees in New Zealand to a health and safety compliant work environment, and their employers do not have the responsibilities of other employers.

19. It is recommended that coverage for aircrew should be effected through legislative amendment to the HSE Act.

Coverage of railway workers

20. There is an overlap between the HSE Act and the Transport Services Licensing Act 1989 (TSL Act) in relation to the safety of employees and contractors working with moving rail vehicles.

21. The Tranz Rail Occupational Safety Inquiry, established by the Ministers of Labour and Transport recommended that:

The provisions of the HSE Act that impose duties on employers should apply to Tranz Rail in relation to all its non-maritime employees at all times. Section 6H of the TSL Act should therefore be repealed.

22. The effect of this recommendation would be to include coverage of the rail transport sector within the HSE Act. The Department of Labour supports this recommendation.

Coverage of maritime workers

23. While the HSE Act is the primary legislation covering safety and health in the workplace other, sector-specific, legislation exists for some industries. The Maritime Safety Authority (MSA) has legislative responsibility under Part II of the Maritime Transport Act 1994 (MT Act) for the health and safety of seafarers on New Zealand ships. In practice, its work is confined to commercial vessels, although it may exercise its powers in respect of recreational vessels in exceptional circumstances. The MT Act covers all aspects of safety at sea, Part II being analogous to the HSE Act. The wording of Part II is intentionally similar to the relevant sections of the HSE Act, and a similar compliance and enforcement regime applies.

24. Should you decide to proceed with an amendment to the HSE Act it is recommended that advice be prepared, with the Ministry of Transport on any consequential amendments to the MT Act for your and the Minister of Transport's consideration.

Coverage of persons at place of work (section 16)

25. Section 16 of HSE Act was amended in 1998 to remove cover for *all* persons in a place of work. The particular purpose of that amendment was to clarify for farmers and recreational groups that there was no liability in respect of recreational people entering farmland. The effect of this amendment, however, has been to exclude some workers and public the HSE Act originally covered.

26. Further amendment to section 16 is recommended, by re-drafting to impose hazard-based liability, instead of relationship-based liability, with an explicit 'avoidance of doubt' exclusion for rural landowners and recreational users of land.

Severity

27. The principal reason for prosecuting non-compliance with the HSE Act is deterrence (to establish credible enforcement). Deterrence is partly a function of the perceived severity of punishment. Short of introducing further sanctions into the HSE Act the main avenue to increase the severity of punishment for non-compliance with the Act is to increase the level of fines.

Increase level of fines

28. The maximum fine under the Act (for both individuals and bodies corporate) for non-compliance is \$25,000. Where non-compliance results in serious harm, however, the maximum fine is \$50,000; and where it is proved that the offender had knowledge that non-compliance was reasonably likely to cause serious harm, the maximum fine is \$100,000.
29. The average fine imposed by the Courts since the HSE Act was introduced is \$6,196.15, while the maximum single fine is \$35,000. This is not sufficiently severe to deter medium to large employers from non-compliance with the Act (allowing for the fact that employers discount the size of the fine to reflect their perceived certainty of being prosecuted and the stigma attached to prosecution).
30. Officials recommend an increase in the level of fines to target these employers.

Certainty

31. Deterrence is also a function of the perceived probability (certainty) of punishment. Most of the proposed mechanisms focus on improving the certainty of punishment for non-compliance under the Act. The reason for this focus stems from evidence that while most employers already perceive the fines imposed to be substantial, this does not encourage consistent HSE Act compliant behaviour because they perceive the risk of prosecution to be low.
32. One (non-legislative) option considered by officials is to improve the publicity around the cases that the OSH does prosecute. This would increase the return from prosecutions by deterring other potential offenders. While OSH intends to pursue this option, it is unlikely to deter minor offenders.

Infringement fees (spot fines)

33. Where “enforced compliance” is necessary prosecution can be too costly (relative to the resultant injury prevention outcome) in the case of smaller non-injury type offences.
34. Infringement fees would overcome this administrative barrier by allowing small monetary penalties to be imposed on site by OSH inspectors for minor but clear infringements of the HSE Act. Infringement fees would increase the certainty of being penalised (in the absence of prosecution) and therefore compliance with the Act.

Employee participation

35. There is currently no enforceable requirement under the HSE Act for employees to participate in the development and implementation of the health and safety systems in their workplace: the primary statutory duty for addressing health and safety hazards is assigned to person in control of the workplace (primarily employers). Reports from OSH inspectors suggest that there are few workplaces with formal employee representation. Employees who are aware of workplace health and safety issues, however, are often more likely to identify the immediate risks they encounter in their workplace.

36. Officials recommend, therefore, that employees have an explicit right under the HSE Act to select health and safety representatives and allow those health and safety representatives to issue Provisional Improvement Notices (PINs).

Remove OSH monopoly on prosecution

37. Legislation is generally subject to the Summary Proceedings Act 1957, which allows private prosecution. In contrast, the HSE Act expressly prohibits prosecutions by anyone other than warranted inspectors. Private prosecution, however, is a useful safeguard against constrained prosecution activity by OSH as the sole administering agent. It would increase incentives to comply with the Act by increasing the certainty of prosecution for non-compliance. In this manner, private prosecution should alleviate some of the pressure on the resources available to OSH to pursue enforcement activity with a mechanism for information disclosure. Officials recommend, therefore, that the prosecution monopoly be removed.

38. Where OSH has undertaken an investigation into an incident, private prosecutions will rely heavily on access to information held by OSH. It is suggested that OSH will be required to ensure the maximum availability to this material within any constraints placed on it by the Official Information and Privacy Acts.

39. It should also be noted that private prosecution would be subject to the same difficulties as OSH of laying a prosecution within the current limitation period.

Flexible limitation period

40. Prosecutions for alleged offences against the HSE Act are subject to the six-month limitation period prescribed by section 14 of the Summary Proceedings Act 1957. This limitation period begins when the alleged offence took place.

41. There is a range of prosecutions that OSH would like to make under the HSE Act that are not accommodated by this limitation period. In particular, these include prosecutions in respect of latent occupational illnesses and injuries.

42. Officials recommend that a 'reasonable discoverability test' as well as a discretionary extension mechanism to the current limitation period of six months be incorporated into the HSE Act. This would align the purpose of the limitation period to ensure that a claim is brought within a reasonable timeframe with the type of offences under the HSE Act.

Working time and occupational stress code of practice

43. Since 1991, when the Employments Contracts Act repealed the minimum forty-hour working week, average working hours have increased. Occupational stress is often manifested in cumulative fatigue, a consequence of unreasonably long and/or irregular working hours. Fatigue is associated with increased accident rates and is therefore an important health and safety issue.

44. It is recommended that a code of practice be developed under the HSE Act to provide a default provision in relation to working time where employers and employees fail to negotiate this in their employment contracts. More generally, it will encourage employers and employees to adopt good occupational stress management practices.

Cumulative effects of proposed mechanisms

45. The proposed mechanisms have a variety of cumulative effects that raise a number of issues for OSH, employers and employees.

Cumulative effects of coverage mechanisms

46. The cumulative effect of the proposed coverage mechanisms is to ensure that *all* employees (and others) in New Zealand have the same legislative protection against health and safety hazards in their workplaces. This will reduce jurisdictional uncertainty around coverage of the Act.
47. The main flow-on effect is to employers (and others with duties under the Act) in the form of a reduction in compliance costs. These compliance costs currently represent the costs to employers of finding out whether their employees (or contractors) are covered by the Act, whether this cover extends more generally to other persons in their workplace, and what constitutes a “place of work”. (On the other hand, there may be some additional compliance costs for those who are not presently subject to duties under the HSE Act.)
48. There will also be a (marginal) flow-on effect to OSH. OSH will need to modify its existing operational policy to accommodate workplaces that are not presently covered by the Act (e.g. coverage of aircrew). Memoranda of Understanding with other government agencies active in the transport industry will need to be revised, in particular to ensure access to technical expertise.

Cumulative effects of severity mechanisms

49. The direct cumulative effect of increasing the level of fines under the HSE Act is to encourage compliance by large employers. The enhanced mechanism is also likely to increase ‘fear’ of prosecution, and therefore indirectly encourage further compliance by smaller employers. It is likely that some employers will invest heavily in defending themselves against potential court action. In the longer-term, however, higher fine levels should encourage compliance.
50. The ultimate flow-on effect to employers (and the economy more generally) should be to increase investment in health and safety systems. It is possible, however, that the threat of higher fines could encourage additional investment in health and safety by employers who are already compliant with the Act, without actually ‘capturing’ those (large) employers that are currently non-compliant with the Act. This will inevitably depend on the administration of the Act by OSH and the sentencing decisions of the courts.
51. The flow-on effect to OSH of an increase in the level of fines will be greater scrutiny in its decision-making process to prosecute and an increase in litigation. Employers are more likely to defend and challenge financially risky prosecutions against them.

Cumulative effects of certainty mechanisms

52. The cumulative effect of the certainty mechanisms is to allow more players, more tools and more time to “enforce compliance” with the HSE Act.
53. There may be some flow-on behavioural effects for employers as a result. For those, mainly small, employers who lack adequate information regarding what constitutes

compliance with the Act, some may seek quick fix solutions from consultants. There already exist a small number of health and safety advisors who provide “off the shelf” health and safety plans said to ensure that the employer would be compliant with the HSE Act. This provision of so-called off the shelf “solutions” may occur more frequently with employers who are not currently aware of their duties under the HSE Act or are uncertain about the acceptable means of fulfilling those duties.

54. The predominant flow-on effect to OSH is likely to be an increase in pressure to use any new and enhanced enforcement tools. Although desirable, this will continue to put pressure on OSH to use its resources for reactive rather than proactive business such as promoting self-management approaches through codes of practice and hazard-management guidelines. Counteracting pressure on OSH’s proactive business may also stem from an increase in demand for guidelines and advice on how to comply with the Act to avoid punishment.
55. The challenge for OSH, therefore, will be to manage its resources to preserve some balance between reactive and proactive compliance measures. OSH will need to take into account the role of other government agencies under the IPF and, in particular the changes to ACC which have resulted in them taking a larger role in provision of information on injury prevention in the workplace. There will also be a need for OSH to manage its processes to accommodate the additional players involved in “enforcing” compliance with the HSE Act. It is important that the purpose of the proposed ‘certainty’ mechanisms is clearly understood by all those with duties under the HSE Act to ensure consistency and therefore defensibility of OSH’s decision-making process.

Overall cumulative effect

56. The overall cumulative effect of the proposed mechanisms is likely to be increased compliance with the HSE Act. The greater certainty and severity of prosecution created by the proposed mechanisms will increase the stakes of non-compliance. This will entail increased incentives for employers to implement compliant health and safety systems in their workplaces. To the extent that improved compliance results in an improvement in injury prevention outcomes, there should be a significant social and economic benefit.
57. This overall cumulative effect, however, is likely to come at the expense of increased costs of health and safety compliance for those employers (and others with duties under the HSE Act) who currently do not take all practicable steps to prevent harm to employees at work. (And, possibly an unnecessary increase in costs for those employers who currently do take all practicable steps.) For some employers, these costs may be offset by qualifying for ACC premium discounts on the establishment and maintenance of well-developed health and safety systems, either through the Partnership Programme or the Workplace Safety Management Programme (WSMP). Irrespective of this, these costs may alter perceptions of the role of OSH in the broader health and safety system.
58. Amongst those with no or little contact with OSH there will undoubtedly be an increase in perception of OSH as an enforcement agency rather than an agency able to assist employers to improve health and safety. This will perhaps be reinforced as ACC increases its information provision role in workplace health and safety. This perception is currently and will continue to be influenced by the professionalism of the HSE Inspectorate. They must constantly make decisions as to the appropriate response to take in order to enhance the long-term improvement of New Zealand’s workplace health and

safety record. The appropriateness and consistency of those decisions will continuously influence employers' perceptions as to the primary role of OSH, be it a guide or an enforcer or appropriate mix of both. These operational issues are being addressed in the context of OSH's Strategic Development Plan, which is in its initial stage of implementation.

Management of issues

59. Officials have identified a number of issues associated with simultaneously implementing all of these mechanisms into the HSE Act. In particular, these relate to the higher potential costs (especially to employers) arising from strengthening the severity of compliance mechanisms and increasing the certainty of them being activated. In addition there is the attendant issue for OSH of ensuring a balance is maintained between legal compliance and the promotion of self-management of workplace health and safety.
60. Officials are confident, however, that systems can be put in place to mitigate most of the issues identified for OSH. The work currently being undertaken by OSH in relation to its Strategic Development Plan will ensure that staff are appropriately skilled and equipped to implement any new tools and processes flowing from the proposed changes. The partnership between OSH and ACC in relation to injury prevention strategies for workplace health and safety is firmly established. This relationship and the work being undertaken on the Injury Prevention Framework will enhance all agencies' abilities to respond to employers' requests for assistance in meeting their duties under the HSE Act and other workplace health and safety legislation.
61. It should be noted that implementing and managing these systems might increase pressure on OSH's resources. In particular, the potential additional fiscal costs that could arise from a more litigious response from some employers to a higher risk of compliance action and higher fine levels, and more demand for information products and assistance to employee representatives. On the other hand, pressure on resources elsewhere in the economy may be eased, as more health and safety issues may be resolved in the workplace by employee representatives or through employers' increased incentives to implement health and safety systems.
62. The evolving/dynamic nature of these systems also needs to be stressed. In particular, the importance of continuing to develop self-management products (e.g. codes of practice and ACC's Partnership and WSMP programmes) in a workplace environment in which many employers will need to learn how to more actively engage with their staff in managing the health and safety aspects of their businesses.

Further work

63. It is unclear to what extent the proposed amendments canvassed in this paper will increase the incentives on small (and cost conscious) employers to improve their health and safety performance. Officials believe that it would be premature to recommend further HSE Act mechanisms to address this 'gap' in the incentive structure in the broader health and safety system (discussed in the Background section above) given other recent initiatives of the Government (i.e. the ACC reforms, ER Act and IPF).
64. Officials consider that this is an area that will require close monitoring by OSH, in conjunction with other government agencies, over a longer period than the HSE Act

review project. To this end a longitudinal survey will be undertaken to ascertain the effects on workplace health and safety of any amendment made.

Consultation

65. During the drafting process the individual papers that make up this package have been provided to a number of government departments for their consideration. These were ACC, The Department of the Prime Minister and Cabinet, the Treasury, Ministry of Health, Ministry of Justice, Ministry of Women's Affairs, Ministry of Transport, Department for Courts and Te Puni Kokiri.
66. This process however has not allowed departments to consider the cumulative effects of all the papers and this may raise issues that need to be further addressed during the development of a Cabinet paper.
67. Consultation with sector organisations and other interested parties will be completed by mid-September.

Process from here

68. Officials will seek a time to discuss this paper and the package of HSE Act review papers with you.
69. Officials are seeking "in principle" decisions from you on the recommendations made in these papers. These decisions will be subject to further consultation and fiscal costings that will inform the preparation of a draft cabinet paper.
70. Officials will also come back to you with a strategy for evaluating the effects of any HSE Act reforms in conjunction with the recent ACC reforms, the ER Act, and the IPF. This strategy will provide details of the proposed longitudinal survey mentioned in paragraph 64.

Recommendations

It is recommended that you:

- a) **note** the recommendations in the package of HSE Act review papers to:
 - i) maximise *coverage* of the Act, by:
 - (1) amending the definition of "place of work" to include mobile workers;
 - (2) amending the Act to explicitly include aircrew;
 - (3) amending the Act to explicitly include railway workers;
 - (4) further amending to section 16 to clarify that for farmers and recreational groups that there is no liability in respect of recreational people entering farmland;
 - ii) improve the *severity* of punishment for non-compliance with the Act, by:
 - (1) increasing the level of fines under the Act;

- iii) improve the *certainty* of punishment for non-compliance with the Act, by:
- (1) introducing infringement fees;
 - (2) amending the Act to give employees an explicit right to select health and safety representatives;
 - (3) allowing health and safety representatives to issue Provisional Improvement Notices (PINs);
 - (4) removing the monopoly on prosecution;
 - (5) introducing a ‘reasonable discoverability test’ and a ‘discretionary extension mechanism’ to make the limitation period more flexible;
 - (6) developing a code of practice on working time;
- b) note** the likely cumulative effect of this package of measures will be to increase the Act’s coverage, the severity of sanctions applying to non-compliance under the Act, and the certainty of the available mechanisms being activated;
- c) note** the issues associated with implementing these recommendations together (as set out in paragraphs 45 – 58 above);
- d) note** that officials are confident that systems can be out in place to manage most of these issues;
- e) note** that officials will seek to estimate the likely additional fiscal costs of administering the proposed amendments in the course of preparing cabinet papers as part of the HSE Act review project;
- f) note** that a longitudinal survey will be undertaken to ascertain the effects on workplace health and safety of any amendment to the HSE Act, in conjunction with the recent ACC reforms, the ER Act and the IPF; and
- g) agree** to discuss with officials the particular recommendations set out in the package of HSE Act review papers within the context of increasing the coverage of the Act, increasing the severity of compliance sanctions, and increasing the certainty of the available mechanisms being activated (see recommendation (b) above).

RJM Hill
for Secretary of Labour