

UPDATE:

Summary of the Transport and Industrial Relations Committee report on the Health and Safety in Employment Amendment Bill

- On 21 October 2002, the Transport and Industrial Relations Committee (the Select Committee) reported back on the Health and Safety in Employment Amendment Bill (the Bill). For an introduction copy of the Bill, go to www.osh.dol.govt.nz
- The Bill was introduced on 31 October 2001. It received its first reading in Parliament on 5 December 2001 and was referred to the Select Committee. The Select Committee began hearing public submissions on the Bill on 13 March 2002.
- The Select Committee considered 7456 submissions, including 6862 form submissions and 594 substantive submissions. 120 submitters presented their submissions in person and one submitter appeared before the Select Committee twice.
- Copies of the Select Committee's report with its recommended amendments to the Bill are available at <http://www.clerk.parliament.govt.nz/cgi-bin/select-reports> or can be purchased from Bennett's Government bookshops. For further information contact the Clerk of the Transport and Industrial Relations Committee: 04 471 9527.
- Below is a **summary of the key changes** recommended by the Select Committee as referenced from the Select Committee's report.

**Summary of the key changes to the Health and Safety in Employment
Amendment Bill as recommended by the Transport and Industrial Relations
Committee**

COVERAGE OF THE ACT

'Harm and Hazard'

- The Bill proposes that the definitions of 'harm' and 'hazard' be amended so it is explicit that: 'harm' includes physical or mental harm caused by work-related stress and 'hazard' includes a situation where for example, because of mental or physical fatigue, a person may be an actual or potential cause or source of harm.

Submitters concerns

- Employers may not know about stress and yet be held liable for the effects of it.
- The source of stress may be hard to determine e.g. it may be caused by a person's home life or other external factors.
- 'Fatigue' is only one type of temporary impairment that may affect behaviour so as to create a hazard.

Select Committee recommendations

- *An amendment to the definition of 'all practicable steps' to **confirm and clarify** that obligations only arise, in relation to any type of harm or hazard, where the person concerned 'knows or ought reasonably to know about' the issue in question.*
- *In relation to 'fatigue', an amendment to the definition of 'hazard' to include reference to other matters that may temporarily affect behaviour, including fatigue, drugs, alcohol and traumatic shock.*

Volunteers

- The Bill proposes coverage for volunteers where (a) a volunteer works for an employer or self-employed person and (b) the volunteer receives and expects to receive no reward for their work and (c) the volunteer's work produces gain or reward for the employer or self-employed person.
- The definition includes people required to be in a place of work for the purposes of receiving training or gaining work experience

Submitters concerns

- Concern about which employers would be covered and the extent of the duties that would be owed by those employers.
- Concern that the proposed coverage would result in 'uneven' coverage (i.e. only volunteers working for an employer would be covered).
- Concern that the proposed coverage could act as a barrier to the recruitment and/or employment of volunteers.

Select Committee recommendations

- *The obligations that apply in respect of volunteers should be limited to the Act's core obligations as set out in sections 6-12 (general duties of employers), section 19 (employee duties) and section 25 (reporting of serious harm). Obligations under the Act regarding supervision requirements, training and employee participation should not apply.*
- *An amendment to clarify that employers and self-employed persons have duties to volunteers only when the volunteers' work produces financial gain for the employer or self-employed person.*
- *An amendment to include a definition of 'financial gain', which excludes coverage of volunteers whose sole activity is collecting donations or the sale of raffle tickets.*
- *Persons in a place of work receiving 'on the job training' or gaining work experience should not be treated as volunteers. (The coverage of such persons is now dealt with separately in the Bill and discussed below).*

Definition of 'employee'

- *A number of submitters expressed concern about why there is a difference in the definitions of employee, in the Act and the in the Employment Relations Act (ERA). The select committee recommended that the definition in the HSE Act be made consistent with the definition in the ERA.*

Select Committee recommendations

- *An amendment that the definition of 'employee' in the HSE Act be made consistent with the base definition of 'employee' in the ERA.*

Persons in a place of work who are not employees and receiving on the job training or gaining work experience

- *In response to some submitters concerns raised in relation the volunteers provision, the Select Committee recommended that persons who are not employees and in a place of work receiving on the job training or gaining work experience, should be treated separately from volunteers.*

Select Committee recommendations

- *An amendment that a person who is not an employee and in a place of work for the purposes of receiving on the job training or gaining work experience must be treated as if he or she were an employee of the person who has agreed to provide the on the job training or work experience.*
- *Part 2A of the Act (the employee participation provisions) do not apply to persons in a place of work who are not employees and receiving on the job training or gaining work experience.*

Loaned Employees

- The Bill proposes that where an employer (person A), places an employee at the disposal of another employer (person B) to do work for person B, person B must be treated as another employer of the loaned employee. This clause applies when there is no contractual relationship between person A and person B regarding the work to be performed by the loaned employee.

Select Committee recommendations

- *The Select Committee considered that the obligations of the ‘loaning employer’ (person A) and the ‘borrowing employer’, (person B), in a loaned employee situation, needed to be made more explicit and recommended that:*
- *A loaned employee must be treated as if he or she were an employee of person B while he or she is working for person B and person B must be treated as his or her employer during this time.*
- *Person A has a duty to ensure that the loaned employee is capable of doing the work proposed safely and that person B is aware of person B’s duties under the Act (i.e. their duty to provide a safe workplace for the loaned employee).*

Application of the Act to ships and aircraft

- The Bill proposes that coverage under the HSE Act be provided to a persons employed or engaged under New Zealand law to work on board a ship and to persons employed or engaged under New Zealand law to work aboard an aircraft.

Submitters concerns

- Concern that in relation to ships, the proposed coverage was too broad in terms of New Zealand’s international obligations.
- Some submitters considered that the Maritime Safety Authority (MSA) should remain the enforcement agency responsible for the maritime industry.

Aircraft

- Concern that the crew aboard aircraft already have adequate health and safety protections.
- Some submitters considered that in relation to aircraft, the Civil Aviation Authority (CAA) should administer the Act for the aviation sector. Select Committee recommendations.

Select Committee recommendations

- *An amendment that the Act applies to persons employed or engaged under New Zealand law to work on board a New Zealand ship, or a foreign ship carrying coastal cargo on while the foreign ship is on demise charter to a New Zealand-based operator.*

- *To ensure continuity of occupational health and safety coverage by the MSA for crew aboard ships, a transitional provision for ships at sea to provide that the Director of the MSA is responsible for administering the Act for ships at sea until any designation regarding the maritime sector is made under the designated agency provisions of the HSE Act.*
- *In relation to crew aboard aircraft, the Select Committee made no specific recommendation in relation to the administration of coverage of the Act. It did however include a comment that it accepts that the CAA is the most appropriate agency to administer occupational safety and health for aircrew while aircraft is in operation.*

Personal protective clothing and equipment

- The Bill proposes a clarification to section 10(2)(b) of the Act, which sets out the steps that an employer must take if a significant hazard cannot be minimised. The amendment clarifies that the employer is required to actually provide protective clothing and equipment, and ensure that it is made accessible to, and used by, employees.

Submitters concerns

- Concern that this section of the Act is used by some employers to require their employees to provide their own protective clothing and equipment.
- Some submitters considered that the duty on employees to wear and use protective clothing and equipment that is supplied to them should be made more explicit.

Select Committee recommendations

- *The Select Committee recommended that while clarification to section 10(2)(b) is required, further clarification is also required in relation to the obligations of employers and the rights and duties of employees. Specifically:*
- *An amendment providing a statement that employees may provide their own protective clothing as a matter of comfort and convenience), but that the employer may not require this as a precondition of employment or by paying an allowance in lieu. (Note also, that on reasonable notice the employee may choose that the employer provide the clothing). If an employee chooses to provide his or her own clothing, the employer must be satisfied that the clothing is suitable.*
- *An amendment to section 19 of the Act which sets out the duties of employees, confirming that they must use protective clothing and equipment that is supplied to them.*

'Duties of Persons Selling or Supplying Plant for Use in a Place of Work' (Sale or Supply of Equipment)

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

Submitters concerns

- Concern that the clause as drafted would preclude sales of old or obsolete equipment e.g. 'as is, where is' sales.
- Concern that in a sale situation, the requirement to ensure that plant is arranged so that it is safe for its intended use, was too onerous.

Select Committee recommendations

- *The clause be replaced so as to ensure that it does not apply to 'as is' sales, whether in trade or otherwise; to treat hire and sale situations separately, and to ensure that the obligations on persons who agree to install or arrange plant, are set out clearly. Specifically:*
- *In a hire or loan situation, there is an obligation to ascertain the intended use of the plant, and, if the plant is to be used in a place of work, to take all practicable steps to ensure that it is safe for its intended use.*
- *In a sale situation, there is an obligation to take all practicable steps to ensure that the plant is safe for any known intended use, or, any use of that plant that the person could reasonable expect.*
- *In a situation where a person agrees to install or arrange plant to be used in a place of work, that person must install or arrange the plant so that is safe for its intended use.*
- *The section does not apply to the sale of plant, whether or not in trade, if the plant is second-hand and sold 'as is'.*

Reporting Obligations

- Some submitters noted that the requirements under the Act to notify the Occupational Safety and Health Service (OSH) of accidents and serious harm incidents, does not apply to principals or self-employed persons. This raises concerns about the under-reporting of these matters, particularly given the large number of self-employed persons in New Zealand. Other submitters noted that a lack of quality data on accident and serious harm incidents might limit the ability of OSH to fulfil its injury prevention obligations effectively.

Select Committee recommendations

- *An amendment to the recording and notification obligations section of the Act (section 25) to place such obligations on self-employed persons and principals.*

EMPLOYEE PARTICIPATION

- The Bill proposes to introduce a new duty on employers that requires them to give employees an opportunity to be involved in the development of workplace health and safety procedures.
- In developing a system of employee participation, it is for the parties to work together in good faith to agree on a system applicable to their needs and the needs of their workplace.

- If the parties cannot agree on a system, the Bill proposes default provisions allowing for elections of health and safety representatives.
- The Bill proposes that health and safety representatives be eligible for 2 days paid leave per year to attend a Ministerial-approved health and safety training course.
- One of the functions of trained health and safety representative will be to issue hazard notices.
- The Bill sets out the right to refuse work likely to cause serious harm.

Submitters concerns

- The apparent prescriptive nature of the provisions, confusion about extent of the obligations, the seeming lack of recognition of existing systems and the role and place of election provisions.
- Concern about the cost of complying with the new provisions, particularly the leave provisions.
- In relation to the right to refuse work likely to cause serious harm, some submitters had concerns about employees involved in inherently dangerous activities e.g. police and fire fighters, and that some employees may be open to hindsight actions.

Select Committee recommendations

Purpose statement

- *The intention behind the employee participation provisions should be clarified by a **purpose statement** to explain that employee participation in health and safety matters is to fully inform, not usurp, management decision-making. It is to ensure that the employer has the optimum level and mix of information, including that from employees, while maintaining accountability for decisions.*

General duty

- ***In certain circumstances, limiting the number of employees to whom the employee participation provisions apply** (those who work more than 180 hours in a calendar year).*
- *Providing guidance in the Act itself on the meaning of **'reasonable opportunities'***

Development of employee participation system

- *Clarifying that the requirement to 'develop' a system can be met by **putting forward an existing system for agreement**. This is to ensure that the clause is flexible and can accommodate current employee participation arrangements.*
- *To improve readability and clarity, retaining the core obligations of the employee participation provisions in the main body of the Act and placing the remaining detailed provisions in a **Schedule** to the Act.*

Health and safety representatives

- *In relation to electing health and safety representatives, including requirements that such persons **work sufficiently regularly** and for such duration as to enable them to carry out their functions effectively.*
- *Re paid leave days for health and safety training, an amendment to **cap the employer obligation** to allow leave in any one year by a formula similar to that in the employee relations' education leave provisions of the Employment Relations Act.*
- *Introducing a concept of **work-related groupings** when considering health and safety committee coverage.*
- *Limiting employee membership of health and safety committees to five but retaining the requirement that there be no more employer representatives than employee representatives.*

Right to refuse work likely to cause serious harm

- *An amendment introducing a clear process that once an employee forms an initial belief to stop work, he or she must then discuss the matter with his or her employer and may only continue with the refusal to stop work, based on reasonable grounds.*
- *'Reasonable grounds' includes being advised by a health and safety representative that the work that the employee is required to perform, is likely to cause the employee serious harm.*

Compliance Orders

- In considering the nature of the employee participation provisions, the Select Committee recommended that it be possible for an inspector or any other person to apply to the Employment Relations Authority for a compliance order, if one of the relevant parties is not complying with the employee participation provisions. This change will be achieved by amendments to the Bill and to the ERA.
- It will ensure that where the parties are not able to agree on an employment participation issue, that they have access to a mechanism to help achieve compliance.

ENFORCEMENT

Offences Likely to Cause Serious Harm and other Offences (Increase to fine levels)

- The Bill proposes that in relation to offences likely to cause serious harm, the maximum penalties be increased to \$500,000 and to a term of 2 years imprisonment, or both.
- In relation to all other offences under the Act, an increase in the maximum penalty to \$250,000.

Submitters concerns

- The possibility of ‘false claims’ and with the introduction of private prosecutions, increased claims, in order to receive an award of money by the Courts.
- The inability of employers, particularly small employers to pay higher fines.

Select Committee recommendations

- *An amendment making specific reference to the provisions of the Sentencing Act 2002 and to key sentencing criteria for offences under the Act, including the relevance of the financial circumstances of the offender.*
- *The Select Committee noted that the provisions of the recently passed Sentencing Act 2002, make it clear that the financial circumstances of the offender must be taken into account when the Court orders an offender to pay reparation or a fine. In addition, the Sentencing Act no longer allows proportions of fines to be directly paid to victims. A separate sentence of reparation can be made by the Court based on demonstrable loss or damage to the victim.*

Infringement Offences

- The Bill proposes that infringement notices will be introduced as an extra enforcement tool for inspectors. Fine levels for infringement notices are set out for individuals or bodies corporate depending on the nature of the offending. The proposed fines range from \$100-\$800 for an individual and from \$500 to \$4,000 to a body corporate.

Submitters concerns

- The perceived inflexibility of the proposed regime
- The importance of OSH applying the regime consistently.

Select Committee recommendations

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

The proposed commencement date of the Bill is amended to 5 May 2003.