

Changes to the Health & Safety in Employment Act 1992

(The introduction of the Health & Safety in Employment Amendment Act 2002)

Introduction

This paper is to act as an information sheet to provide you with an understanding of the changes made to the Health and Safety in Employment Act 1992 by the Health and Safety in Employment Amendment Act 2002 (HSEAA 2002) that was recently passed by Parliament. The HSEAA 2002 is due to become law on 5 May 2003.

This paper covers some background, the changes and broadly how they may impact the New Zealand Fire Service.

Background

The Health and Safety in Employment Act 1992 already requires that parties to employment relationships and contractors must take all practicable steps to ensure that no 'hazard' harms people present at their site. Specifically, the Act requires those it covers to identify hazards (things capable of causing harm) and to take all practicable steps to eliminate them. If this is not possible, all practicable steps must be taken to isolate them. If it is not possible to isolate the hazards, all practicable steps must be taken to minimise them.

The Government has a strategy that is intended to improve workplace culture. This includes:

- introduction of the Employment Relations Act 2000;
- ongoing ACC reform;
- amendments to the Health and Safety in Employment Act 1992.

The changes to the Health and Safety in Employment Act are designed to ensure that obligations in the Act apply to all New Zealand's workplaces and to enable employers, employees, volunteers and Government to collaborate in improving workplace health and safety.

The main changes the Act has made are as follows with a brief clarification following:

- Increases in the scope of the HSE Act
 - Change in definition of 'all practicable steps'
 - Extends the definition of 'harm' and 'hazard' to cover 'mental harm'
 - Allows employees to refuse to do work likely to cause serious harm
 - Requires employee participation
 - Removes the Crown monopoly on prosecutions
 - Increases the maximum fines
 - Introduces 'Infringement Offence Notices'
 - Makes it unlawful to insure against fines
 - Extends the limitation period
- **Increases the scope of the HSE Act** to cover volunteers, crew aboard ships and aircraft, rail workers and mobile workers. It is also extended to cover those supplying equipment for a place of work and hiring out facilities.

The possible effects to the NZFS of the change:

- *Certain sections of the Principal Act 1992 now apply to volunteers. Volunteers now have a formal legal obligation to take all practicable steps to ensure their own safety and that of their fellow workers under section 19. The NZFS also has a corresponding duty to its volunteers. The NZFS is of the view that both parties are already largely fulfilling these*

obligations. However, the Act also requires the NZFS to treat volunteers as employees for the purpose of sections 6-12 of the Act (Hazard identification and control) and Part IV General Provisions including (recording and notification of accidents and serious harm). Work on these latter requirements is underway.

- The definition of 'place of work' is extended to also apply to mobile workers such as those involved in air and road transport. Again, the NZFS is of the view that this does not represent any significant change as we already take all practicable steps to ensure that no harm comes to say, appliance crews. However, thought may have to be given to other NZFS workers that could be considered 'mobile workers'.
- Providers of equipment are now accountable for hazardous equipment provided for work purposes. This includes both hiring and lending. So any hiring or lending of NZFS equipment should be restricted to situations where it is absolutely necessary to provide it. Even then, all practicable steps must be taken to ensure the equipment is safe.
- There is also a duty to take all practicable steps to ensure the safety of fee paying recreational users of work places. So if we say, rent out our training facilities for other organisations to use, we will have this obligation and liability for any breach of the obligation.
- The Act (except for Part 2A regarding employee participation) now applies to those on work experience. The person on work experience must be treated as if they were an employee. As the NZFS already takes all practicable steps to ensure the safety of its workers, this extension of coverage should make little difference.
- Those on secondment from another employer are to be treated as if they are employees of the entity to which they are seconded unless a contract provides otherwise. However, the usual employer must ensure that the seconded employee is capable of performing the work safely and is aware of their duties under the Act.
- **Change in the definition of "All practicable steps"** The new definition sets a lower standard – a person is required by the Act to take all practicable steps only in respect of circumstances that the person knows or ought reasonably to know about.
- **Extends the definition of 'harm' and 'hazard' to cover 'mental harm'** and a hazard arising through physical or mental fatigue.

The possible effects to the NZFS of the change:

- Stress is now deemed to be a possible workplace hazard. However, many commentators have noted that this is simply a clarification of existing obligations under the 1992 Act and other legal obligations.
- It should be noted that existing case law on stress-related harm requires that:
 - the stress was avoidable; and
 - the employer knew or ought to have known about the stress; but
 - by its actions or omissions failed to take reasonable care for the safety of the employee; and
 - this failure materially contributed to the harm suffered.
- Many NZFS workers appear to pride themselves on their ability to cope with stressful situations without formal support. Informal debriefs amongst firefighters is currently the most common means of dealing with the effects of stressful situations. The NZFS also has a 'Critical Incident Stress Management' programme.
- However, the clarification that workers and employers must take all practicable steps to ensure that their employees do not suffer mental as well as physical harm may require a slight culture shift within the NZFS. In particular, some thought may have to be given to the ability for volunteer firefighters to effectively debrief given that they usually have to return to work immediately after attending stressful incidents.

- *Also, there may need to be an expansion of pre-employment screening to identify individuals with a greater likelihood of being adversely affected by stressful situations.*
- *Occupational Safety and Health (OSH) are preparing a best practice document for the management of stress and fatigue in the workplace. This may assist the NZFS in addressing this change to the Act.*
- *The definition of Hazard has also specifically mentioned along with the stress and fatigue other hazards such as drugs, alcohol, traumatic shock or another temporary condition that affects a persons behaviour.*
- *All Regions will need to re-evaluate their hazard management systems and hazard registers.*
- **Allows employees to refuse to do work** if the employee believes that the work is likely to cause serious harm. An employee may not refuse to do work that inherently or usually carries a risk of serious harm unless the risk has materially increased beyond the understood risk.

The possible effects to the NZFS of the change:

- *On the face of it, this change may appear to be significant for the NZFS and the phrase “has materially increased beyond the understood risk” is confusing. However, it appears that the concept may be very similar to one of the principles of the ‘safe person’ concept recently developed by the NZFS. This provides that refusals to perform unsafe work can only occur when the benefits of taking the risk appear to be outweighed by the extent of the risk.*
- **Requires employee participation** in the ongoing management of health and safety in the workplace. The amendments to the Act require every employer to provide “reasonable opportunities” for its employees to participate in the ongoing management of health and safety. This involves either establishing health and safety committees or having employee representatives. The amendments provide for an entitlement of paid leave for employees to attend health and safety training. This leave is governed by the same notice rules as apply to Employment Relations Education Leave under the Employment Relations Act 2000.

Where the committee or representative makes a recommendation regarding health and safety, the employer must either adopt the proposal or provide a written statement to the committee (or representative) setting out the reasons for not adopting the proposal. The employer and health and safety representatives and committees must deal with each other in good faith.

The possible effects to the NZFS of the change:

- *Across the NZFS, there is an entitlement to a total of 130 days paid leave for health and safety training for representatives (based on the calculation matrix in section 19F of the amendments).*
- *Employee health and safety representation already occurs in the NZFS. There are union delegates, health and safety representatives and/or functional groups/committees. The latter is a key requirement under the ACC Partnership Program Audit requirements. Some fine-tuning may be required along with some guideline on roles, responsibilities and key outcomes for both the employer and employee.*
- **Removes the Crown monopoly on prosecutions** so that a private prosecution would be possible. This would only take place if OSH has decided **not** to take prosecution action itself. The amendments also allow trained health and safety representatives to issue ‘hazard notices’. If such a hazard notice has been issued, the representative may notify an OSH inspector of that fact.

The possible effects to the NZFS of the change:

- *There is now a possibility of a prosecution taken by a union, an employee, or an employee’s family*

- *Health and safety representatives can issue hazard notices if:*
 - *they believe on reasonable grounds that a hazard exists;*
 - *they have brought the hazard to the attention of the employer;*
 - *the employer refuses to discuss or deal with the hazard; or*
 - *the employer and representative do not agree on the steps to be taken to deal with the hazard; or*
 - *the employer has not taken all practicable steps to eliminate, isolate or minimise the hazard.*
- *Unfortunately, it may be that the issuing of hazard notices, making threats of prosecution or taking prosecutions occur for reasons different to the intent of the Act.*
- **Increases the maximum fines** for offences likely to cause serious harm from \$100,000 to \$500,000 and increases the maximum term of imprisonment from one year to two years. For other offences there is an increase of the maximum fine from \$50,000 to \$250,000.

The possible effects of the change to the NZFS:

- *The NZFS has never been prosecuted in respect of harm suffered by a professional firefighter or employee. The Courts have very rarely used even the existing maximum fines. Where prosecutions do occur, they usually affect the employer rather than individuals and are for quite negligent acts or omissions.*
- **Introduces 'Infringement Offence Notices'** as an extra method of enforcement of the Act. OSH inspectors can issue these infringement offence notices where a breach of the Act has occurred.

Possible effects to the NZFS of the change:

- *Fines may be brought against an individual or corporate body – training and monitoring may be required to ensure all managers and employees understand this.*
- *There are instant fines for **any** infringement offence **except** for a failure to comply with section 7(1) must be not less than \$100 and not more than \$3,000 (as multiples of \$100) and;*
- *Instant fines for failure **to** comply with section 7(1) 'the systematic identification and assessment of hazards' incurs fines of between \$800 - \$4,000 (as multiples of \$100).*
- **Makes it unlawful to insure** against fines under the Health and Safety in Employment Act.

The possible effects the NZFS of the change:

- *Although we are unable to insure against the fine, we can insure against the cost of defending a charge under the Act and payment of reparation to a victim.*
- **Extends the limitation period** that is currently used for laying information. Previously, there was a six-month limitation period that started when the harm had occurred. An amendment to the Act includes a 'reasonable discoverability' test as the starting point for laying charges within the six-month limitation period, and also provides for a discretionary extension on application to the Court.
- *Possible effects to the NZFS of the change:*
 - *Employers may now be prosecuted for 'long latency' occupational illness, where the time from exposure to the onset of symptoms is longer than six months. This could include Occupational Overuse Syndrome (OOS), asbestosis or hearing loss that may have occurred years before.*
 - *Therefore there may be a need for new exit medical examinations or questionnaire to establish a worker's health when they leave, and to retain employee files for a much longer period. For example, noise induced hearing loss may be claimed ten to twenty years later.*

What are the next steps?

1. The Amendment Act is due to be enacted on 5 May 2003.
2. Updates of documents and policies that refer to the principal Act will be amended.
3. Regular communication and updates will be posted via the intranet or e-mail.