

14 September, 2000

MINISTER OF LABOUR

REVIEW OF THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992: WORKING TIME / OCCUPATIONAL STRESS

Executive Summary

This paper discusses and evaluates options for dealing with 'occupational stress' and working time as issues under the Health and Safety in Employment Act 1992 (the HSE Act). In particular, it considers means of providing protection for employees against physical and psychological fatigue that is damaging to their health and safety outcomes.

'Occupational stress' is difficult to define; consequently it is not a term that can be usefully employed in legislation. While stress is part of life, it becomes problematic and therefore hazardous when it has perceptible effects on physical or psychological well being. Manifestations of hazardous occupational stress may be hard to identify, and therefore hard to manage, particularly as the causes of stress may be a mixture of the job and factors under both the employer and employee's control.

A primary outcome of hazardous occupational stress is cumulative fatigue, often as a consequence of unreasonably long and/or irregular working hours. By its very nature, cumulative fatigue is a progressive problem; there may be a long latency before its effects become apparent. Cumulative fatigue may lead to debilitating illnesses, such as depression or chronic fatigue syndrome, or be associated with other illnesses such as Occupational Overuse Syndrome. Diagnosis can be difficult and uncertain, and recovery only possible over a long time frame. Fatigue is also associated with increased accident rates. Hazardous occupational stress is, therefore, an important health and safety issue.

Average hours of work in New Zealand have been slowly increasing since the 1980s, against international trends which have been for declining hours of work. Incentives may exist for employers and employees to negotiate longer hours. For both employers and employees there may be short run gains and uncertain risks in the long run.

There are two possible means for addressing occupational stress in regulation. Minimum requirements could be established to ensure protection against occupational stress. Alternatively, individual enterprises could be encouraged to adopt good occupational stress management practices through the provision of codes or guidelines. It is recommended that a code of practice be developed, and that consideration be given to industry specific codes, if industries can be identified that would benefit from this.

Purpose of this paper

1. This paper discusses and evaluates options for dealing with ‘occupational stress’ and working time as issues under the HSE Act. In particular, it considers means of providing protection for employees against physical and psychological fatigue that is damaging to their health and safety.

Problem definition

2. ‘Occupational stress’ is difficult to define; consequently it is not a term that can be usefully employed in legislation. While stress is a normal part of life, it becomes hazardous when cumulative workplace pressures have perceptible effects on physical and mental health, accident and injury rates, and the incidence of human errors that may lead to these problems.
3. Hazardous occupational stress at this level has well-documented outcomes. Commonly reported are:
 - physical and mental exhaustion;
 - lack of concentration, memory loss and errors of judgement;
 - cardiovascular disease, asthma, migraines, and gastrointestinal disorders;
 - substance abuse, depression and burnout;
 - persistent absenteeism;
 - unethical and illegal behaviour - for example, falsifying attendance and sick-leave records, cutting corners, and covering up mistakes;
 - higher than normal rates of accidents and injury;¹ and,
 - lower productivity and increased business costs.
4. Manifestations of occupational stress may be hard to identify, and therefore hard to manage, particularly as the causes of stress may be a mixture of the job and factors under both the employer and employee’s control. Each possible cause places pressures on the individual that, if not successfully managed, may result in illness, injury, and psychological disorders or less quantifiable feelings of distress.
5. Not only is occupational stress hard to identify and manage, it also tends to be cumulative and therefore subject to latency periods and misdiagnosis. As a result, employers and employees may be encouraged to ignore the long term risks, as they are unknown and uncertain, while accepting the short run gains of higher productivity and income. There may also be other factors, such as imbalances of bargaining power, which contribute to situations where occupational stress occurs.
6. This potential for the parties to ‘get it wrong’ means that there is a role for government in ensuring the principles of the HSE Act are maintained (reasonable standards of health and safety at reasonable cost). The problem is determining

¹ During the preparation of this paper, numerous instances of industrial injuries and fatalities attributable to stress were referred to in research documents and cited by individuals.

whether that role should be more extensive than the present interventions of the HSE Act and OSH Inspectorate and the guidelines that presently are in place.²

7. The HSE Act provides for the systematic identification and control of workplace hazards. This systematic approach is broad and flexible enough to be used for managing occupational stress. There are, however, particular problems associated with occupational stress issues which are discussed below.

Further comment on problems resulting from occupational stress and international experience

Incidence and effects of 'occupational stress'

8. 'Stress' is one of the major health concerns of the last decade. Canadian studies suggest that 50-70 per cent of doctors' appointments are stress-related. Similar studies in the United States put the figure at 80 per cent. Stress is the most common problem attributed to overwork: the United Nations has labelled it as "the 20th century disease".
9. A world-wide Canadian poll found that 82 per cent of respondents reported regular work-related stress and over a third reported daily work-related stress. Two-thirds of Britain's workplace safety representatives rated 'stress' as among the top five workplace health and safety concerns.³
10. Despite the large bodies of literature on the topic, 'occupational stress' is ill-defined. In common usage it has become a catch-all for a variety of conditions, environmental and personal, physiological and psychological, trivial and profound. On the one hand it indicates a *cause* of personal illness and distress; on the other it describes the *condition* of being ill or distressed. There are no accepted diagnostic criteria for stress as a condition. Consequently, research into 'stress' cannot be relied upon, as its definition (if any) varies from study to study.
11. Research into the effects of working time (see below) suggest that the key causative factor in resultant illness, injury and distress is *cumulative* fatigue. It seems likely that hazardous occupational stress similarly results from an accumulation of stress and fatigue.

Depression and burnout

12. Depression is a more subtle manifestation of hazardous occupational stress and tends to follow extended periods of high performance pressures and low levels of personal autonomy. Some studies suggest that at least five per cent of employees suffer depression at any one time and that 20 per cent experience depression at some time in their working lives.

² There is a 1998 OSH publication, "Stress and Fatigue, Their Impact on Health and Safety in the Workplace". This publication and its role are discussed below.

³ Trades Union Congress.

13. Burnout, or occupational exhaustion, is characterised by low energy levels, and difficulties in communication and completing tasks. One 1999 Canadian study identified 35 per cent of employees with symptoms of burnout. Ironically, the greatest impact appears to be among loyal, well-motivated employees who are willing ‘to go the extra mile’. A British survey found 40 per cent of employees intending to leave their current employment as a result of stress-related problems.
14. In recent years there have been some high profile damages claims in New Zealand and the United Kingdom where hazardous occupational stress has been proved to be the cause of debilitating psychological and physical illnesses. The consequences of these illnesses have been to significantly reduce or to end the ability of the plaintiffs to earn an income, and so the sums awarded in damages have been very high.⁴

Causes of hazardous occupational stress

15. Hazardous occupational stress may be broadly categorised as:

- *intrinsic to the job*

For some hazardous occupations stress is, in effect, a condition of employment. The contributing factor might be repeated antagonistic confrontation (e.g. police, social services), or continual physical danger (e.g. petroleum extraction, flying helicopters), or sustained physical effort (e.g. fisheries, stevedoring).

- *conditional on the response of employers*

Those in control of the workplace may maintain conditions of employment that cause or contribute to hazardous occupational stress. Examples might be longer hours of work expected from salaried employees, arbitrary setting of increasing staff performance targets, or reductions in employment conditions as sick leave.⁵ A more subtle manifestation of this type of overload is cultural; in some sectors extreme working conditions (e.g. underground mining), high levels of physical or economic risk (e.g. share trading), or long hours of work (e.g. security services) are accepted as the norm. Whether these risks are ‘unreasonable’ will depend on the particular circumstances of the employment relationship. This last manifestation may also be consensual, as discussed below.

- *consensual by employees, with the acceptance of employers*

Employees may expose themselves to hazardous occupational stress for a variety of personal reasons, with the acceptance or agreement of their employer. These

⁴ For instance: *Walker v Northumberland County Council* [1995] 1 All ER 737 where a social worker recovered damages in negligence for having been required to leave a stressful job, and *Gilbert v Attorney-General* unreported, Colgan J, 21 June 2000, AC 49/00 involved claims for breach of contract and an award of approximately \$900,000. This case is under appeal. In *Brickell v Attorney-General* unreported, McGechan J, 9 June 2000, HC Wellington, CP 296/97 the plaintiff was awarded \$276,000. There are two further claims for brought by policemen for approximately \$150,000 and \$400,000 still being considered. One prominent NZ lawyer has described these NZ cases as the “tip of the iceberg”.

⁵ In a sample survey of collective employment contracts held by the Department of Labour, negotiated under the ECA: 12 industries showed a decrease in sick leave provisions; while five showed no change. The sample was from August 1998 to August 2000.

may be psychological (e.g. the ‘A-type’ personality), economic, social (e.g. loyalty to ‘the team’) or emotional (e.g. ‘fear of failure’). Tolerance to hazardous occupational stress varies markedly from individual to individual and makes quantitative analysis problematical.

Working Time

16. Average hours of work have been increasing in some industrialised countries, including New Zealand (by a small amount) and the United States of America. In countries where legislation limits hours of work, particular in the European Community (EC), the trend has been for reduced hours of work. Overall, hours of work have been declining. Excessive and irregular working hours have been identified in a number of studies as a major contributor to hazardous occupational stress.

Working time in New Zealand is becoming more diverse

17. Until 1991, standard weekly hours of work in New Zealand were set at 40 hours by the Labour Relations Act 1987 (LRA) (section 172) and its predecessor Acts. This could be varied by agreement through collective bargaining, and frequently was. The Employment Contracts Act 1991 (the ECA) repealed the LRA, leaving working time a matter for negotiation between employers and employees either collectively or individually. Average hours of work have been increasing since 1991, although as noted the aggregate increase has been small. There have, however, been greater increases in the numbers reporting very long hours of work (more than 50 per week).⁶ Where public safety issues arise (e.g. passengers in transport) mandatory limits to work hours were still provided under relevant industry-specific legislation.

This change in working time reflects the increased diversity of the labour market

18. New Zealand, like much of the world in recent decades, has seen a marked reduction in primary industry employment and a rapid growth in the service sector. There has been a parallel liberalisation of trading laws, with the effect of spreading service sector employment into evenings and weekends. Manufacturers have similarly extended their operations, as have transport operators to service these sectors. Consequently, there is likely to be little support for a simple restriction of working time based on the ‘ideal’ of a five-day 40-hour week – even amongst employees – for whom longer shifts or work outside of ‘normal’ hours may provide a desirable level of remuneration.

Outsourcing and Self-employment create problems for regulation

19. A number of individuals have become self-employed doing work previously done by employees: for example, telephone companies commonly engage small independent operators to carry out line work and domestic installations. The numbers of self-

⁶ Until the 1990s this figure remained at about 17 per cent of those employed, it has increased steadily to around 20 per cent. Some proportion of this will be because of an increase in multiple part-time job holding.

employed overall have been increasing since the early 1950s. From December 1986 to December 1999 the proportion of those in self-employment as compared to all other employment has increased from 9.7 per cent to 12.8 per cent.⁷ The self-employed would not be covered by any regulation designed for employees and employers. Regulations might, therefore, provide incentives for outsourcing.

Shift work can be hazardous because of the disruption to normal rest patterns

20. There is both anecdotal and statistical evidence to suggest that shift-work raises health and safety issues. This is less because of the time spent at work than the effect of reduced and irregular rest periods. Extensive international research, in both laboratory and working contexts, suggests that continual sleep deprivation results in a progressive loss of competence, through a combination of diminished attention, degraded motor control and impaired judgement. The problem may be exacerbated by failure of the affected worker to recognise the condition.

Rest and sleep to recuperate are essential for health, safety and productivity

21. Research reports by the Sleep/Wake Research Centre⁸ contributed to an Australian National Road Transport Commission Expert Group, and in relation to air traffic control operations, included the following findings.

- Worker fatigue is the result of a range of factors arising from both the work environment (workloads, work duration, remuneration, work predictability, etc) and personal circumstances (health, age, sleep, commuting, family and social circumstances, etc).
- To be alert and to function optimally individuals require adequate and regular sleep. The majority needs a minimum of six consecutive hours and an average of seven to eight hours nightly.
- The human metabolism is diurnal: that is, individuals are naturally awake and alert during daylight and lethargic and/or asleep during darkness. Night-time sleep is more restorative than an equal period of daytime sleep.⁹
- Loss of natural (nocturnal) sleep incurs a 'sleep deficit'. Sleep itself is restorative. A persistent sleep deficit has cumulative effects that require correspondingly greater periods of restorative sleep.
- A chronic sleep deficit may become overwhelming, leading to critically impaired performance and risk of serious harm ('falling asleep at the wheel').
- In some sectors, particularly those in which there is a high risk of serious harm or catastrophic failure, there may be merit in limiting actual working hours. For example, a Technical Study Group convened by the Civil Aviation Authority has recommended that, air traffic controllers work no more than ten hour shifts, for

⁷ Household Labour Force Survey.

⁸ Wellington School of Medicine, University of Otago.

⁹ It has been found, for example, that a mid-shift nap is beneficial for night workers, because it is taken at a 'natural' time.

not more than two successive night shifts, and no more than 200 hours per 30-day period. This is not required if there is an approved fatigue management programme.

*Economic incentives may lead employers and employees to underestimate the risks of hazardous occupational stress when determining their working hours*¹⁰

22. There are economic incentives for employers and employees to negotiate longer working hours.

Reducing fixed costs through greater utilisation of resources

23. Buildings, machinery and, in many enterprises, salaried employees represent a fixed cost to the employer. The larger the output over which such costs are distributed, the lower the per-unit fixed cost and the greater the potential unit profit. Where shift work and/or overtime payments are stipulated, unit cost savings may outweigh their costs.
24. Employing a relatively small workforce over long hours also tends to reduce fixed costs. For example, there are fewer individuals to recruit, train and support; and an ability to respond flexibly, by altering working hours, to changes in the market. Having fewer employees also reduces monitoring problems for employers.
25. Employees may seek longer working hours. For example, employees may seek rewards for working longer hours, including additional overtime pay or, as in the growing use of a four by ten hours shift system, an additional 'free day'¹¹ in the week. Also, employees are generally unaware of their rights, tend to be excessively optimistic and discounting of the future. In these circumstances, they may well inadequately protect themselves in the employment.¹²
26. In many circumstances, employers and employees will not allow these possible incentives to outweigh the longer-term costs of overwork. Employers would be likely to experience more accidents, absenteeism and turnover, while employees might leave a job that was proving too taxing, or experience illness or other consequences. Studies by British and New Zealand researchers indicate that long hours of work (i.e. in excess of 45 to 50 per week) result in progressively diminishing productivity and increasing risk of process errors and accidents, as a result of 'attention fatigue'. However, these countervailing incentives may be weak where there are cultures of long hours, highly competitive environments, and

¹⁰ Summarised from Canadian, UK and Australian Internet sources.

¹¹ The benefits of a 'free day' are disputed by researchers, some of whom aver that it becomes, in reality, a recovery day with no net benefit.

¹² See: Colmar Brunton "Survey of Labour Market Adjustment", for the Department of Labour, August 1997 showing very low awareness of employment rights amongst employees, particularly vulnerable groups. This finding has also been reflected in the Department's case study research: "The Effects of Employment Regulation in the Accommodation; Winemaking and Brewing Industries" 1999. For a discussion of research into the behaviour of employees in the US, see Cass R. Sunstein "Human Behaviour and the Law of Work", University of Chicago, Working Paper No. 100, 2nd Series, 2000.

particularly where there are readily available substitutes for employees who decline to work long hours.¹³

Corporate downsizing and increasing feelings of insecurity

27. 'Downsizing' has been a characteristic management strategy of recent years. Occupational Health and Safety Canada reported in March 1998 that 43 per cent of employers studied internationally had laid-off staff since 1993. While reducing the number of those employed, downsizing also tends to create feelings of job insecurity among those still in work. This undermines the power of employees to negotiate employment agreements limiting work hours.¹⁴

New technology has mixed impacts on occupational stress

28. New technology has not reduced the overall demand for labour; it has instead produced continual and rapid change as new techniques have been introduced. This has tended to intensify and accelerate the speed (and demands) of work, either because greater speeds of production become possible or because the variety of tasks individuals are expected to perform have increased. It may also, however, increase the variety and control that individual employees have.

Is there a particular problem in New Zealand?

29. Because occupational stress is hard to identify and may have multiple causes, reporting of the levels of occupational stress are likely to be low relative to their actual incidence. The information available on occupational stress in New Zealand is limited. New Zealand is, however, likely to have similar problems as occur elsewhere, particularly amongst the Anglo-Saxon industrialised nations. Commonly health related issues receive less attention from employers than safety issues;¹⁵ the consequences of doing so have increasingly led employees to seek damages in Court in New Zealand. Individuals bringing Court action is a patchwork and palliative response to the problem. In these circumstances, consideration should be given to the Government taking a more proactive approach to the hazard of occupational stress.

¹³ Some employers in the UK, particularly those sectors where contract labour is the norm, have been accused of 'mining the workforce': that is, workers are employed until they cease to be productive, at which point they are effectively discharged (through non-renewal of contract) and replaced.

¹⁴ See, for instance the reported responses of full-time staff to increased casualisation in the accommodation industry: "The Effects of Employment Regulation: Case Study Research in the Accommodation, Winemaking and Brewing Industries", LMPG Occasional Paper, 4/99.

¹⁵ Compliance Costs case study research undertaken by the Department of Labour and Ministry of Economic Development, forthcoming.

Regulating hours of work

The diversity of the labour market militates against direct regulation

30. The need for flexibility in working arrangements means that limiting work hours by regulations similar to those required by the European Community (EC) *Working Time Directive* would not be well received, either by employers or by many employees. The number of authorised exceptions to the British *Working Time Regulations* tends to support this: it is apparent that some sectors (transport, security, emergency services) would have been unable to function effectively under a blanket restriction. The HSE Act provides for systematic practice, taking into account the diversity of employment relationships. This basic framework is well suited to dealing with the complexities of working time and hazardous occupational stress.

Any regulatory response should concentrate on promoting adequate recovery time

31. Clinical, statistical and anecdotal evidence suggest, however, that liberalising working hours may lead to circumstances in which dangerous levels of fatigue are accumulated by workers. New Zealand has gone through such a period of deregulation. The key to resolution of this issue, up to the point where working time is patently excessive,¹⁶ is *recovery time*: that is, time to sleep, carry out the normal maintenance tasks of daily living, interact socially, engage in recreational pursuits, etc. This would suggest that any solution to the working hours problem should focus on fatigue management and recovery time, rather than on any blanket limitation of working time.

Australian recommendations on rest periods

32. Draft recommendations of an expert working group convened by the National Road Transport Commission of Australia suggest that the following rest periods¹⁷ are advisable if drivers on shift work are to maintain acceptable levels of health, well-being, productivity and safety. They seem applicable to a range of occupations.

- Between day shifts, there should be a minimum of six hours for sleep and sufficient additional time for travel, meals, and family/social contact.
- Between night shifts, there should be a minimum of eight hours for sleep (and sufficient additional time, etc).
- During each working week, there should be a minimum of two consecutive 'sleep' nights.
- There is a case for limiting the timing and duration of working hours where fatigue may lead to serious harm or catastrophic failure.

¹⁶ A prevalent theme in the relevant literature is that health risks and process errors (attention deficit) become significant after 45 to 50 working hours a week.

¹⁷ 'Averaging' of rest periods should be done over no more than two weeks.

33. In recommendations concerning New Zealand air traffic controllers' working time the following additional condition was put forward.
- During night shifts of more than eight hours, there should be at least one opportunity for a short period of natural sleep.
34. By these standards, the EC *Directive* would be over-prescriptive in terms of total working time (48 hours) and inadequate in its specification of minimum rest periods (a weekly rest period of 24 hours).

Approaches to promoting adequate recovery periods and management of hazardous occupational stress

35. In respect of cumulative fatigue, the Sleep/Wake Research Centre (SWRC) considers that prescriptive regulation will not of itself be effective in promoting such awareness. Prescription would merely provide a universal minimum standard offering some general protection, without guaranteeing the safety and well-being of workers in high risk sectors. The SWRC considers that a hazard management approach is required.
36. The characteristics of an effective hazard management system in occupational stress cases include:
- management and workforce education on the causes and consequences of hazardous occupational stress in the workplace;
 - non-punitive management-workforce dialogue;
 - resolution of issues specific to the workplace;
 - management-workforce participation in, for example, in the design of shifts and rosters;
 - recognition that factors external to the workplace affect the incidence of hazardous occupational stress (for example, commuting,¹⁸ age, health, and family and social circumstances);
 - recognition that productivity gains are possible through intelligent balancing of work and recovery requirements;
 - regular monitoring, analysis and review of workforce hazardous stress; and
 - regular medical examination of workers in hazardous stress situations.
37. Employers have little direct control over workers' behaviour outside the workplace, and are consequently unable to manage employees' personal habits, circumstances or choices that may potentiate hazardous physical or mental stress, for example: competitive sport; nursing a sick child; or a second job. It follows that some responsibility rests on the workforce to manage hazardous stress, and that it is for both employers and employees to communicate about and manage the risks.

¹⁸ An Australian study estimated that 26% of traffic fatalities were among commuters some of which could be considered work-related deaths.

38. These management approaches fit well with the present principles of the HSE Act and the proposed changes to the Act, for instance for increased employee participation. They also sit well with the broader changes to the industrial relations environment (the Employment Relations Act 2000) and to accident compensation.

Options for government action to address hazardous occupational stress

39. Hazardous occupational stress could be a focus of information, compliance and enforcement activity under the HSE Act. Problems of definition, and of assigning cause, exist. Enforcement action by the Inspectorate is, therefore, likely in extreme cases only.

40. Should the Government choose to intervene directly in hazardous occupational stress and working time issues, the most effective focus may be responses directed at 'recovery time'. Interventions could include:

- a) legislation or regulations made under the HSE Act;
- b) a general code of practice made under the HSE Act; or
- c) published guidelines.

Option A: General Legislation or Regulation is expensive, inflexible and may have unintended consequences

41. Mandating recovery periods by legislation or in regulation (e.g. by instituting two full nights' compulsory break per week) would be binding on both employers and employees. Mandating stress management programmes would be more difficult, as they are still at an early stage of research and development, and the underlying concepts are not widely understood or accepted. Enacting legislation and making regulations suffer from a lack of flexibility and an inability to encompass diverse and complex employment relationships. Given the diversity of labour market operations, reflected in the non-prescriptive nature of the HSE Act, prescriptive regulation risks imposing arrangements that increase pressure on organisations.

42. This option is not recommended, although there may be some merit in limiting work hours for specific high-risk industries as, for example, piloting aircraft or transporting dangerous chemicals, where the risk of catastrophic failure is substantial. There are already regulations in some of these industries. Further regulations might be merited, but these should be adopted cautiously, only where there is good information on the specific problem and the best means for addressing it.

Option B: General Code of Practice

43. Codes of Practice have a number of advantages in this context, as they:

- can be industry or occupation specific;
- are developed using consultative processes which can themselves inform and engage the participants in the process in new ways;
- are able to contain information, guidelines and standards;

- provide a basis for good-faith bargaining;
 - require only Ministerial approval;
 - may be cited in legal argument, and have status in court;
 - are less costly to produce than legislation or regulations; and
 - can be relatively easily altered to accommodate changes in principles or circumstances.
44. A working time code could be made under section 20 of the HSE Act. The development process for a code would produce more information than is presently available on the problem of hazardous occupational stress in New Zealand. The consultation process that is required and the final status of a code having a greater impact in courts would yield greater interest in the outcome. There would be greater awareness of the issues amongst employer and employee organisations as a result of the consultation and promulgation process. The development of a code would also expose situations where there are likely to be heightened risks, either because of the competitiveness or culture of an industry, or because of a lack of bargaining power for employees. If there are particularly vulnerable groups or industries where a code is unlikely to provide sufficient incentive to provide healthy and safe working time arrangements, regulations could subsequently be developed.
45. The principal advantage of a code over other documents that Government could produce is the status that they have in Court proceedings under the HSE Act.¹⁹

There is a booklet on Occupational Stress already published by the Department

46. The Department has published a booklet covering “Occupational Stress” (January 1998). This booklet was developed as a scientifically based document following consultation with all the leading academics in this field in New Zealand and others overseas. Principles were developed from this base document so that employers could recognise and manage impaired employees. This booklet is not a code of practice or termed a ‘guideline’ by OSH.
47. This document has not been challenged since its publication and has been used as the basis for deliberations in all discussions concerning “occupational stress” including those Court cases dealing with the issue to date (e.g. *Gilbert*). This document gave a commitment to be updated within 18 to 24 months. This review has not yet occurred.

The booklet could be the starting point for a code

48. The booklet and reviewing it could form the basis of an Approved Code of Practice. There is a risk, however, that the negotiation process that the development of a code involves may lead to an inappropriate dilution of the scientific basis of the

¹⁹ Subsection 20(9) of the HSE Act provides that: “A Court may, in determining whether or not a person charged with failing to comply with any provision of this Act has complied with the provision, have regard to any approved code of practice...”. The code may therefore assist the Court in its consideration of whether there has been a breach, without the code being determinative of that there has been.

guidelines. There had been concern from some employers prior to the adoption of the guidelines, and which might arise more strongly were a code to be proposed, given the legal status of codes.

49. Development of a general code would therefore need to be undertaken with the best possible scientific information available, and with clear expectations that good scientific principles will not be sacrificed for the sake of a compromise outcome.
50. It should be noted that New Zealand's ratification of the UN Convention on the Rights of the Child (UNCROC) may require specific regulatory action on working time for young workers. However, other issues will also be relevant, for instance children's vulnerability to exploitation or their educational needs.
51. A general code is the recommended first development option. There would also be scope for later consideration of industry specific regulations, codes or guidelines, if industries could benefit from specific provisions and they do not already exist.

Option C: Industry guidelines might also fulfil a role

52. Industry guidelines have the advantage of flexibility and specificity, and may represent a consensus between employers and the workforce. They are not given legal status by the HSE Act and therefore carry less weight than codes, and there is the potential for considerable variation between sectors. In industries where long work hours, inadequate rest periods, extreme working conditions, heavy physical labour and/or high staff turnover (for example, forestry) are common practice, guidelines may be an insufficient motivator of good health and safety practice.
53. This option is not recommended as the initial, general strategy, principally because guidelines do not carry as much legal weight as a code, and are therefore less likely to focus employers' attention on the need to manage for hazardous occupational stress. Individual sectors may wish to develop guidelines based on the general code.

Financial Implications of the Preferred Option

54. Developing an Approved Code of Practice would involve some cost, requiring the involvement of officials, employers, the work force and experts in overload management. Further costs would be incurred in printing, distributing and publicising the code, although these might be offset to some extent by a charge for publications. The total is usually in the range \$50,000 to \$75,000. Once the code was in place, costs to Government would be minimal.
55. The costs to unions, employers and others involved in the development of a code will be relatively small. Compliance with a code is not required, however, it sets a minimum standard. If an employer (and employees) wished to depart from the code they need to demonstrate that the alternative they have chosen is superior or equal to the standard of the code. This expenditure would reduce any risk from possible prosecutions. The extent of any such costs would depend on the degree of prescriptiveness contained in a code.
56. Alternatively, where additional costs are incurred in hiring replacements for workers whose production hours were reduced in conformity with a code or guidelines, these

might be off-set by productivity or other gains. Overseas experience suggests that increased productivity, reduced sick leave, and improved injury prevention outcomes might offset these additional costs. It may, however, prove difficult to convince employers of the reality of such gains.

57. Some workers, whose incomes were dependent on working long or unsocial hours, or in extreme conditions, might suffer a reduction in income. Potential gains in health and well being might not prove to be a sufficient incentive to encourage compliance with the code. Any compensation for lost earnings would normally fall on employers, and would have to be negotiated.

Legislative Implications for the Preferred Option

58. There are no legislative implications.

Consultation

59. The following organisations were consulted during the preparation of this paper.

- *The New Zealand Employers' Federation* - The NZEF view is that current negotiating arrangements between employers and employees are adequate to ensure that reasonable working times are incorporated into employment agreements.
- *The New Zealand Engineering, Printing and Manufacturing Union* - The NZEPMU view is that working time is a significant health and safety issue, particularly in relation to the provision of adequate rest and sleep time.
- *The New Zealand Council of Trades Unions* - The NZCTU has similar views to the NZEPMU.
- *The Sleep/Wake Research Centre, Wellington School of Medicine* - The Centre provided researched information on the effects of long working hours, shift work and night work.

Ministry of Women's Affairs comment

60. The Ministry of Women's Affairs considers that the question of 'working time' raises broader issues than the health and safety issues that are considered in this paper. A significant reason for the gender earnings gap, for example, is the difference in the number of hours of paid employment that are undertaken by women and men. This contributes to women's lower level of lifetime earnings. Expectations around working hours may also negatively impact on women's career progression. The 'long hours culture' in some sectors has been identified as a clear impediment to women's career progression in the United Kingdom and Ireland, for example. These broader equity issues need to be taken into account when Ministers consider what form of government intervention is appropriate with respect to working time.
61. The Ministry of Women's Affairs therefore recommends that the issue of working time, including these broader equity issues, is considered in the context of the review of the minimum code of employment rights and that a final decision on the

appropriate form of government intervention is deferred until this work has been done.

Recommendation

I recommend that you:

- a) **direct** officials of the Department of Labour to further research the extent of the problem of hazardous occupational stress with a view to developing a code of practice under section 20 of the Health and Safety in Employment Act 1992 to address hazardous occupational stress, in accordance with the principles outlined in this paper.

- b) **note** that a general code is the recommended first development option. There would also be scope for later consideration of industry specific regulations, codes or guidelines, if industries could benefit from specific provisions and they do not already exist.

RJM Hill

For Secretary of Labour