

Health and Safety in Employment Act 1992
Defining Serious Harm

 **A DISCUSSION PAPER ON THE REVISION OF
THE DEFINITION OF SERIOUS HARM**

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Foreword

It is now four years since the Health and Safety in Employment Amendment Act 2002 came into force. In that time, the amendment has been an important plank in the Government's commitment to improving workplace health and safety.

The Act now:

- covers more workplaces;
- requires the self-employed and principals to report injuries and illness;
- encourages employee participation;
- confirms that employers must manage stress and fatigue in the workplace; and
- affirms employees' right to refuse work that may cause them serious harm.

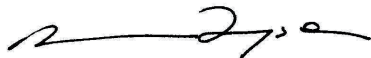
Since the amendment came into force in May 2003, the emphasis for employers, officials and others has been on improving the processes and administrative practices that maintain the law – and make safe and healthy workplaces. As another step towards this, I have decided to review the definition of “serious harm”.

The definition is important to the application of the Act, and there is a strong incentive for clarity. Various key duties and rights are triggered by the occurrence of, or potential for, “serious harm” to employees or others in workplaces.

The amendment also extended requirements to report instances of serious harm, and these now apply to an estimated 210,000 self-employed, and to harm done to non-employees in workplaces.

The current definition has not been amended since 1993. It has presented difficulties and uncertainty for employers and others applying the law, and what was intended as a temporary measure has now outlived its utility. So it is timely to review the definition. As well, there is the potential to produce a definition that improves the quality, coverage and consistency of workplace injury and illness statistics.

I therefore strongly encourage employers, individuals, unions and industry groups to consider this discussion document and contribute to the development of the new definition.



Hon. Ruth Dyson
Minister of Labour
April 2007

Making submissions

Email submissions are encouraged as it greatly enhances our analysis process.

To help you make a submission, an electronic document is available on the Department of Labour website:

www.dol.govt.nz

Please email your submission to:

seriousharm@dol.govt.nz

or, alternatively, send it to:

Review of Serious Harm
Workplace Policy Group
Department of Labour
PO Box 3705
Wellington

Submissions close on 15 June 2007.

A document providing an overview of submissions will be posted at the above website with details of how the government intends to proceed with the review.

Please note that any submissions that you make may be the subject of a request under the Official Information Act 1982. To assist the Department of Labour with the processing of any such requests, please indicate at the beginning of your submission whether or not you would like its contents made a matter of public record.

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A: Introduction

The definition has several important uses

“Serious harm” is a key concept for hazard management and notification of harm. It has four uses under the Health and Safety in Employment Act 1992, as amended in 2002, by defining:

1. What is a “significant hazard” and so must be managed by an employer (under the hierarchy of actions set out in sections 7-10);
2. Which occurrences of harm or accidents must be notified and reported to the Department of Labour (or Maritime New Zealand or Civil Aviation Authority), and when an accident scene must be protected until investigated (sections 25 and 26);
3. The degree of harm that creates the most serious (section 49) offences under the Act; and
4. The work that employees may refuse because it is likely to cause them serious harm (new s28A).

The 2002 amendment made explicit the right to refuse unsafe work. It also made it explicit that harm caused by workplace stress is covered by the Act’s definition of “harm” and “hazard” (s2 (1)), and meaning that stress and fatigue must be managed like any other hazard, and that a fatigued person is a potential hazard.

Because the Act’s processes rest upon the definition of serious harm, a simpler and clearer definition will assist employers, employees, health and safety inspectors, and others, to achieve compliance with the law.

The definition is also linked to accident and incident notification requirements under energy legislation and the Hazardous Substances and New Organisms Act 1996.

The reliance on a single defining term is unusual

Overseas jurisdictions, including those with performance-based health and safety legislation like New Zealand’s, do not place the same reliance on a single term to define the scope of such a range of duties and processes. The United Kingdom, for example, maintains specific regulations requiring the reporting of occupational illness and injury and dangerous incidents (the 1995 “RIDDOR” Regulations).

Australian states’ health and safety legislation is concerned with the management of “risk” in workplaces. This means that the legislative duties are not phrased in terms of controlling hazards to prevent “harm”. So there is no need to set a threshold such as “serious harm”.

The existing definition was intended to be temporary

The HSE Act, s2, defines serious harm as “death, or harm of a kind or description declared by the Governor-General by Order in Council to be serious for the purpose of this Act”. On enactment in 1993, an interim definition of “serious harm” was set out in the First Schedule to the Act (see appendix 1).

The intention was that it would be replaced by Order in Council (effectively a regulation) within a short time. However, since the Act was passed, no order has been made to amend the definition in the First Schedule.

The definition is ambiguous in certain key areas, particularly through the use of the phrase “temporary severe loss of bodily function” in the first clause. This has led to practical difficulties and inconsistent interpretations among employers, and the health and safety inspectorate. Operational guidelines have not solved the problem.

Also, some types of incidents and injuries have not been covered.

An earlier review wasn't implemented

The definition of "serious harm" was first reviewed in 1995 by a Department of Labour working party, which considered a range of issues concerning its use. However, the results of the review were not implemented.

The review had recommended that the definition be changed to replace the term "temporary severe loss of bodily function" with the words "which are likely to render a person unable to carry out normal employment duties for 7 calendar days". Public consultation was undertaken in 1997, and found broad support for the proposal.

Following consultation with the Ministry of Health, a reference to burns "requiring referral to a specialist registered medical practitioner" was replaced with a reference to treatment by a "general medical practitioner". This was considered more consistent with current practice.

A regulation was drafted, but did not proceed.

Recent discussion and review is consistent with the amended legislation

This review was originally begun in 2002, between the passing and coming into force of the HSE Amendment Act 2002. After initial consultation, the decision was made to defer the process until the new legislation was better established. The process was resumed in November 2004. It is being led by the Workplace Group of the Department of Labour, in consultation with Maritime New Zealand (MNZ) and the Civil Aviation Authority (CAA).

In 2002, as a preliminary to the review, officials consulted with stakeholder groups (listed in appendix 2). This was to identify any key concerns for discussion in this document. Because the amendment Act had been passed, if not in force, at that time, this step has not been repeated.

Since this consultation, the amendment has extended the reporting requirements to principals and the self-employed. Employers must also now

report occurrences of serious harm to non-employees in places of work they control.

These changes have made the definition relevant to more dutyholders or potential dutyholders. In addition, employees now have the right to refuse work that is likely to cause them serious harm.

The views expressed in this document are those of the Department of Labour, as reviewers. For convenience the collective pronoun "we" is used at different points in the document.

Issues raised by stakeholders

Stakeholders raised the following issues, all of which we discuss in more detail later:

"Temporary severe loss"

This phrase is difficult to interpret and use. Stakeholders agreed that a change to a time-activated standard would provide clarity. It is clearly suitable for more straightforward physical injuries, but less so for gradual process injuries or disease.

Some groups said it would be desirable to make the definition of the phrase more consistent with that of "first week of incapacity" used in the Injury Prevention, Rehabilitation, and Compensation Act 2001.

Recognition of mental harm

Unions commented that the existing definition is concerned only with physical injury, at the expense of psychological or mental harm. They felt that this was inconsistent with the recognition given to harm caused by work-related stress by the amendment. (Although non-physical harm requiring hospital admission is caught by clause 6 in the current definition.)

Employer groups felt that further consultation with the appropriate professional groups is necessary before a decision is made on which, if any, conditions are included in the definition to reflect the amendment.

In practice, few cases of work-related stress have come to the attention of the Department of Labour — either through complaints from affected employees or their workmates, or as a basis for personal grievance actions.

Electric shock

The electrical supply industry agreed that serious cases of electric shock should be included. Proposed amendments to energy supply industry legislation will increase the role of the HSE Act, further supporting this view. Inclusion will complement recent amendments to the Electricity Act and the Gas Act. These amendments require the reporting of “serious harm” and “significant property damage”.

The Electricity Act defines serious harm in a manner that is consistent with the proposed definition, while the Gas Act’s definition uses that of the HSE Act.

These acts also provide that reporting completed to one agency is deemed to meet reporting requirements under other legislation, and requires agencies to transfer data as appropriate.

Cases of unconsciousness

There are gaps in the coverage of some cases of unconsciousness — where the unconsciousness results from a physical blow, a fall, or contact with an energy source.

Hospital admission

There was agreement that 48 hours in hospital is too high a threshold, and is out of step with current medical practice.

Any changes made which refer to the level of medical treatment given will need to be consistent with the Health Practitioners Competence Assurance Act 2003.

What the draft definition proposes

A draft definition has been prepared and is reproduced in the panel on the following page. It has:

1. Removed the list of injuries and illness currently included in the first clause.

As proposed, this would define “temporary severe loss of bodily function” as including, but not necessarily limited to, “any case where a person is unable to perform their normal duties for more than 7 calendar days”.

Section 25(3) requires notification to the Department of Labour of any such harm as soon as the degree of incapacity becomes clear.
2. Deleted the current reference to burns, which will be caught by either the proposed clause 1 or clause 4.
3. Extended the coverage of the existing clause 5 to include cases of acute illness or loss of consciousness which were previously excluded, i.e. from a fall or physical impact, or from contact with an energy source.
4. Amended clause 6 to remove the requirement to spend 48 hours in hospital. The clause has been extended to include “any physical or mental harm that requires hospital admission, surgery, or treatment by a medical practitioner who is a registered specialist operating within their scope of practice”.

Draft definition

We have prepared a draft definition after initial discussion with stakeholders. Its purpose is to provide a basis for wider consultation.

It should be noted that s2 of the HSE Act will continue to define "serious harm" as

"death, or harm of a kind or description declared by Order in Council to be serious for the purposes of this Act".

Each of the underlined phrases is discussed below.

- | | |
|--|---|
| <ol style="list-style-type: none"> 1. <u>Injury (including that caused by gradual process) or disease</u> which causes: <ol style="list-style-type: none"> a) <u>permanent loss of bodily function</u>; or b) <u>temporary severe loss of bodily function</u> (including any harm causing the person to be | <ol style="list-style-type: none"> unable to <u>perform their normal duties</u> for <u>more than 7 calendar days</u>); or 2. <u>Amputation or surgical removal</u> of body part; or 3. Loss of consciousness, or acute illness requiring treatment by a <u>medical practitioner</u> from: <ol style="list-style-type: none"> (a) lack of oxygen; or (b) absorption, inhalation, or ingestion of any substance; or (c) <u>contact with any energy source</u>; or (d) <u>a fall or other physical impact</u>; or 4. Any <u>physical or mental harm</u> that requires hospital admission, surgery, or <u>treatment by a medical practitioner who is a registered specialist operating within their scope of practice</u>. |
|--|---|

B: Content of the definition

Knowing which types of harm to notify is causing the most problems for duty holders

We have based the review on how the definition is used to define the duties imposed by the various sections of the Act. But, of the various uses, the most emphasis has been placed on the requirement to notify and report cases of serious harm.

Consultation with stakeholders had indicated that it was this use that caused the most problems. Failure to notify or report an occurrence of serious harm is an offence. Although prosecutions are unusual, an inspector aware of a failure to report may now issue an infringement notice to an employer or other person who has received prior warning for a “similar matter”. Although no infringement notices have been issued on this basis, their potential use is an additional incentive for clarity.

Clarity can only be expected to improve other uses of the definition.

Deciding which hazards are “significant” is less of a priority

Employers advised us that they tend to manage all identified hazards, without necessarily making the distinction between those that are “significant” or not.

Inevitably, reports of new categories of serious harm (i.e. types previously not included) will result in the associated hazards receiving additional consideration from the employer or other person required to manage hazards.

QUESTION 1. Should the review focus primarily on the use of the definition to describe notification requirements?

Harm may be described in a range of ways – which is best?

The four clauses of the revised draft definition follow the same broad approaches to categorising and capturing illness and injury that are contained in the existing schedule. But, we considered other ways of structuring the definition.

The Factories and Commercial Premises Act 1981, which was repealed by the HSE Act, contained a reporting requirement for all workplace injuries or illness involving more than 48 hours absence from work — but excluded many occupational illnesses and gradual process injuries as a result. That Act also covered a much narrower range of workplaces.

We considered different ways of grouping or categorising the different types of harm that are considered “serious”. Should, for example, trauma injuries be distinguished from those requiring diagnosis by a medical professional? Or should the degree of harm be determined entirely by the time spent away from the workplace?

In practice, no single approach is likely to provide a complete solution. One may “catch” injuries more effectively than illness, while another may avoid dangerous incidents, or not include harm that occurs over a long period, such as noise-induced hearing loss or gradual process injuries.

Other approaches for categorizing types of harm include:

- injuries vs illness;
- confirmation of the harm on diagnosis vs occurrence;
- “inclusive” descriptions vs “exclusive” lists; or
- distinguishing between different periods of incapacity or the gravity of harm.

An example of one way that serious harm may be grouped is into three categories:

- trauma injuries, whether or not they cause permanent or temporary severe loss (e.g.

crushing or other injuries from being caught in a machine);

- gradual process injuries or disease, notifiable on diagnosis (e.g. carpal tunnel syndrome, or solvent-induced neurotoxicity); and
- incidents where an employee or other person is in grave danger (e.g. accidental contact with an underground mains power supply).

This is the approach taken by the United Kingdom “RIDDOR” Regulations, with a list provided for each category.

We have not classified incidents of harm in this way in the draft. This is because of the comprehensive coverage achieved by combining the time-activated standard for “temporary severe loss” in clause 1, and the requirement for hospital admission or specialist medical treatment in the proposed clause 4.

Why not use lists?

An alternative approach, which we considered and then decided against, was to split the existing first clause into two clauses, one listing injuries leading to permanent or temporary severe loss, and another listing occupational diseases or gradual process injuries, which would be reportable when an employer, self-employed person or principal learns of the diagnosis.

As noted above, this is the approach taken in the UK regulations. But we did not use it in the draft because it was considered unnecessarily complicated, while potentially restrictive of new or unusual illnesses that may arise. Lists, by their nature, tend to be incomplete, regardless of their length or complexity.

A specialist in occupational medicine suggested that the categories of injury would be based on an artificial distinction, because, in practice, there is often a causal link between trauma injury and chronic occupational injury or disease (see below).

The draft refers collectively to “injury or disease”

The wording of the first clause of the draft is intended to capture any physical symptoms or effects of injury. The phrase was chosen as being consistent with the injury=illness=injury principle of occupational medicine, which recognises that trauma injury may lead to either acute or chronic symptoms (the latter of which may be diagnosed as “disease”).

For example, many repetitive strain injuries will heal if the sufferer rests, but if the activity causing the injury persists, the damage may be more serious, and described as “gradual process injury”. Therefore, the intention is not to restrict “injury” to trauma injury, and the use of the words in brackets “including that caused by gradual process” clarifies that conditions such as OOS are included. The definition of “personal injury caused by a work-related gradual process, disease or infection” provided in s30 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 will complement the use of the phrase.

Because it is not qualified by the lists of injuries and diseases used in the existing schedule, the phrase will include a range of injuries that are currently excluded. In particular, the draft will capture all cases of strains and sprains leading to more than the specified time away from normal duties.

Burns are no longer described separately

The proposed first clause will include burns leading to the specified number of days away from normal duties. In addition, those requiring hospital admission or specialist medical treatment will be caught by the proposed clause 4. These were previously described in a separate clause, which is now unnecessary.

Clause 1 is only concerned with “loss of bodily function”, not mental harm

The first clause is intended to capture only physical injury or disease, i.e. not mental or psychological harm.

Mental harm arising from workplace activities, which is explicitly recognised by the amendment, will be caught by the proposed clause 4 in any

case resulting in specialist medical treatment or hospital admission.

An alternative suggestion for dealing with stress and fatigue was by a separate clause concerning, for example, “any case of work-related stress or fatigue leading to five or more days off work on the advice of a medical practitioner”. This approach was considered and rejected. We felt that it could lead to confusion about whether the stress or fatigue is the cause of the harm or the harm itself. Also, it could lead to inaccurate diagnoses being made in the early stages of managing cases of work-related stress or fatigue.

This could, in turn, lead to confusion surrounding reporting requirements and potentially lead to unnecessary or premature reporting of what are often difficult situations for employees and employers. It is not unusual for a period of leave to be taken as an agreed plan to manage stress, and it is doubtful that the health and safety inspectorate’s involvement in these situations at an early stage would always help resolve a workplace problem of that kind.

It is also important to remember that, while the 2002 amendment recognised workplace stress and fatigue as sources of harm, they are the causes, but not the harm itself.

Instead, the intention of the draft definition is that stress and fatigue related disorders should only be notifiable to the Department of Labour after diagnosis by a specialist medical practitioner, i.e. a psychiatric diagnosis (see below).

Any permanent loss of bodily function continues to be serious harm

The first clause includes any case of permanent loss of bodily function, as does the existing schedule.

However, while the existing First Schedule limits the types of permanent loss to a defined list of conditions, the draft doesn’t. As a result, any permanent loss will be included, such as that

resulting from soft tissue injury, and also noise-induced hearing loss, respiratory disease and numerous other diseases and conditions not currently included.

Conditions included in the Department of Labour’s Notifiable Occupational Disease System (NODS) will be caught by this clause. (Although, in practice, NODS reporting tends to be by employees and health professionals some time after the employment that led to the exposure to the hazard has ended.)

There could be further debate in the courts over just how “permanent” the damage needs to be. Is, for example, a ruptured Achilles’ tendon or knee ligament a permanent loss of bodily function?

Extending this category, along with that of “temporary severe loss”, will have compliance implications for employers and others, as well as the health and safety inspectorate, who will need to review more cases of soft tissue injuries in particular. These cases are not covered by the current definition (see discussion below).

The phrase “temporary severe loss” is retained

Initial consultation confirmed that all groups want to retain the phrase “temporary severe loss”, but that its meaning needs to be clarified. Stakeholders said that the words state the intention of the clause, which is important for interpretation.

We have therefore decided to retain the phrase, while defining it with a time-activated measure.

Harm to non-employees is included

The definition of “temporary severe loss” is based on being unable to perform normal duties for a specified period. A person’s injuries might lead them to be unable to carry out normal duties elsewhere — at another workplace, in their home or another place — and this would still be “serious harm”. This is consistent with the existing definition.

QUESTION 2: Is the avoidance of lists in the definition appropriate and effective?

QUESTION 3: Is there sufficient inclusion of gradual process injuries?

QUESTION 4: Should clause 1 be limited to "bodily function"?

QUESTION 5: Should the phrase "temporary severe loss" be retained, while supplemented with a time-activated definition?

QUESTION 6: Will there be sufficient inclusion of "temporary severe loss of bodily function" for non-employees?

Time away from "normal duties" has been chosen instead of absence from the workplace

Having decided to define "temporary severe loss" as a period of incapacity, the next question is how to describe the incapacity.

The period of incapacity needs to be described simply and clearly. Although a range of parameters could be used, we felt it came to a choice between time away from "the workplace", or from "normal duties".

"Perform their normal duties"

We chose this wording for the draft because it best reflects a loss of bodily function with respect to the work that an employee is engaged to do. It is also the least ambiguous. As discussed above, it will also provide coverage in the less common situations of harm occurring to non-employees.

Various stakeholders emphasised the importance of rehabilitation, and the benefits of an early return to work. They suggested that a definition based on time away from the workplace would encourage this. We felt that encouraging an early return to work shouldn't be at the expense of an accurate reflection of the harm that had been done in any situation.

Other stakeholders favoured basing "temporary severe loss" on time away from "normal duties".

They described it as a better reflection of the loss of bodily function and more consistent with the Act's object of promoting the prevention of harm to all persons at work and to persons in, or in the vicinity of work. We agreed for the purposes of preparing the draft.

An alternative wording was suggested as "being unable to carry out their usual range of duties". This would cast a wider net than the draft, because it refers to any restriction in the range of activities which an employee would normally be able to carry out. It is also potentially ambiguous, as the person reporting is effectively required to assess the injured person's normal capacity.

Instead, "normal" was chosen for the draft.

It provides greater coverage, with sufficient flexibility. The wording could, for example, exclude a situation where an injured orchard employee was fit for spraying work, but not fit for pruning from ladders.

The employee's "normal duties" would be those she or he would normally carry out at the time of the impairment, not a hypothetical range of activities throughout the year. So, to return to the example of the injured orchard worker, the "temporary severe loss" of bodily function might be considered serious harm during the pruning season, but not at a time of spraying.

We consider this degree of flexibility is necessary, because the list of a person's normal duties provides the best objective measure for determining fitness for work. This is the case whether or not the person injured is an employee of the person reporting. Explanatory materials will be needed in support of the definition itself.

QUESTION 7: Should the definition of "temporary severe loss" be based on absence from the workplace, or, alternatively, being unable to complete normal duties?

The period for “temporary severe loss”

In deciding on the appropriate number of days, we need to consider:

- whether the days should be consecutive, or within a period, such as a month, of the event or injury;
- whether the number of days applies to absence from the place of work or inability to complete “normal duties” (see above); and
- what will provide simplicity and clarity for users of the definition.

The draft uses a period of “for more than 7 calendar days”

Subject to further submissions, we have used the seven-calendar-day threshold in the draft because it:

- gives consistency with entitlements to “weekly compensation” under the Injury Prevention, Rehabilitation, and Compensation Act 2001, and for statistical purposes;
- is a reasonable compromise that will capture most serious trauma cases;
- will cover a period of rostered time off in most cases; and
- is consistent with the period suggested by the officials’ committee which reviewed the definition in 1997.

The days of absence need not be consecutive, but they must be causally linked to the accident, exposure or other incident that led to the harm. As an example, if a person suffers an injury and doesn’t work for two days, returns to work for two days, and is then absent for another six days from the same injuries, the period of absence is considered to have exceeded seven days.

A majority of stakeholders said there would be advantages in keeping the number of days to the same as that for an ACC claim for earnings-related compensation for work-related personal injury. It would provide:

- consistency for employers and others;
- administrative convenience (through a consistent diagnosis and documentation); and
- comparability of data (although, correlation between the two sets will not be complete).

Others saw little to be gained from any attempts to achieve consistency between the two sets of data.

A further point that was made was that any gains in the comparability of statistics should not impinge on the workability of the definition for the purposes of compliance with the HSE Act.

Some employers suggested using a longer period of incapacity. They said this would exclude cases where other factors than the harm itself — such as tiredness, adjustment issues, leave, or other influences — affected the amount of time an employee spent away from the work.

Departmental medical practitioners (appointed under the HSE Act) are concerned to identify the most significant cases for the practice of occupational medicine. For the purpose of this role, they suggested a 14-calendar-day threshold. They also advocated using a period of time which required an overlap with two shift periods (i.e. including at least one weekend or rostered day off). Their view was that for most workers, this would help to avoid the complications of other causative factors where there is incapacity through gradual process or disease.

The health and safety inspectorate are more concerned with trauma injury. They described the advantages of earlier reporting for effective intervention in the workplace, and emphasised the need to deal with harm before a situation became too severe. For the purpose of this role, the inspectorate suggested that the period of incapacity should not be any longer than five, or at most seven days.

As noted above, earlier legislation had required notification of any injury resulting in two days' or more absence from the workplace. Although it has not been the law since 1992, the requirement — although applying only to employees in specified workplaces, and deficient with respect to occupational illness — was widely understood by employers and referred to by some of the groups consulted.

QUESTION 8: Is seven days an appropriate period of incapacity, and if not, what is, and why?

How the effects of stress and fatigue are included in the definition

Legislative change suggests that the definition should include a reference to mental harm.

Section 2 of the HSE Act was amended to include harm caused by stress and fatigue, and we propose that the definition of serious harm is consistent with this. The draft therefore includes a reference to “mental harm”, as opposed to the current reference to “bodily function” only (see discussion above).

We consulted stakeholders on the best way to include mental harm — whether explicitly by inclusion in a list of occupational diseases, or implicitly through reference to hospital admission or treatment by the appropriate medical specialist. This is discussed below.

Clause 4 refers to “physical or mental harm”

The extension of coverage gives effect to the new recognition of stress and fatigue as causes of hazard and harm.

“Likely to cause” has been excluded from the explanation of permanent or temporary severe loss

A proposed amendment of the definition in 1997 included the phrase “likely to cause”, with respect to the specified period of incapacity.

At that time, its use received some negative comment on the basis that the definition should refer to the harm itself, not to the likelihood of its occurring.

It was also commented that, because the HSE Act is concerned with avoiding harm and not “risk”, the phrase was inconsistent with the Act. Instead, an employer or other person with duties is required to consider the likelihood of a particular hazard leading to harm in the course of taking “all practicable steps” to manage the hazard.

This is confirmed with respect to the new section 28A right to refuse unsafe work, which applies to work “likely to cause serious harm”.

The section 25(3) duty to notify and report occurrences of serious harm refers explicitly to the duty applying “after the occurrence” of an accident, not after the full effects or extent of injury become known. This means that after trauma accidents or other events where the extent of the harm is obvious, employers and others cannot wait for seven days, or whichever period applies, before reporting the occurrence of temporary severe loss or acute illness.

We concluded that to include a reference to the “likelihood” of harm into the definition would be logically inconsistent with this, and potentially confusing for those complying with the Act’s duties.

“Mental harm” is the phrase used in the amendment to section 2 of the Act. The draft refers to harm requiring “treatment by a medical practitioner who is a registered specialist operating within their scope of practice”, i.e. by a psychiatrist. For consistency, the term “medical practitioner” has been used to describe the specialist directing treatment in response to the diagnosis.

Any case requiring hospital admission would also be serious harm. As with other types of harm, there would need to be a clear causal link between an incident or conditions in the workplace and the diagnosed mental or nervous illness.

This would have the effect of bringing such cases to the attention of employers as pointers to “significant hazards” in the place of work, which they are in turn obligated to manage. Only cases with diagnosis by a medical specialist would come to the notice of the Department of Labour. Of those, the inspectorate would investigate only in appropriate circumstances.

This approach will complement employee participation requirements, by encouraging the discussion and resolution of stress and fatigue issues within the workplace. At the same time, questions surrounding privacy, or other complications from early involvement by the Department of Labour will be avoided.

Other options for including mental harm

Two other options were considered and rejected. The first involved the inclusion of specified types of psychiatric illness (e.g. using the DSM IV¹ diagnostic criteria) in a list of occupational illness or disease diagnoses.

¹ *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition. Published by the American Psychiatric Association, Washington DC 1994. This document is the pre-eminent diagnostic reference for mental health professionals in the US, and is widely used in New Zealand.

This option was not available after a decision was made not to use lists in the draft definition.

It would also be difficult from the point of view of legal drafting, where there are constitutional difficulties with incorporating other documents or standards into legislation.

(In practice, only a particular edition of such a document as DSM IV may be referred to in legislation. This can remove the flexibility that is sometimes seen as a reason for referring to an alternative authority.) Further, we felt that employers and others would find such an approach unduly complex and difficult to comply with.

The other option considered was the insertion of a separate clause: “Exhaustion or physical or psychological illness requiring more than seven calendar days’ absence from work on the advice of a medical practitioner”. This option was rejected as not requiring a sufficient degree of precision in diagnosis. We felt that many of the cases reportable under such a clause would arise from multiple causes, and involve combinations of work/life factors, with other influences on, and illnesses in, the patient. This could, in turn, lead to a wide range of responses from different medical practitioners.

QUESTION 9: Has “mental harm” been adequately caught by the draft definition?

Trauma injuries or events that suggest significant hazards, or danger to the injured person

Clause 2 will capture all cases of “amputation or surgical removal”

The explicit reference to any case of amputation has been maintained. This is because, although

clause 1 of the draft definition includes any case of permanent loss of bodily function, it would include most, but not all, cases of amputation.

The use of the term “or surgical removal” includes any case of the loss of an eye or subsequent surgical removal of any body part as a result of an injury. The term was chosen instead of “enucleation”, which had been suggested by the medical profession, but was felt would be unclear to a lay audience.

The district court case law concerning the meaning of “amputation” is unclear, and interpretations have ranged from including any case of the removal of the very tip of a finger, to a considerably higher threshold. There is scope to further qualify the phrase to avoid less serious cases of amputation.

The UK “RIDDOR” regulations, for example, exclude cases where a single digit or part of a digit is removed. However, this approach was not taken for the draft because it was suggested that such a high threshold would contradict the “permanent loss of bodily function” element of the draft’s first clause. Also, from an injury prevention perspective, an amputation will usually suggest a relatively straightforward hazard control, and it would be inappropriate for the definition to imply that a hazard that caused serious harm was not a “significant hazard” that required fixing.

“Surgical removal” includes the removal of, for example, a tumour or carcinoma arising from an occupational illness. This further strengthens the coverage of occupational illness.

As discussed below, the draft also extends coverage to some further types of trauma events not previously covered.

Clause 3 will include all cases of “loss of consciousness or acute illness”

This will capture a range of situations, such as decompression sickness, electrocution, carbon monoxide poisoning, acute poisoning or contact with toxic fumes, and falls from heights.

These are events where the person is in grave danger and, even though a threshold of “permanent” or “temporary severe loss” may not have been crossed, the employer or other person reporting should be on notice that they must deal with a significant hazard. The health and safety inspectorate should also be informed of the incident and decide whether or not to investigate.

The clause takes a different approach to the existing definition, which describes loss of consciousness from lack of oxygen, as distinct from loss of consciousness or acute illness from various forms of poisoning. In addition, it is important to note that all of the conditions or incidents involving poisoning or lack of oxygen that are currently covered, will remain so, as well as the new conditions discussed below.

The seriousness of the illness or injury is defined by the need for treatment

The terminology describing the level of medical treatment required under proposed clauses 3 and 4 has been updated for consistency with the Health Practitioners Competence Assurance Act 2003. (In connection with burns, clause 3 of the existing definition refers to “specialist registered medical practitioner or specialist outpatient clinic”, and clause 6 refers only to “hospitalised for a period of 48 hours or more commencing within 7 days of the harm’s occurrence”.)

In clause 3 of the draft definition, the term “acute illness” is qualified by “requiring treatment by a medical practitioner”. The phrase describes a doctor of medicine, either in general practice or practising in a specialist branch of medicine. The qualification sets a threshold for treatment of the “loss of consciousness or acute illness” at a level beyond that of requiring first-aid, and also beyond merely being examined by a doctor. To qualify as serious harm under this clause, a diagnosis followed by treatment would be required.

By contrast, in clause 4 the phrase “treatment by a medical practitioner” has, in turn, been qualified

by “who is a registered specialist operating within their scope of practice” to require diagnosis and/or treatment at a level of specialisation beyond that of general practice. However, the word “surgery” would, presumably, include that carried out by a general practitioner. See below for a description of clause 4.

“Contact with any energy source”

The existing definition excludes many cases of electric shock. Although it captures cases leading to burns requiring specialist medical treatment, there is no specific reference to electric shock. Because of the omission, only cases involving hospital admission, or defined types of temporary severe loss of bodily function are caught (e.g. neurological or dermatological symptoms, or loss of vision).

Serious cases of electric shock are reportable under the Electricity Act 1992, which defines various competency and safety requirements for the industry. However, recent amendments to the Electricity Act 1992 and the Gas Act 1992, including incident reporting regimes that complements that of the HSE Act, mean the definition will need to capture all serious cases of electric shock.

In terms of the energy supply industry, the proposed new clause requires reporting of any incident involving:

- loss of consciousness or acute illness requiring treatment by a medical practitioner; and
- explosions or incidents involving contact with machinery or energy supply.

“A fall or physical impact”

Because falls often highlight an ongoing hazard, the intention is to use a lower threshold than the “temporary severe loss” category of clause 1 provides. The draft would catch any case leading to unconsciousness or acute illness.

We considered extending coverage only to falls from a specified height, or only to those that occur on notifiable work. But this was not felt to be necessary because of the corresponding requirement that there be acute illness or a loss of consciousness requiring medical treatment.

“Physical impact” has been included to capture incidents arising from unsafe conditions, and possible cases of concussion or other injuries. It could include such agents of the harm as falling objects, projectiles from machinery or other sources, kicks by animals or assaults of a serious nature.

QUESTION 10: Should all cases of amputation or surgical removal of body part be included in the definition?

QUESTION 11: Is there sufficient coverage of dangerous incidents or events to highlight “significant hazards” in workplaces?

Clause 4 includes all cases involving hospital admission, surgery or specialist medical treatment

Clause 4 is intended to capture any cases of “physical or mental harm” requiring hospital admission, surgery or specialist medical treatment. This is in addition to the coverage provided by clause 1, which is concerned only with loss of “bodily function”. As discussed above, this extended coverage gives effect to the legislative recognition of stress and fatigue as types of hazard and harm.

We expect that, while the more obvious forms of occupational injury and disease will be caught by clauses 1-3, clause 4 will capture the less obvious forms of illness and disease with more involved processes of diagnosis and/or treatment. This would include, for example:

- long-latency diseases such as occupational cancers or respiratory disease, or
- diseases arising from prolonged exposure to hazards, such as solvent-induced illness, or

- symptoms arising from exposure to compounds such as aldehydes, or organochlorines.

For such cases to qualify as serious harm where there has not been a hospital admission or surgery, there would need to be a diagnosis by a specialist medical practitioner in the appropriate scope of practice.

The reference to surgery will capture not only more serious cases, but also minor surgery, such as the removal of metal shards, grease or other foreign bodies from a wound, or the eye.

The Concise Oxford Dictionary (eighth ed.) defines surgery as: “the branch of medicine concerned with treatment of injuries or disorders of the body by incision, manipulation or alteration of organs etc., with the hands or with instruments”. This means that, unless it is narrowed by the courts, the definition will include a wide range of cases.

Alternatively, to limit coverage, it may be appropriate to place a limit on the time between the incidence of the harm and any hospital admission, treatment by a medical specialist, or surgery that results. This could, for example, differentiate between “first-aid” type treatment of harm — where there may not have been permanent or temporary severe loss of bodily function — and, more pressing surgery to repair trauma injuries.

Against this must be weighed the possibility of confusion surrounding the treatment of occupational illness or disease with long latency periods.

QUESTION 12: In clause 4, is there a need to include a time limit between the occurrence of the injury itself and the treatment provided?

C: Issues related to the definition

Supporting materials or guidance to the definition

Because the chosen option for the draft is a brief document without lists, explanatory material will be needed to supplement the definition.

We expect that this will only need to be a brief explanatory text supplementing each of the clauses or phrases in the definition. Such material will, in turn, need to be structured in a manner that is consistent with the prescribed form described below.

QUESTION 13: What explanatory material should be made available for employers and others?

Prescribed forms and manner of notification

Section 25 of the Act requires employers, the self-employed and principals to contracts for services to maintain a register of accidents, incidents, and occurrences of serious harm.

Section 25(3)(a) requires notification, followed by written notice (s25(3)(b)), of serious harm incidents to “the Secretary”. For most workplaces this is the chief executive of the Department of Labour, but in the shipping and aviation sectors it is the chief executive of Maritime New Zealand and the Civil Aviation Authority respectively.

The register must contain information prescribed by regulation², and the manner of notification and reporting is also prescribed³. (A form is provided in the regulations, completion of which is deemed “sufficient compliance” with the Act.)

² Set out in Regulation 4, Health and Safety in Employment (Prescribed Matters) Regulations 2003.

³ Regulation 5

A new regulation is proposed to prescribe the contents of the register and the manner of notification/reporting.

The revised form will be consistent with the needs of:

- health and safety inspectors and others reviewing notifications and reports;
- the Department of Labour client information database;
- the NZ Injury Data Review (published October 2002);
- the Injury Information Manager (Department of Statistics) and the NZHIS; and
- the ILO code of practice (see below).

It will be consistent with the Government’s response to the NOHSAC *Report to the Minister of Labour on the Surveillance of Occupational Disease and Injury in New Zealand* (see appendix D).

Methods of notification

We expect notifications will continue to be predominantly by telephone or fax.

It is government policy that serious harm incidents can be reported or notified electronically, as well as by post or fax.

A number of private providers sell preprinted accident registers and serious harm reporting forms, or include versions of the form in “off the shelf” health and safety management software packages. This will no doubt continue.

Maritime New Zealand will also continue to be able to use a single form to collect information prescribed under the HSE Act, in addition to that required under maritime legislation.

Explanatory materials, along with the appropriate legislative references, will be included in the

forms or any internet-based reporting system maintained by the Department of Labour. Private providers of these materials will be informed of any changes as soon as practical.

Information currently collected

The current regulations require employers to record information in the accident register and provided to the Secretary of Labour in the written notice. A form is reproduced in the regulations as a facsimile with either space provided for the employer to complete details, such as their name and address, or to provide “tick the box” responses (such as for injury types). The following categories of data are collected:

1. Particulars of employer, self-employed person or principal (business name and address).
2. Relation of person reporting to person injured/ill.
3. Location of place of work (detailed).
4. Personal data of injured/ill person (including name, home address, date of birth, sex).
5. Occupation or job title of injured/ill person.
6. Whether injured/ill person is an employee/self-employed/contractor/other.
7. Period of employment of injured/ill person (when an employee).
8. Treatment of injury.
9. Time and date of accident/serious harm (including shift and time at work).
10. Mechanism of accident/serious harm.
11. Agency of accident/serious harm.
12. Body part.
13. Nature of injury or disease (incl. whether or not fatal).
14. Where and how the accident/harm happened.

15. Whether an investigation been carried out (and whether or not a significant hazard was involved).

16. Person completing.

Proposed changes to the accident register and serious harm reporting form

A database of occupational injury is maintained by the Injury Information Manager within the Department of Statistics. There is scope for consistency with serious harm records from the Department of Labour’s operational/client management system, which will be a source of data for the larger database.

It should ideally be consistent with the ILO code of practice for the recording and notification of occupational accidents and diseases. This is particularly the case as New Zealand moves towards ratification of ILO Convention 155⁴, which encourages the collection of comprehensive injury and illness data as an input to the setting of national policy — an important component of the convention.

Changes are proposed to the collection of the following categories of information.

Nature of injury or disease

The prescribed form requires the person filling it in to “tick the box” to describe the nature of the injury or disease. A revised list is proposed that is based on the ILO code of practice. It would comprise the following groups:

- 1: Injuries (from Annex F)
- 1.10 Fractures (N800-N829)
 - 1.20 Dislocations (N830-N839)
 - 1.25 Sprains and strains (N840-N848)
 - 1.30 Concussions and other internal injuries

⁴ Occupational Safety and Health Convention, 1981 (No. 155)

(N852-N855, N860-N869, N958)

1.40 Amputations and enucleations (N871, N866-N888, N896-N898)

1.41 Other wounds (N850, N870, N872-N879, N880-N885, N890-N895, N900- N908)

1.50 Superficial injuries (N910-N918)

1.55 Contusions and crushings (N851, N920-N929)

1.60 Burns (N940-N949)

1.70 Acute poisonings (N960-N979)

1.80 Effects of weather exposure, and related conditions (N980-N989)

1.81 Asphyxia (N990-N991)

1.82 Effects of electric currents (N992)

1.83 Effects of radiations (N993)

1.90 Multiple injuries of different nature

1.99 Other and unspecified injuries (N856, N994-N999)

2: Disease (or acute illness) resulting from exposure to agents

2.1 Chemical

2.2 Physical (incl. noise, OOS etc.)

2.3 Biological

3: Diseases by target organ systems

3.1 Respiratory

3.2 Skin

3.3 Musculoskeletal

4: Occupational cancer

Ethnicity

The Otago University Injury Prevention Unit suggested that information be collected on the ethnicity of the person suffering serious harm. This will assist the epidemiological evaluation of serious harm occurrences themselves, while allowing comparisons with other mortality and

morbidity data collected by the NZHIS and other agencies. It is also recommended by the NZ Injury Prevention Strategy (June 2003). Information will need to be collected as recommended by Statistics NZ.

Information about the employer/workplace

Section 3.2 of the ILO code describes the classification of information to be recorded at both the level of the enterprise and at the national level:

- (a) economic activity of the employer enterprise or establishment (ISIC)
- (b) occupation (ISCO)
- (c) employment status (ICSE)
- (d) nature and bodily location of the injury, type of accident, agency related to the injury or the accident (refers to annexes F, G, H and I of the code for classifications concerned).

The details of notification are further specified in chapter 6 of the code.

In summary:

- information relevant to category (a) above will be added to the prescribed form;
- category (b) is already provided for;
- category (c) information is collected on the person's length of employment and their employment status; and
- information under category (d) is discussed above.

A text description of the occurrence will continue to be required

As with the existing form, respondents will be required to provide a description of the occurrence of the harm. Consistent with the recommendations of the NZ Injury Data Review, more emphasis will be placed on a description of the activity at the time of injury occurring.

Interface with NODS and the Department of Labour's operational database

The Department of Labour maintains an operational/client management database for the labour and health and safety inspectorates. The database will be revised for consistency with the new definition and to allow the transfer of data to the Injury Information Manager. The information collected will be consistent with the reporting requirements of the Notifiable Occupational Disease System.

Use of a unique identifier

It is proposed that to allow integration of the data collected with the Department of Labour and other databases, that respondents are asked to provide their ACC number. Where clients have provided information previously, this could reduce the burden on respondents to provide other details.

This is consistent with the existing form's requiring the name and date of birth of the injured person

and with the NOHSAC *Report to the Minister of Labour on the Surveillance of Occupational Disease and Injury in New Zealand* (December 2005).

Size of the form to remain A4

The printed version of the written notice of serious harm should remain A4 size. This makes for ease of completing, processing and storing the documentation.

Appendix 3 contains a proposed Input Record Format for the prescribed manner of written notice of serious harm.

QUESTION 14: What information should be included in the prescribed manner of written notice for occurrences of serious harm? (Refer to the proposed fields in appendix 3.)

QUESTION 15: What information should be included in the prescribed form of accident register, and should it contain the same information as the manner of written notice?

D: Guiding documents

ILO code of practice for the recording and notification of occupational accidents and diseases 1996

With particular reference to chapters 2 and 3.

Chapter 2, Policy on recording, notification and investigation of occupational accidents, occupational diseases and dangerous occurrences, and related statistics

Chapter 3, Legal, institutional and administrative arrangements for setting up reporting, recording and notification systems

Includes a requirement that competent authorities prepare and maintain a list of occupational diseases, containing at least the diseases enumerated in the most recent version of schedule 1 to the Employment Injury Benefits Convention 1964 (No 121).

Also codification requirements of section 3.1.2.

Section 3.2 describes the classification of information to be recorded at both the level of the enterprise and at the national level:

- (e) economic activity of the employer enterprise or establishment (ISIC)
- (f) occupation (ISCO)
- (g) employment status (ICSE)
- (h) nature and bodily location of the injury, type of accident, agency related to the injury or the accident (refers to annexes F, G, H and I of the code for classifications concerned).

Chapter 6 describes in detail arrangements for notifying industrial injury and illness at both the level of the enterprise and the national level. Lists of notifiable information are given for each of:

- occupational accidents;
- occupational diseases; and
- dangerous occurrences.

Chapter 7 describes the extension of recording and notifications to self-employed persons.

The ILO considers the gathering of such information to be essential to the development of a national policy concerning occupational health and safety. New Zealand's meeting these requirements will contribute to its ratification of ILO convention 155, a key element of which is the development of a national policy.

The ILO code of practice also requires the maintenance of certain records on accidents at the level of the enterprise, and these will be relevant to the development of the regulations regarding the prescribed form of the accident register.

A copy of the code is available at: www.ilo.org/public/english/support/publ/pindex.htm

New Zealand Injury Prevention Strategy, June 2003

With particular reference to objectives 5 and 6.

Objective 5: Integrate injury prevention activity through collaboration and co-ordination

Action 7: Develop mechanisms to co-ordinate injury prevention research and evaluation activities.

Objective 6: Advance injury prevention knowledge and information

Action 2: Investigate the demographic (e.g. age and gender), geographic, and socio-economic characteristics of groups most at risk of injury, and the factors that contribute to injury, both underlying (e.g. social conditions) and more immediate (e.g. alcohol).

Action 3: Investigate the circumstances of specific injury events and near misses, and collate and analyse this information as a means of identifying opportunities for prevention.

Action 4: Improve injury surveillance systems through the co-ordination and enhancement of injury databases and the aggregation and

publication of timely and comprehensive injury statistics.

Action 5: Improve the availability and quality of ethnicity information in injury databases by ensuring consistency with standards for the collection, production and presentation of ethnic data recommended by Statistics New Zealand.

Action 9: Ensure that injury prevention research strategies focus on key injury issues, particularly those where effective interventions are not well established.

A copy of the strategy document is available at: www.nzips.govt.nz

Workplace Health and Safety Strategy for New Zealand to 2015

With particular reference to objectives 1a) and 1c).

Objective 1a): Set high government expectations for workplace health and safety in New Zealand and ensure that regulatory standards are achieved.

Action 4: Develop, review, align and evaluate standards and guidance (such as audits, inspections and investigations) within the legislative frameworks of the HSE Act and the HSNO Act, so they are clear, relevant and effective.

Objective 1(c): Improve co-ordination and alignment of government agency roles and activities.

Action 6: Develop more effective processes for sharing data and information between government agencies.

A copy of the strategy document is available at: www.whss.govt.nz

Surveillance of Occupational Disease and Injury in New Zealand: Report to the Minister of Labour

This review by the National Occupational Health and Safety Advisory Committee was published in December 2005, and followed the completion of two technical reports on existing surveillance practice in New Zealand and abroad.

The review proposes the staged development of an effective surveillance system for occupational disease. This would include changes to the way data from existing sources, including notifications of serious harm, are collected and coded. The review also recommended the use of a unique identifier for those suffering harm, to improve the integration of disease and injury data from administrative sources.

A copy of the report is available at: www.nohsac.govt.nz

NZ Injury Data Review

In support of the development of the injury prevention strategy, during 2000-01 the New Zealand Injury Data Review reviewed existing sources of injury data and proposed a conceptual framework for injury data and a model for information management. This has, in turn, informed the establishment of the Injury Information Manager within the Statistics New Zealand, and an injury database is in development.

The Injury Data Review also indicated that improvements could be made in the collection of:

- free text from providers of the written notice, particularly describing activity;
- the date of death, where relevant;
- ethnicity of the injured; and
- the severity of the injury.

A copy of the review is available at: www.dol.govt.nz/publication-view.asp?ID=119

E: Resource and compliance implications

The effects of the proposed changes to the definition are discussed here with reference to each of its four uses. (A compliance cost statement and a regulatory impact statement will be prepared in the course of developing any Order in Council.)

There will be new “significant hazards”

The new definition will not increase the hazard management requirements of employers and others under the Act — but it will make clearer the hazards that they are expected to manage as “significant”.

As discussed above, the new definition will also clarify the reporting requirements for a range of occurrences of harm not caught by the existing definition.

Employer groups have indicated that the increase in the number of potential “significant hazards” is not of particular concern, and that effective hazard management would already involve consideration of any such hazards. The comment was made that, when employers identify and manage hazards to meet the requirements of sections 7-10 of the Act, the step of considering whether or not a hazard is “significant” is not always made.

Instead, in practice, employers using formal hazard management processes tend to identify all hazards in a workplace and then rank them according to the need to eliminate, isolate or minimise as the Act requires.

More accidents will be reported

The extension of coverage will increase the number of accidents and occurrences of serious harm that are required to be reported to the Department of Labour, Civil Aviation Authority and Maritime New Zealand.

The extent of this will depend, among other things, on the time period chosen to define “temporary severe loss” of bodily function. However, as drafted, the new definition will include significant numbers of strains, sprains and other soft tissue injuries. This is in addition to cases of electric shock, loss of consciousness and other causes proposed for inclusion.

As discussed above, harm caused by stress and fatigue are caught by clause 4 of the draft. The option chosen for the draft relies on the existence of a diagnosis and treatment by a medical specialist. This would have the effect of bringing such cases to the attention of employers as pointers to “significant hazards” in the place of work, which they are, in turn, obligated to manage. Only pronounced cases would come to the notice of the Department of Labour.

This approach, while not encouraging early involvement by the health and safety inspectorate in stress and fatigue cases, will complement the Act’s employee participation requirements. It will encourage the discussion and resolution of stress and fatigue issues within the workplace, while avoiding potential breaches of privacy or unnecessary escalation of any given situation through early reporting or premature involvement by the health and safety inspectorate.

Reporting rates for serious harm injuries have always been low. For example, in the year ended 30 June 2006 a total of 5,925 cases of serious harm were notified to the Department of Labour. By comparison, new work-related compensation claims lodged with ACC in the same year numbered over 28,536 (approximately two-thirds of which were cases of soft tissue injury, many of which are not currently reportable under section 25). The figures are not directly comparable, but are indicative of a low level of reporting.

This is consistent with overseas jurisdictions, although, in part this can be attributed to the uncertainty surrounding the definition of “serious harm” under the New Zealand legislation.

The numbers of serious harm accidents and incidents reported to the Department of Labour for the last five years ended June were:

2002	5,731
2003	5,640
2004	6,572
2005	6,603
2006	5,925

For comparison, summary data on the occurrence of work-related injury and disease were published in *The Burden of Occupational Disease and Injury in New Zealand: Report from the National Occupational Health and Safety Advisory Committee to the Associate Minister of Labour*, Wellington 2004 (www.nohsac.govt.nz).

That report concluded, in summary, that each year in New Zealand:

- between 700 and 1000 workers die prematurely as a result of work-related disease;
- there are between 17 and 20,000 new cases of occupational disease (between 2,500 and 5,500 of which are severe);
- there are about 100 work-related fatal injuries; and
- there are over 200,000 occupational injuries resulting in ACC claims (an estimated 50% of which result in disability, and 6% in permanent disability).

There will be little impact on enforcement and penalties

Before the 2002 amendment, penalties under section 50, which is the basis for most prosecutions under the HSE Act, were stepped according to whether or not serious harm had occurred. The amendment removed this distinction, meaning that it is not a direct determinant of

penalty. However, the occurrence of serious harm remains a necessary element of the more serious, but rarely prosecuted, section 49 offences.

The revised definition also provides scope for the definition to be oriented more towards its use for the purposes of the Act's hazard management and reporting requirements, without the change impacting unduly on enforcement processes.

Consistent with this, the Act's new infringement notice regime requires infringement fees to be set after consideration of the extent of any harm that occurred as a result of the breach. The term "serious harm" is not used in the regime.

Employees will be better able to refuse unsafe work

Clarifying the definition will assist employees and their representatives to exercise the right to refuse work likely to cause serious harm (s28A).

Section 28A (8) describes any question about the application of the right to a particular situation as an employee relationship problem. Dispute resolution is conducted under the processes of the Employment Relations Act 2000. Any clarification will therefore allow and encourage the use of the right, and avoid unnecessary dispute after the fact in any particular case. This is particularly the case with stress and fatigue issues, and which are often more effectively resolved through mediation or, in some cases, by the Employment Relations Authority.

QUESTION 16: What are the resource and compliance implications of the new definition, and are these reasonable for your business or organisation?

QUESTION 17: Will the revised definition help employees to exercise the right to refuse work likely to cause serious harm?

Appendix 1: Definition of “serious harm” contained in the First Schedule of the Act

“Serious harm” means death, or harm of any of the kinds and descriptions listed below:

1. Any of the following conditions that amounts to or results in permanent loss of bodily function, or temporary severe loss of bodily function: respiratory disease, noise-induced hearing loss, neurological disease, cancer, dermatological disease, communicable disease, musculoskeletal disease, illness caused by exposure to infected material, decompression sickness, poisoning, vision impairment, chemical or hot-metal burn of eye, penetrating wound of eye, bone fracture, laceration, crushing.
2. Amputation of body part.
3. Burns requiring referral to a specialist medical practitioner or specialist outpatient clinic.
4. Loss of consciousness from lack of oxygen.
5. Loss of consciousness, or acute illness requiring treatment by a medical practitioner, from absorption, inhalation, or ingestion, of any substance.
6. Any harm that causes the person harmed to be hospitalised for a period of 48 hours or more commencing within 7 days of the harm’s occurrence.

Appendix 2: Stakeholder organisations initially consulted in 2002

EMA (Northern)

NZCTU

SiteSafe NZ

Massey University

Business New Zealand

Federated Farmers NZ

Electricity Engineers' Association NZ

NZ Police Association

Transpower

Department of Labour (Occupational Physician)

Finsec

NZEPMU

NZ Chemical Industry Council

BHP NZ Steel

ACC

Air New Zealand

Injury Prevention Research Unit (Otago University)

Appendix 3: Input record format for prescribed manner of written notice to Department of Labour of serious harm

Sub-category: Employer details

1. Business name
2. Business address 1
3. Business address 2
4. Business address 3
5. Postcode
6. Relationship to injured person
7. ACC number
8. Industry of person completing
9. Surname of person completing
10. Other names of person completing
11. Title of person completing
12. Contact phone number
13. Signature
14. Date of completion

Sub-category: Injured person details

1. Surname
2. Other names
3. Date of birth
4. Sex
5. Ethnicity
6. Home address 1
7. Home address 2
8. Home address 3
9. Postcode
10. Contact phone number
11. Occupation or job title of injured person (where applicable)
12. Employment status of injured person (where applicable)
13. Duration of employment of injured person (where applicable)

Sub-category: Cause/agency of harm details

1. Location of place of work (text description)
2. Time of accident /serious harm

3. Date of accident/serious harm
4. Shift
5. Time at work before harm occurred
6. Mechanism of accident/serious harm
7. Agency of harm
8. How the accident/harm happened (text description highlighting what the person was doing at the time of injury)
9. Has a formal investigation been carried out?
10. Was a significant hazard involved?

Sub-category: Injury/illness details

1. Fatal or other serious harm
2. Date of death (if applicable)
3. Body part
4. Nature of injury or disease
5. Level of treatment given

Field formats

The field formats are as follows:

- X - This represents any single alphabetic or numeric character. X followed by a number in brackets, (n), represents a string of 'n' characters. Note, 'n' will be the maximum length allowed for the field. Neither leading nor trailing spaces shall be present in the field.
- 9 - This represents any single numeric character. '9' followed by a number in brackets, (n), represents a string of digits. Note, 'n' will be the maximum number of digits allowed for the field.
- DDMMYYYY - This is an 8-digit date in DDMMYYYY format where DD is a 2-digit day number (including any leading zero), MM is a 2-digit month number (including any leading zero) and YYYY is a 4-digit year, eg 1st April 2007 would be shown as 01042007.
- HHMM - This is a four-digit time in HHMM format where HH is a 2-digit hour (including any leading zero) and MM is a 2-digit number of minutes (including any leading zero). The time shall follow the 24-hour clock convention, e.g. 4.05am would be 0405, and 4.05pm would be 1605.

APPENDICES

Sub-category: Employer details				
Field	Field Name	Format	Required	Editing rules
1	Business name	X(60)	Yes	
2	Business address 1	X(30)	Yes	
3	Business address 2	X(30)	Yes	
4	Business address 3	X(30)	Yes	
5	Postcode	9(4)	Yes	Valid values: NZ Post Postcodes www.nzpost.net.nz/nzpost/control/business/postcode_finder#post_code_finder
6	Relationship to injured person	X(1)	Yes	Valid values: E employer P principal S/E self-employed
7	ACC number	9(9)	See above	
8	Industry of person completing	X(30) 9(4)	Yes	NZSIC code (from text description)
9	Surname of person completing	X(30)	Yes	
10	Other names of person completing	X(60)	Yes	
11	Title of person completing	X(30)	No	
12	Contact phone number	9(9)	No	Phone no. (incl. area code)
13	Signature	X(1)	Yes	Valid fields Y yes N no
14	Date of completion	DDMMYYYY	Yes	
Sub-category: Injured person details				
Field	Field Name	Format	Required	Editing rules
1	Surname	X(30)	Yes	
2	Other names	X(60)	Yes	
3	Date of birth	DDMMYYYY	Yes	Important for interaction and verification of records with injury manager and NZHIS
4	Sex	X(1)	Yes	Valid values M - Male F - Female.
5	Ethnicity	9(2)	Yes	
6	Home address 1	X(30)	Yes	
7	Home address 2	X(30)	Yes	
8	Home address 3	X(30)	Yes	

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9	Postcode	9(4)	Yes	Valid values: NZ Post Postcodes: www.nzpost.net.nz/nzpost/control/business/postcode_finder#post_code_finder
10	Contact phone number	9(9)	No	Phone no. incl. area code
11	Occupation or job title of injured person (where applicable)	X(30)	Yes	Alternatively, could be coded as NZSC095, 5-digit identifier
12	Employment status of injured person (where applicable)	9(2)	Yes	Valid fields: To be derived from existing fields on form
13	Duration of employment of injured person (where applicable)	9(3)	Yes	Numerical codes attached to existing categories
Sub-category: Cause/agency of harm details				
Field	Field Name	Format	Required	Editing rules
1	Location of place of work (text description)	X(3000) into 9(3)	Yes	Could translate description into NDS-IS But translated code for statistical purposes May need clearer prescription of location description
2	Time of accident/serious harm	HHMM	No	Not necessary where it is a case of serious harm other than an injury related to a specific accident or event
3	Date of accident/serious harm	DDMMYYYY	Yes	Not necessary where it is a case of serious harm other than an injury related to a specific accident or event
4	Shift	X(1)	Yes	Valid values D day A afternoon N night
5	Period (hours) at work before harm occurred	9(2)	Yes	
6	Mechanism of accident/serious harm	9(2)	Yes	Department of Labour mechanism of injury codes The mechanism or action that caused the injury See below
7	Agency of harm	9(3)	Yes	Department of Labour agency codes The object or condition that caused the injury See below
8	How the accident/harm happened (text description)	X(3000) into 9(3)	Yes	Text description in the respondent's own but translated words, and which will inform the completion of the agency and mechanism fields by the Department of Labour staff member completing the data entry.

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9	Has a formal investigation been carried out?	X(1)	Yes	Valid values: Y yes N no
10	Was a significant hazard involved?	X(1)	Yes	Valid values: Y yes N no
Sub-category: Injury details				
Field	Field Name	Format	Required	Editing rules
1	Fatal	X(1)	Yes	Valid values: Y yes N no
2	Date of death (if applicable)	DDMMYYYY	If Y above	
3	Body part	9(2)	Yes	Valid values: Refer to ACC injury site codes
4	Nature of injury or disease	9(2)	Yes	Valid values: as described above
5	Level of treatment given	9(1)	Yes	Valid values: Tick boxes: Nil First-aid Doctor (not hospitalised) Medical specialist Hospital admission

Appendix 4: Draft regulatory impact and business compliance cost statements

<p>PROBLEM DEFINITION</p>	<p>The definition of “serious harm” contained in Schedule 1 of the Health and Safety in Employment Act 1992 (the HSE Act) is an important threshold for accident reporting, hazard management, and other duties under the Act.</p> <p>The current definition is inconsistent with the Act’s purpose in that it:</p> <ul style="list-style-type: none"> • does not include the types of harm caused by stress and fatigue and explicitly included in the Act’s coverage since the HSE Amendment Act 2002 • excludes some serious acute illnesses and injuries • is ambiguous and hard for businesses to interpret in key areas-particularly “temporary severe loss of bodily function” • is inconsistent with the needs of the Hazardous Substances and New Organisms Act 1996, Electricity Act 1992 and Gas Act 1992 which now refer to the HSE Act definition of serious harm • sets thresholds based on treatment that are out of step with current medical practice.
<p>OBJECTIVE STATEMENT</p>	<p>The public policy objective is to ensure that the policy intent of the HSE Act is implemented and administered in a manner that:</p> <ul style="list-style-type: none"> • eliminates unnecessary compliance costs and minimises necessary compliance costs for employers and others • provides maximum clarity and consistency • gives comprehensive coverage of workplaces and hazards • maintains the interests of employees and others affected by work activities. <p>The Government’s <i>Workplace Health and Safety Strategy for New Zealand to 2015</i> and accompanying <i>Action Plan</i> gives the Department of Labour responsibility for revising the definition of “serious harm” under the Health and Safety in Employment Act 1992. The Government has agreed to the public release of a discussion paper which includes a proposed revision of the definition of “serious harm” under the HSE Act 1992. After consultation an Order in Council may be passed to revise the definition.</p>
<p>FEASIBLE OPTIONS</p>	<p>There is agreement among stakeholder groups and agencies that the current definition creates a degree of uncertainty and inefficiency for workplaces covered by the HSE Act. There are three broad options for responding to the problem:</p>

	<p><i>a) Status quo</i></p> <p>The current definition contains gaps and ambiguities which make it harder for employers, principals to contracts, the self-employed and employees to meet their duties under the HSE Act. The points of failure are:</p> <ul style="list-style-type: none"> • types of harm cause by stress and fatigue are not covered • the description of “temporary severe loss of bodily function” is ambiguous and incomplete • certain acute illnesses and injuries are omitted, including some cases of unconsciousness, burns, injuries from falls, and electrocutions. <p>These have the effect of:</p> <ul style="list-style-type: none"> • creating uncertainty for those with duties to manage the workplace hazards concerned • reducing serious harm notification and investigation rates • leading to regular litigation on matters of interpretation which have not provided sufficient clarification • impeding the flow of information between workplaces and the inspectorate • undermining confidence in the completeness of coverage, and effectiveness of the legislation. <p>The existing definition is an important component of the HSE Act framework. While it currently allows the operation of the Act in most respects, it is deficient in the ways listed above and as such undermines the effective working of the legislation. This view has been confirmed by consultation with stakeholders.</p>
	<p><i>b) Provide more guidance on interpretation of the existing definition</i></p> <p>Guidance cannot exceed the law, and any interpretation can be challenged in court. This is only likely in circumstances where a person is being prosecuted, and before convicting the courts will always take a narrow interpretation and have reference only to the words of the statute.</p> <p>The department has previously published additional guidance – particularly on the interpretation of “temporary severe loss of bodily function” – but with limited effect. The standing of any additional guidance is therefore questionable and is unlikely to remove uncertainty for those using the definition to determine compliance.</p>
	<p><i>c) Revise the definition by passing an Order in Council that replaces the existing Schedule 1 {the preferred option}</i></p> <p>The Order-in-Council would address each of the points of failure with the latter, by:</p>

	<ul style="list-style-type: none"> • including, and defining, the types of harm caused by stress and fatigue • clarifying the description of “temporary severe loss of bodily function” • explicitly including the acute illnesses and injuries – including some cases of unconsciousness, burns, injuries from falls, and electrocutions – where there is currently uncertainty <p>It would also better align the definition with the requirements of the Hazardous Substances and New Organisms Act 1996, Electricity Act 1992, Gas Act 1992, and provide more consistency with the Injury Prevention, Rehabilitation, and Compensation Act 2001.</p>
NET BENEFITS	<p>The preferred option will provide the following benefits:</p> <ul style="list-style-type: none"> • Employers and others are clearer on their obligations and rights under the HSE Act and related legislation, and so hazards are better managed • Easier compliance with reporting and notification requirements for employers and others • Less uncertainty around the management of stress and fatigue, and the role of the health and safety inspectorate in “stress cases” in particular • Improved statistics on the nature and causes of workplace injuries and illness • The health and safety inspectorate will be better informed of workplace injuries and illness, meaning better surveillance, individual case/client management and more responsive inspection and enforcement. <p>Depending on the option chosen, the proposal will involve the following costs:</p> <ul style="list-style-type: none"> • Increased reporting from employers, the self-employed and principals, but the HSE Act already requires a record of all, i.e non-serious harm, accidents and occurrences of harm in the same format, so minimal time and costs will be involved • Some costs in redesign of hazard management and information systems by private providers • More processing of increased number of notifications by agencies (within existing baselines) • Some redesign of information products and administrative processes by agencies, which will be included in ongoing revision and maintenance. <p>The net benefits from the preferred option are:</p> <ol style="list-style-type: none"> a. Reduced compliance costs through clarity of standards and requirements across workplaces and industries b. Clarification of legislative requirements for the management and resolution of stress and fatigue in workplaces

	<ul style="list-style-type: none"> c. Potential to better align employer hazard management processes across different legislative regimes d. Improved employee equity through fully coverage of injuries and illness e. Consistent application of health and safety legislation improves economic efficiency.
<p>CONSULTATION</p>	<p>When developing the proposal and discussion document in 2002, there was initial consultation with the following key stakeholder groups, selected individual employers, and affected government agencies:</p> <p>EMA (Northern) NZCTU SiteSafe NZ Massey University Business New Zealand Federated Farmers NZ Electricity Engineers' Association NZ NZ Police Association Transpower Department of Labour (occupational physician) Finsec NZEPMU NZ Chemical Industry Council BHP NZ Steel ACC Air New Zealand Injury Prevention Research Unit (Otago University)</p> <p>This initial consultation has not been repeated because the discussion document is only intended as a basis for broader consultation, which can now occur.</p>
<p>BUSINESS COMPLIANCE COST STATEMENT</p>	<p>The proposed change will involve three potential compliance costs to business:</p> <p>a) Increased reporting by employers, self-employed and principals.</p> <p>These persons are already required to record all incidents in a prescribed form, which is the same as that required for reporting serious harm. Reporting may be carried out by mail, fax, or electronically. If the changes proposed in the discussion document are made, the current approx 6,000 reports annually will increase substantially, mainly through the better alignment with the ACC's definition of compensable accidents. Most of the increase will be soft tissue injuries (sprains and strains) not currently reportable. The number of trauma injuries reported is not expected to increase much.</p>

	<p>The Department of Labour expects the number of reports to double, which would still be less than a 50 percent reporting rate, but recognises that reporting rates for minor injuries will remain low. The Department does not expect to respond to most of the new reports, but to record the occurrences for monitoring accident/injury trends in particular workplaces.</p> <p>The incidence of serious harm occurrences is spread relatively evenly across NZ's 346,000 enterprises and 1.7 million employees, also the self-employed and principals. This means that if the reporting rate were to double, 1.7 percent of workplaces will be additionally affected in any given year.</p> <p>For individual workplaces affected by the serious harm injuries or illnesses concerned, the reporting requirement is likely to be of small concern compared with other issues they will be dealing with.</p> <p>b) Costs of retraining and changing procedures to meet the new requirements. These will be relatively minor for businesses, as the bulk of the knowledge required by businesses to comply is the same as currently. Where clarification is required, reference will need to be made to the new definition instead of the old. The Department of Labour will update published information, and provide advice to businesses through its call centre.</p> <p>c) Costs in amending hazard management and accident and incident recording and reporting systems by private providers or firms who maintain their own systems.</p> <p>Proprietary systems are usually packaged and sold as "regularly updated" to reflect ongoing changes in regulations, approved codes and standards. The changes required are minor and not expected to be a significant issue. The proportionate cost may be higher for some smaller businesses who maintain their own hazard management systems, but there will be corresponding benefits from the review process.</p>
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