

Chair
Cabinet Finance, Infrastructure and Environment Committee

Changes to the Health and Safety in Employment Act: Effective Enforcement Proposals

Executive summary

- 1 This paper proposes increasing existing deterrence measures to encourage compliance with the Health and Safety in Employment (HSE) Act 1992. The proposed measures will provide increased possibility of effective enforcement action and severity of consequences for breaches of the Act.
- 2 This paper describes four proposals that deal with improving enforcement mechanisms. These proposals are:
 - increasing the level of fines;
 - removing the OSH monopoly on prosecution;
 - including a reasonable discoverability test in the six-month limitation period; and
 - clarifying that insurance policies that indemnify against fines (but not the cost of defending a charge under the HSE Act) are unlawful.
- 3 Also proposed in this paper are three minor and technical amendments, which are either for the purpose of clarifying the current wording of the HSE Act provisions, or for ensuring consistency between sections of the HSE Act. A further proposal relating to enforcement under the HSE Act is discussed in a separate paper: 'Changes to the Health and Safety in Employment Act: Infringement Offence Notices'.
- 4 The cost of implementing the proposal to increase the level of fines is \$0.016 million in 2001/02, \$0.136 million in 2002/03, \$0.133 million in outyears (operating), and \$0.028 million in 2002/03 (capital). The cost of implementing the proposal to remove the prosecution monopoly is \$0.018 million in 2001/02, \$0.067 million in 2002/03, \$0.070 million in outyears (operating), and \$0.025 million in 2002/03 (capital). The cost of implementing the proposal to include a reasonable discoverability test in the limitation period is \$0.033 million in 2001/02, \$0.530 million in 2002/03, \$0.530 million in outyears (operating), and \$0.110 million in 2002/03 (capital).

Effective enforcement and the HSE Act

Focus for this proposal

- 5 Case studies indicate that while most employers already perceive the fines imposed to be substantial, this does not encourage compliant behaviour because many employers perceive the risk of prosecution to be low¹. These proposals aim to deter the group of employers who are aware of the risks of not complying with the HSE Act but choose to take the risk rather than comply. Currently, a workplace has approximately a:

¹ Whatman R, Harvey O, and Hill R. December 1999. *The Effect of Employment Regulation: Case Study Research in the Accommodation, Winemaking and Brewing Industries*, New Zealand Department of Labour Occasional Paper 1999/4. Wellington: Labour Market Policy Group of the Department of Labour

- 1 in 8 possibility of a visit by an HSE inspector during the year;
 - 1 in 25 possibility of receiving an improvement notice;
 - 1 in 333 possibility of receiving a prohibition notice; and
 - 1 in 1000 possibility of being prosecuted.²
- 6 These proposals, combined with work that is currently underway on the Government’s Injury Prevention Framework, will encourage greater compliance with the HSE Act.
- 7 It should be noted that these proposals do not encompass the upper end of sanction available. The New Zealand Council of Trade Union’s submission on the Discussion Paper on the Review of the Health and Safety in Employment Act 1992 (the Discussion Paper) put forward the proposal that the Government consider a new charge of ‘industrial manslaughter’. This would act as a supportive tool in focusing on corporate responsibility in occupational health and safety. In the United Kingdom³ and Victorian (Australia)⁴ jurisdictions, health and safety authorities are proposing to introduce industrial manslaughter to provide a ‘powerful deterrent’. This issue has not been explored in the HSE Act Review.

Comment

Increasing the level of fine and the imprisonment term available under the HSE Act

- 8 Currently the HSE Act allows for a maximum fine of \$50,000 (and no prison term) where failure to comply with the HSE Act has caused a person serious harm. If no serious harm has occurred there is a maximum fine of \$25,000 (section 50). If it can be proved that a person or business knew that an action or failure to act was reasonably likely to cause serious harm, the penalty can be raised to \$100,000 and/or imprisonment for not more than one year (section 49).
- 9 It is proposed to increase the maximum fines payable and the imprisonment term available under the HSE Act to:
- \$250,000 under section 50; and
 - \$500,000 and/or two years imprisonment under section 49.
- 10 It is further proposed to remove the distinction in section 50 between the maximum penalty for a failure causing serious harm and the maximum penalty for a failure that does not cause serious harm.
- 11 There is no need for this legislative distinction as the courts consider the degree of harm resulting as a ‘de Spa’⁵ factor. In fact, a distinction like this (as opposed to the balancing of the factors under de Spa) has the perverse effect of giving a possible advantage depending on the level of harm caused rather than punishment for allowing the hazard to exist. This is contrary to the principal objective of the HSE Act, which is to ‘provide for the prevention of harm to employees at work.’⁶

² Occupational Safety and Health Service, Department of Labour

³ <http://www.hse.gov.uk/press/c00047.htm>, Callaghan announces HSC support for new corporate killing charge.

⁴ <http://www.workcover.vic.gov.au/ywa/home.nsf/Site+Search>, Ministerial letter and draft Bill.

⁵ *Department of Labour v de Spa & Co Ltd*, [1994] 1 ERNZ 339. In *de Spa & Co*, the High Court listed the relevant factors for determining the level of fine to impose in an HSE Act conviction. The Court emphasised that it was not an exhaustive list, allowing other factors to be introduced in subsequent cases. The judgement was given on 31 March 1994 and in the six years since that time, the Courts have followed the *de Spa* approach closely.

⁶ S5(1) HSE Act

- 12 Current fines do not provide sufficient incentive for compliance with the HSE Act. The average fine imposed by New Zealand courts since the HSE Act was introduced is \$6,196.15⁷. The maximum fine for a single charge under section 50 is \$40,000. The High Court in *de Spa* considered the need to leave room for a ‘worst case scenario’,⁸ so it is doubtful whether the courts will impose significantly higher fines under section 50. An increase of imprisonment term will also provide a consistent message of severity of punishment for section 49.
- 13 Fine levels are also inconsistent with other legislation administered by OSH in the workplace. HSE inspectors are responsible for enforcing the provisions of the Hazardous Substances and New Organisms Act 1996 (HSNO Act) in workplaces – this Act allows for a maximum fine of \$500,000 or three months imprisonment. This disparity in fine levels may give incentives to prosecute under the legislation that attracts a higher fine.
- 14 Higher fine levels would signal to employers and employees the importance the government places on healthy and safe workplaces. The proposed maximums are sufficiently high to highlight the seriousness of injury, illness or even loss of life suffered in the workplace.

Summary of submissions – level of fines and imprisonment term available under the HSE Act

- 15 Question 11: Are the suggested increases in the level of fines appropriate? Of the submitters to the Discussion Paper 71 percent responded to this question, 40 percent supported the initiative and 41 percent opposed. Thirteen percent commented that the fines should be comparable with HSNO Act and the Resource Management Act. Eight percent commented that insuring against fines under the HSE Act would occur rather than changing health and safety practices and 17 percent of the employers who commented on this question believed that raising fines would not increase compliance or improve health and safety.

Six-month limitation – reasonable discoverability of breach and discretionary extension of time limit

- 16 It is proposed that the HSE Act be amended to include a specific section on the limitation period for when a charge must be laid for a breach of the HSE Act so that the normal limitation period in section 14 of the Summary Proceedings Act 1957 will not apply. This new section will include a reasonable discoverability test as the starting point for laying charges within a six-month limitation period, and also provide for a discretionary extension on application to the Court.
- 17 The current six-month limitation period (which begins from when the harm occurred) does not accommodate certain types of cases that could be brought under the HSE Act and Regulations. These cases include:
- long latency occupational illness, where the time from the first exposure (to the source of harm) to the onset of symptoms is longer than six months;
 - a latent defect related to the design, manufacture or supply of defective machinery where harm results from a hazard caused by that defect. When harm occurs more than six months after the machinery is designed, manufactured or supplied, prosecution is barred by the limitation period; and
 - failure to notify serious harm. Unless the failure to notify comes to the attention of OSH within six months of the breach, the employer cannot be prosecuted.

⁷ Occupational Safety and Health Service, Department of Labour

⁸ The need to leave scope for a worst case scenario was also considered by the Court in *Ansett New Zealand Air Freight Limited*, 2 February 1996.

- 18 The reasonable discoverability test will provide for charges to be laid within a six-month period from the time when the *matter of the information became known, or should have reasonably become known to the person who is laying the charges*. This amendment will enable the prosecution of cases where a clear breach of the HSE Act or Regulations has taken place, but where the six-month limitation period has expired due to latency or failure to notify. This approach is similar to other health and safety areas and jurisdictions⁹ and common law tortious claims.
- 19 Typical kinds of long latency occupational illness that occur in the occupational health context are found in the table below. The time from the first exposure (to the source of harm) to the onset of symptoms may be years. If the illness is diagnosed outside six months from when the exposure caused harm, OSH can no longer prosecute for that harm caused.

Average Latent Periods for Occupational Illness and Injury	
Illness or Injury	Average latency period
Chemical toxicity	Six months to five years
Exposure to solvents	Ten years
HIV in healthcare workers	Ten years for AIDS symptoms
Noise induced hearing loss	Ten to twenty years
Asbestosis (lung cancer)	Twenty years
Hepatitis in healthcare workers	Twenty-five to thirty years for liver cancer
Occupational Stress	Varies. Recently the High Court upheld a claim for exposure over a period of sixteen years. ¹⁰

Source: OSH health data

- 20 In addition the six-month limitation period should be able to be extended by the District Court when considered within the context of private prosecutions (if the removal of the monopoly on prosecutions is approved) and for OSH when exceptional investigation circumstances exist.
- 21 In the private prosecution context, a private party may choose to begin their investigation only after OSH has decided not to prosecute (see paragraph 28 below). This may not provide enough time for another party to prepare a prosecution within the six-month period and the Court would consider whether further time is warranted in that situation.
- 22 An example of exceptional circumstances in which OSH may request an extension would be where a latent health investigation requires evidence spanning a number of years and evidence of a complex nature needs to be gathered. In such situations a discretionary extension should be available on request to the Court who would, having heard from interested parties, consider whether it was in the public interest for the prosecution to continue even though the normal limitation period had passed, and also whether the later prosecution would unfairly prejudice the party to be prosecuted.

Ministry of Justice comment on the six-month limitation period proposal

- 23 “The Ministry of Justice has reservations about the appropriateness of amending the Health and Safety in Employment Act as proposed in this regard. A specific and clearly defined limitation

⁹ Building Act 1991 section 80(4), HSNO Act section 109(2), Resource Management Act 1991 section 338(4). In overseas jurisdictions; United Kingdom - Health and Safety at Work Act 1974 section 34(3), Australia - Queensland, Workplace Health and Safety Act 1995 section 165.

¹⁰ An ex-Police Photographer was recently awarded damages of over \$200,000. Judge McGechan; *Brickell v Attorney-General*, High Court; Wellington; June 2000; CP267/97. Also refer ‘Review of the HSE Act: Occupational Stress’ (00/004152)

period provides the certainty that is desirable in the criminal law, including public welfare regulatory offences.

- 24 A provision of the kind proposed whereby time will run from when a matter "became known, or should have become known" creates an undesirable level of uncertainty both for potential defendants and those prosecuting. In practical terms it is highly likely that this kind of provision will give rise to lengthy arguments as to when the matter giving rise to the prosecution became known, or should have become known to the person laying the charge.
- 25 This may lead to an unacceptable delay in the proceedings and have significant resource implications both for the Courts and those prosecuting. Causation issues and probable difficulties with identifying an appropriate defendant after a period of years are also likely to arise.
- 26 In the OSH context Justice accepts that in some cases the time from first exposure (to the source of harm) to the onset of symptoms may be as long as twenty years and that latent defects in plant or protective equipment can become apparent over a range of timeframes. A fixed term limitation period for prosecutions may be an appropriate means of dealing with this kind of situation with a provision for the Attorney-General to approve the commencement of prosecutions outside this period. The advantages of such an approach include that it would prevent arguments about when the matters giving rise to the offence became discoverable and would enable the Attorney-General to take into account any potential unfairness or prejudice to a potential defendant which might arise from delays in bringing about a criminal prosecution"

Summary of submissions – six-month limitation period

- 27 Question 13: Should the current six-month limitation period start from when it has been discovered that harm has occurred and allow for an application to be made to the Court for an extension of time to take a prosecution? Of the submitters to the Discussion Paper, 68 percent responded to this question, 44 percent supported the initiative and 23 percent opposed. Nineteen percent commented on the current difficulties of including occupational health cases under the HSE Act, six percent were concerned about the difficulties of prosecuting and defending old cases, and four percent did not support the extension of time option at all.

Removal of the monopoly on prosecutions

- 28 It is proposed that the HSE Act be amended to allow private prosecutions only where OSH has made a decision not to prosecute and has not issued an infringement offence notice in respect of that breach. This will require that section 54 of the HSE Act be amended. This amendment would align the HSE Act with other comparable legislation, including the HSNO Act.
- 29 Section 54 of the HSE Act states that only inspectors may initiate prosecutions. At present, only Department of Labour employees are currently inspectors, thereby creating a government monopoly on prosecutions for breaches of the HSE Act. The need to prioritise and application of the principles of public prosecution means that not all offences are prosecuted by OSH.
- 30 There are a number of reasons for removing the monopoly on prosecutions including: the deterrent effect of a greater range of people enforcing the HSE Act; providing an alternative means of seeking justice for parties who feel aggrieved when their case is not prosecuted by OSH; and providing a safeguard against potential official inertia, incompetence or biased reasoning.

Summary of submissions – removal of the monopoly on prosecutions

- 31 Question 12: Should the HSE Act be aligned with contemporary legislation and allow anyone to initiate a prosecution. Of the submitters to the Discussion Paper, 78 percent responded to this

question, 26 percent supported the initiative and 54 percent opposed. The majority of submitters were concerned that the wrong incentives would motivate a private prosecution. Many opposed private prosecutions in the belief that the Department of Labour is best equipped to assess whether a complaint merits prosecution.

- 32 Submissions in support of this proposal stated that it would provide a means of accountability and that, probably, few cases would be taken. Several supported private prosecutions because they believed it to be a basic right that all parties should have the opportunity to bring a prosecution.
- 33 Aligning the HSE Act to contemporary legislation, especially the HSNO Act, is important to maintain a consistent approach to enforcing health and safety legislation in the workplace. Therefore the proposal to remove OSH's monopoly on prosecutions remains (except where OSH has decided to prosecute or issued an infringement offence notice) despite the level of opposition to this proposal.

Insurance against fines under the HSE Act

- 34 It is proposed that the HSE Act be amended to clarify that insurance policies that indemnify against fines (but not the cost of defending a charge under the HSE Act) are unlawful and issuing a policy covering fines under the HSE Act constitutes an offence under the HSE Act and is liable for penalty under section 50 of the HSE Act. A significant number of employers are insured against the cost of fines and legal expenses under the HSE Act. This has a significant impact on the deterrent effect of penalties and may become more prevalent if the fines are increased.
- 35 It is further proposed that the use of insurance against the fines that may be imposed under other Acts be examined by officials with a report back to Cabinet by the end of November 2001 identifying possible options for addressing the issue. Insurance policies may extend to other legislation like the Resource Management Act 1991. While Crown Law consider that it is likely that such contracts are (to the extent that they cover fines) void for breaching public policy, in practice neither party to them would challenge them. Discussions between relevant government agencies are occurring on how to deal with the use of insurance for criminal liability.

Summary of submissions - insurance against fines under the HSE Act

- 36 Although the issue of insurance against fines under the HSE Act was not specifically addressed, of the 126 submissions that commented on question 11 (Level of fines), sixteen percent commented about the links between insurance and fine levels. Eight percent believed that employers would take out insurance, rather than changing practices if fines are increased. Two percent, including the Law Commission, believed that the government should consider making insurance against fines under the HSE Act illegal. One commented that insurers are not legally obliged to pay out for criminal fines.

Minor and technical amendments to the HSE Act

- 37 The following proposed minor and technical amendments are either for the purpose of clarifying the current wording, or for ensuring consistency between sections of the HSE Act.

Power to make regulations imposing duties on principals and self-employed persons

- 38 To achieve consistency between Part II of the HSE Act and sections 21 to 24, it is recommended that sections 21 and 22 be amended to allow regulations to be made imposing duties on principals and self-employed persons. Sections 21 to 24 of the HSE Act allow for regulations to be made that impose duties on particular people and in relation to particular matters.

- 39 Sections 21 and 22 describe on whom the duties may be imposed. These sections generally allow regulations to be made that impose duties on all people who have duties under Part II of the HSE Act. However, sections 21 and 22 do not specifically allow regulations to impose duties on principals and the self-employed.

Functions of inspectors

- 40 It is proposed that section 30(b) be amended to include, as a function of inspectors, ascertaining whether the HSE Act *has been* complied with. Section 30 sets out the functions of inspectors under the HSE Act. This includes, in section 30(b), ascertaining whether or not the HSE Act *is being and will be* complied with. Section 30 does not include a function of ascertaining past non-compliance (whether the HSE Act *has been* complied with). The powers of entry and inspection conferred on inspectors under section 31 are given “for the purpose of performing any function”. The lack of the past element in section 30 could lead to a challenge to the power of inspectors to use the powers conferred by section 31 if the use relates to past non-compliance with the HSE Act.

Inspectors’ powers in relation to former and other places of work

- 41 Similarly, it is proposed that section 31 of the HSE Act is amended to:

- make clear that inspectors may require employers to carry out the tasks described in section 31 in relation to any of their employees’ current or former places of work; and
- make clear that inspectors may require persons in control of a place of work to carry out the tasks described in section 31 in relation to any place of work that they control or have controlled.

- 42 Section 31 of the HSE Act gives inspectors powers of entry to and inspection of workplaces. The current wording of section 31(1)(d), (e) and (f) has meant that there are some situations where the powers are not sufficiently explicit for the inspector to be able to investigate properly. Examples of those situations are:

- not all employers or persons in control of a place of work are situated at the work-site where their employees work or they control. The HSE Act is not explicitly clear that the duties on employers or persons that control a place of work under section 31 extend to work-sites where they are not themselves situated; and
- in some cases it is not possible to enter the place of work that is the subject of the inspector’s investigation because it is no longer a place of work and inspectors may need to investigate such a place if there has been a breach of the HSE Act that has become known only after work is completed.

Consultation

- 43 A list of those consulted is included in the Regulatory Impact Statement.

Financial implications

- 44 At a bilateral meeting on Monday 9 July 2001, the Acting Minister of Finance and I agreed, due to pressure on the 2001/02 contingency fund, that:

- the Health and Safety in Employment Amendment Act timeline will be delayed, with the Amendment Act being passed in April 2002, and coming into force in September 2002;
- any costs associated with the HSE Amendment Act that are incurred in the 2001/2002 financial year, will be funded from within the Vote Labour existing baseline through reprioritisation; and

- funding for costs associated with the implementation of the HSE Amendment Act will be considered as part of the 2002 Budget round. The amendments described in this paper and the accompanying papers all have associated costs. The fixed costs for implementing any one of the proposed changes to the Health and Safety in Employment Act are outlined in the accompanying Overview paper.

45 The accompanying Overview paper outlines the effect of this approach, and describes the fixed costs for implementing any one of the proposed changes to the HSE Act.

46 The specific costs associated with the proposals in this paper initiative are:

- increased inspector numbers due to the increase in enforcement activity, and involvement with private prosecutions as witnesses;
- operational policy development and evaluation of proposals; and
- a publicity campaign to notify all those affected by the changes.

47 The following table summarises the estimated costs:

Effective enforcement proposals	2001/02	2002/03	Outyears
	\$m	\$m	\$m
Operating costs (GST incl)			
Increase in fine levels	0.016	0.136	0.133
Private Prosecution	0.018	0.070	0.070
Limitation period	0.033	0.530	0.530
Total	0.067	0.736	0.736
Outside the provisions (GST incl)			
Increase in fine levels	-	0.002	-
Private Prosecution	-	0.002	-
Limitation period	-	0.010	-
Total	-	0.014	-
Capital costs (GST n/a)			
Increase in fine levels	-	0.028	-
Private Prosecution	-	0.025	-
Limitation period	-	0.110	-
Total	-	0.163	-

Human rights

48 The proposals are intended to comply with the Human Rights Act 1993.

Legislative implications

49 Acceptance of these proposals will require the following amendments to the HSE Act:

- sections 21, 22, 30(b), 31, 49, 50, and 54; and
- new sections on:
 - the limitation period for laying charges under the HSE Act; and
 - the illegality of insuring against fines under the HSE Act.

Publicity

50 The communications strategy is described in the accompanying Overview paper.

Recommendations

Policy content

Fine levels

51 It is recommended that the Committee:

1. **agree** that the maximum level of fine under the HSE Act be raised to:
 - 1.1. \$250,000 under section 50;
 - 1.2. \$500,000 under section 49;
2. **agree** that the imprisonment term under section 49 be increased to two years
3. **agree** to remove the distinction between serious harm and non-serious harm from section 50 of the HSE Act.

Six-month limitation period

4. **agree** to amend the HSE Act to incorporate the test of 'reasonable discoverability' to provide for charges to be laid within a six month period from the time when the matter of the information became known, or should have become known, to the person who is laying the charge; and
5. **agree** to amend the HSE Act to introduce a discretionary extension of the limitation period on application to the District Court which will look at whether continuing the prosecution;
 - 5.1. is requested by a private party and warrants further time; or
 - 5.2. is requested by the Department of Labour and is in the public interest and the prosecuted party will not be unfairly prejudiced by the delay;

Monopoly on prosecutions

6. **agree** to amend section 54 of the HSE Act to allow any party to pursue a prosecution, but only after OSH has made a decision not to prosecute and has not issued an infringement offence notice in respect of that breach;

Insurance against fines under the HSE Act

7. **agree** that the HSE Act be amended to clarify that insurance policies that indemnify against fines (but not the cost of defending a charge) under the HSE Act are unlawful and issuing of a policy covering fines under the HSE Act constitutes an offence under the HSE Act and is liable for a penalty under section 50 of the HSE Act;
8. **agree** that the use of insurance against the fine that may be imposed under other Acts be examined by officials with a report back to Cabinet by the end of November 2001 identifying possible options for addressing the issue;

Minor and technical amendments

9. **agree** that sections 21 and 22 of the HSE Act be amended to allow regulations to be made imposing duties on principals and self-employed persons;
10. **agree** that section 30(b) of the HSE Act be amended to include as a function of inspectors ascertaining whether the HSE Act *has been* complied with;
11. **agree** that section 31 of the HSE Act is amended to;

- 11.1. make clear that inspectors may require employers to carry out the tasks described in section 31 in relation to any of their employees' current or former places of work; and
- 11.2. make clear that inspectors may require persons in control of a place to work to carry out the tasks described in section 31 in relation to any place of work that they control or have controlled;

Financial implications

12. **note** that the estimated cost of the fixed costs if any change occurs for implementing any one of the proposed changes to the HSE Act are:

Fixed costs if any change occurs	2001/02	2002/03	2003/04	2004/05	Outyears
	\$m	\$m	\$m	\$m	\$m
Operating costs (GST incl)	0.247	1.866	0.294	0.243	0.084
Outside the provisions	-	0.051	-	-	-
Capital costs (GST n/a)	-	0.562	-	-	-

13. **note** that the estimated costs for implementing the effective enforcement proposals are as follows:

Effective Enforcement Proposals	2001/02	2002/03	Outyears
	\$m	\$m	\$m
Operating costs (GST incl)			
Increase in fine levels	0.016	0.136	0.133
Private Prosecution	0.018	0.070	0.070
Limitation period	0.033	0.530	0.530
Total	0.067	0.736	0.736
Outside the provisions (GST incl)			
Increase in fine levels	-	0.002	-
Private Prosecution	-	0.002	-
Limitation period	-	0.010	-
Total	-	0.014	-
Capital costs (GST n/a)			
Increase in fine levels	-	0.028	-
Private Prosecution	-	0.025	-
Limitation period	-	0.110	-
Total	-	0.163	-

14. **note** that any costs associated with the HSE Act amendments that are incurred in the 2001/02 financial year, will be funded within the Department of Labour baseline through absorption or reprioritisation;
15. **note** that this approach carries a number of risks and will therefore will be closely monitored by the Department of Labour, with progress reported to Ministers on a regular basis;
16. **note** that funding of the remainder of the HSE Act amendments costs will be considered as part of the 2002/03 Budget round;

Drafting instructions

17. **invite** the Minister of Labour to prepare drafting instructions for Parliamentary Counsel Office to amend the HSE Act as set out in recommendations 1 to 11 above.

Minister of Labour
Hon Margaret Wilson

Regulatory Impact and Compliance Cost Statement

Statement of the problem and the need for action

- 1 Available evidence shows that some New Zealand employers perceive the fines under the HSE Act imposed to be substantial but this does not encourage HSE Act compliant behaviour because many employers perceive the risk of prosecution to be low¹¹.
- 2 More robust enforcement mechanisms that increase the possibility of enforcement action and severity of punishment for non-compliance with the HSE will encourage greater compliance with the HSE Act.

Statement of the public policy objective

- 3 The HSE Act along with ACC forms a major part of the legislative infrastructure of the health and safety system that deals with occupational injury and illness prevention in the workplace. A major gap in the incentive structure has been identified as employers who are aware of the risks of not complying with the HSE Act but choosing to run the risk of possible detection.

Options considered

Increasing the level of fines and imprisonment terms available under the HSE Act

- 4 Other options considered were lower or higher amounts of fine and imprisonment terms. The recommended levels are consistent with other comparable legislation.

Six-month limitation period – reasonable discoverability test and extension of time

- 5 Other options considered were:
 - Option 1: Retain the status quo and make no change to the current six-month limitation period on laying charges under the HSE Act.
 - Option 2: A stated limitation period that provides an extension in all cases. (This was considered to simply move the latency problem out to a different duration.)
 - Option 3: Add an extension mechanism only. (This would require special court hearings to deal with every latency case.)

Removal of OSH monopoly on prosecutions

- 6 The other option is to retain the status quo. The proposal to remove OSH's monopoly on prosecutions is consistent with other comparable legislation including the HSNO Act.

Insurance against fines under the HSE Act

- 7 This proposal was included because of support from submissions on the Discussion Paper.

¹¹ Whatman R, Harvey O, and Hill R. December 1999. *The Effect of Employment Regulation: Case Study Research in the Accommodation, Winemaking and Brewing Industries*, New Zealand Department of Labour Occasional Paper 1999/4. Wellington: Labour Market Policy Group of the Department of Labour

Minor technical amendments to the HSE Act

- 8 The other option is to retain the status quo. This may cause inconsistency and confusion when interpreting the HSE Act

Statement of the benefits and costs of the recommended proposals

- 9 The flow-on cost to employers (and the economy more generally) if these mechanisms are adopted should be to increase investment in health and safety systems. It is possible that the threat of higher fines could encourage additional investment in health and safety by employers who are already compliant with the HSE Act, without actually ‘capturing’ those employers that are currently non-compliant with the HSE Act. This will inevitably depend on the administration of the HSE Act by OSH and the sentencing decisions of the courts.
- 10 The cumulative cost implications of increasing compliance incentives is likely to be reflected in 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.
- 11 For some employers, these costs may be offset by qualifying for ACC premium discounts for establishing and maintaining 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.
- 12 The cost of workplace injury and illness has been estimated at \$3.18 billion per year.¹² Increasing the certainty of detection and the severity of punishment under the HSE Act will improve compliance with the HSE Act with those who currently choose not to comply.
- 13 The cost of implementing the proposal to increase the level of fines is \$0.016 million in 2001/02, \$0.136 million in 2002/03, \$0.133 million in outyears (operating), and \$0.028 million in 2002/03 (capital). The cost of implementing the proposal to remove the prosecution monopoly is \$0.018 million in 2001/02, \$0.067 million in 2002/03, \$0.070 million in outyears (operating), and \$0.025 million in 2002/03 (capital). The cost of implementing the proposal to include a reasonable discoverability test in the limitation period is \$0.033 million in 2001/02, \$0.530 million in 2002/03, \$0.530 million in outyears (operating), and \$0.110 million in 2002/03 (capital).

Business compliance cost statement

- 14 The recommendations in this paper will impose compliance costs on the following groups of employers:
- employers who currently do not comply with the HSE Act but perceive a greater risk if non-compliance is detected; and
 - possible additional investment in health and safety by employers who are already compliant with the HSE Act; and
 - employers who currently insure against risk of fine under the HSE Act.
- 15 The specific costs to employers that will be associated with the effective enforcement proposals are:

¹² Occupational Safety and Health Service, *State of New Zealand's Occupational Safety and Health*, unpublished report, December 1999.

Fine levels

- potential for increase in fines awarded by a court;
- an increase in possible imprisonment term (under section 49); and
- more rigorous defence of a prosecution resulting in a possible increase in legal costs.

Six-month limitation period – reasonable discoverability and discretionary extension of time

- increased potential of prosecution for a breach not previously possible to prosecute.

Removal of OSH monopoly on prosecutions

- potential for prosecution by a private individual; and
- increase in legal costs to defend potential prosecutions from private individuals.

Insurance against fines under the HSE Act

- Employers who are presently insured against fines imposed would have factored in the costs of premiums and limitation of their costs into the cost of doing business. Removing their ability to insure increases the potential risk that they face of financial penalty that is uninsurable. The risk could only be estimated, and that estimation is made problematic, at least initially, because of the introduction of infringement offence notices and the increase in fine levels generally. This would lead to increased investment in health and safety by affected employers. Those most likely to be affected would presently have insurance and be in high-risk industries.

Consultation

16 Those consulted in the development of this paper were:

- 177 submitters to the Discussion Paper, including key unions, employer organisations and employers; and
- ACC, Department of the Prime Minister and Cabinet, the Treasury, Ministry for Economic Development, Ministry of Health, Ministry of Justice, Ministry of Transport, Ministry of Agriculture and Forestry (Rural Affairs division), Ministry for the Environment, Department for Courts and Te Puni Kōkiri.
- Ministry of Womens Affairs were given the opportunity to comment on this paper but declined