

A Guide to the Health and Safety in Employment Act 1992

Including the Health and Safety in Employment Amendment Act 2002

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Foreword

The Health and Safety in Employment Act 1992 is fundamental to the wellbeing of New Zealanders.

It allocates responsibilities for safety and health in the workplace, and in doing so affects most people — whether as employers, the self-employed, employees, volunteers, trainees, contractors, principals, people who control places of work, or those who sell or supply plant.

Duties also extend through regulations to those who control workplaces, or design, manufacture or supply plant or equipment.

This guide provides some detail on how the legislation works, and what it means for people. It is for you if you are an employer, manager, union representative, human resource specialist or anyone else who needs to know how the law applies in a place of work.

This “Blue Guide”, as it has become known, was originally produced in printed form in 2000. It summarised a growing body of case law and the “bedding in” of the law in New Zealand workplaces since the legislation was first enacted in April 1993. It is now published in its current electronic form.

Since the first edition, the Government has completed a comprehensive review of the Act and passed the Health and Safety in Employment Amendment Act 2002. These extensive amendments are summarised in this new edition, with cross references to fact sheets outlining various aspects of the amendment as appropriate.

The amendment Act came into force on 5 May 2003. It has not affected the essential scheme of the Act, or this guide, but has provided, in particular, new means of increasing employee involvement, alternative enforcement mechanisms, and addressed some other issues concerning the Act’s coverage. As the new provisions themselves “bed in” in New Zealand workplaces, additional information will be added to this guide.

In the meantime, users of this guide are also encouraged to make themselves familiar with the www.workinfo.govt.nz website.

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July 2003

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Part 1: Introduction

This part sets out the objects of the legislation and the principles on which it is based. It also provides some background on the origins of health and safety legislation in New Zealand, and describes the coverage of the law and how it works.

1.1 About this guide

This booklet is a general guide to the legislation only. It does not describe solutions or approaches for particular industries or hazards — information on which may be found in industry-specific regulations, codes of practice, or guidelines.

Following this introductory part, the guide is arranged according to the responsibilities given to different people in the workplace, i.e.:

- Employers (part 2);
- Employees (part 3); and
- Others — the self-employed, people who control places of work, and principals to contracts (part 4).
- Part 5 describes what needs to happen in the event of accidents or the occurrence of serious harm in a place of work.
- Part 6 describes how the Act is administered and enforced.
- Definitions of key terms in the legislation are included as an appendix.

Examples

Examples accompany the descriptive text throughout this guide. Most have been taken from the New Zealand case law, with the names changed and the facts simplified to illustrate particular points. The examples should therefore not be taken as a description of any actual case.

The advice in this guide

This guide outlines the main features of the Health and Safety in Employment Act 1992, but should not be used as a substitute for the Act itself.

The Department of Labour's Occupational Safety and Health Service, in providing advice on the administration of the Health and Safety in Employment Act 1992, is not to be taken as defining or providing a definitive interpretation of the relevant parts, sections or subsections of the Act. Ultimately, questions of interpretation in a particular case will always be a matter for the Courts to decide. Therefore, any advice given is intended as a guide and you are advised to carefully consider the express provisions of the Act itself.

1.2 Why have health and safety legislation?

The need to regulate for workplace health and safety was first recognised in Western countries in the late 19th century, and New Zealand governments have actively promoted health and safety legislation for more than a century. It began in the 1890s with factories legislation, and progressively legislation was introduced to regulate other hazardous industries, such as mining and quarrying, and construction.

The law tended to be enforced by inspectors with statutory powers. It also tended to be prescriptive, and narrowly focused on particular industries or processes. So, for example, when women and girls employed in match factories showed a danger of phosphorous poisoning, regulations were passed to specifically control that hazard, and inspectors would strictly enforce the law.

Similarly, when a scaffold collapsed, or a mine exploded, or numbers of farmers were crushed by tractors without safety frames rolling on them, public concern would be followed by new laws to deal with the revealed risk, and the list of statutes would grow.

This rather haphazard approach was followed throughout the world, until the 1970s, when governments began to review health and safety legislation from first principles. In the United Kingdom, this revision process saw a major royal commission led by Lord Robens, and publication of the landmark "Robens Report" in 1972. The report recommended the introduction of a single piece of legislation which applied consistent policies and enforcement procedures across the range of industries. It was implemented, and its approach has since been adopted by numerous Commonwealth countries.

In the late 1980s New Zealand began a comprehensive review of the raft of health and safety laws then in place, and the review culminated in the Health and Safety in Employment Act 1992. The new legislation implemented the major principles of the Robens report, while placing additional emphasis on the need for employers to manage hazards in the workplace.

What was new about the Health and Safety in Employment Act?

The Health and Safety in Employment Act 1992 adopted a new legislative approach for promoting health and safety management in places of work — its focus is on the **prevention** of harm arising out of work activities.

It repealed much of the earlier industry-specific legislation, and replaced it with a single Act providing comprehensive coverage of places of work — whether in the state or private sector.

The Act also treats similar hazards with similar procedures, whatever the place of work.

Primary responsibility is placed on the employer, who has a general duty to provide a safe and healthy work environment.

There are other specific duties, including a requirement for employers to identify and actively manage hazards in the workplace. To do this, it sets out a hierarchy of action where employers must follow a process of identification, elimination and isolation. If a hazard cannot be eliminated or isolated, the effects of the hazard must be minimised.

Regulations provide minimum standards for particular high-hazard industries and work practices. Guidelines developed by, or in consultation with, industry also outline good practice. Some guidelines may be approved by the Minister of Labour as "approved codes of practice" providing an accepted means of complying with the Act.

What legislation changed?

A number of previous Acts and regulations were repealed in whole or in part on 1 April 1993. These are listed in detail in schedules to the Act.

The provisions in these Acts were either incorporated into the Act or promulgated as regulations made under the new Act. The major Acts affected were the:

- Agricultural Workers Act 1977
- Boilers, Lifts and Cranes Act 1950

- Bush Workers Act 1945
- Coal Mines Act 1979
- Construction Act 1959
- Factories and Commercial Premises Act 1981
- Geothermal Energy Act 1953
- Health Act 1956 (occupational health provisions only)
- Machinery Act 1950
- Mining Act 1971
- Petroleum Act 1937
- Quarries and Tunnels Act 1982
- Shearers' Act 1962

The Health and Safety in Employment Amendment Act 2002 further extended coverage to the transport sector by repealing sections of the:

- Maritime Transport Act 1994; and
- Transport Services Licensing Act 1989.

1.3 What the Act sets out to do

The Health and Safety in Employment Act's object is to promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work.

Section 5 of the Act sets out the object, and lists various means contained in the Act to achieve it, including by:

- Promoting excellence in **health and safety management**, in particular through being systematic;
- **Defining hazards** and harm in a comprehensive way so that all hazards and harm are covered, including harm caused by work-related stress and hazardous behaviour caused by certain temporary conditions.
- **Imposing duties** to ensure that people are not harmed as a result of work activities; and
- Setting requirements that relate to the taking of all practicable steps to ensure health and safety, and are flexible to cover different circumstances;
- Encouraging the health and safety of **volunteers**;
- Requiring **employee participation** in the improvement of health and safety and encouraging good faith co-operation in places of work;
- Providing a range of **enforcement methods** in response to failure to comply with the Act.

1.4 Coverage is broad

The Act imposes **duties** on a wide range of working relationships in nearly all **places of work**.

This guide describes **duties** as set out in the Act and affecting different parties in the workplace:

- Employers;
- Persons who control places of work;

- Persons who sell or supply plant for use in places of work;
- Self-employed people;
- Principals to contracts;
- Employees;
- Volunteers; and
- People receiving on-the-job training or gaining work experience.

Overlapping duties

Frequently a person will have duties under more than one section of the Act. For example, **an employer** may have duties:

- To employees (sections 6-14, 19A-19I);
- In relation to volunteers, or people receiving on-the-job training or work experience (sections 3C-3F);
- To ensure that the action or inaction of employees does not endanger the public (section 15);
- As a person who controls a place of work (section 16);
- As a principal to a contract (section 18);
- As a person who sells or supplies plant for use in a place of work (section 18A);
- In the event of accident, injury or illness (sections 25 and 26); and/or
- To comply with notices, sampling or other requirements of health and safety inspectors and/or departmental medical practitioners (sections 31, 33, 35, 37, 39-45).

Similarly, **an employee** has duties:

- Not to endanger themselves or others (section 19);
- Not to interfere with an accident scene (section 26); and/or
- To comply with notices, sampling or other requirements of health and safety inspectors and/or departmental medical practitioners (sections 31, 35, 37, 39-45).

An employee who has management or supervisory responsibilities may be authorised to represent the interests of the employer or make statements on the employer's behalf. They also have the duties of an employee in respect of their own conduct.

A self-employed person has similar responsibilities to an employee, and may also have duties:

- As a person who controls a place of work (section 16);
- As a principal to a contract (section 18);
- As a person who sells or supplies plant for use in a place of work (section 18A);
- In relation to volunteers, or people receiving on the job training or work experience (sections 3C-3F); or
- In the event of accident, injury or illness (sections 25 and 26).

Officers, directors or agents of a body corporate have duties. Where their actions or decisions lead to breaches of the Act by the company or other body corporate, they may be charged, whether or not the body corporate is prosecuted (section 56).

A duty may apply to more than one person at a time

Where the Act imposes a duty on one person in a particular set of circumstances, it may apply to another person at the same time, whether in the same or a different capacity. This means more than one person may be held liable for a particular breach of the Act, or the same person may be held liable under more than one section.

State employees are included

The Act applies to local and central government agencies including departments, Crown-owned entities, or state-owned enterprises. Chief executive officers of government agencies are responsible for ensuring that the state meets its obligations as an employer under the Act. There are, however, some exemptions in relation to the defence forces, and some aspects of emergency services.

Other legislation is not affected

Other legislation may impact on health and safety in the workplace, even though it is not primarily concerned with the issue — examples are the Gas Act 1992, the Building Act 1991, and the Electricity Act 1992. In these cases there may be some overlap with the Health and Safety in Employment Act.

The general principle is that, where two pieces of legislation apply to any given situation, an employer or any other person affected needs to follow both. In effect, meeting the requirements of the other legislation will usually mean that the requirements of the Health and Safety in Employment Act are being met in relation to the particular hazards covered.

Where appropriate, formal agreements have been reached between administering departments to clarify roles and responsibilities.

Where the gravity of a particular offence justifies it, criminal charges under the Crimes Act may take precedence.

Application of individual sections

The following table sets out in graphic form who is "caught" by the individual sections of the Act.

Table 1: Duties of the Act

Section /duty	Er	Se	Ee	Pr	Oo	Dm	Ss
3C Enforceable duty to volunteers	•	•					
3D Duty to volunteers (non-enforceable)	•	•			•		
3E Duty to trainees, those gaining work experience	•	•					
6 General duty	•						
7-10 Hazard management	•						
11,12 Information	•						
13 Training and supervision	•						
15 Duty to non-employees	•						
16 Control of places of work	•	•		•	•		
17 Self-employed's duty		•					
18 Principal's duty				•			
18A Duty of persons selling or supplying plant for use in place of work						•	•
19 Employee's duty			•				
19A-19I Employee participation	•		•				
20 Compliance with ACOPs	•	•	•	•	•	•	•
21 Compliance with regulations	•	•	•	•	•	•	•
25 Recording/notifying accidents	•	•		•	•		
26 Non-interference after accident	•	•	•	•	•		
31-35 Access by inspectors/ DMPs	•	•	•	•	•		
37 Suspension of employee by DMP	•		•				
39-46 Prohibition/improvement notices	•	•	•	•	•		
47-48 Assistance to inspectors	•	•	•	•	•		
49-50 Offences against the Act	•	•	•	•	•		
51 Harm caused preventing harm	•		•				
56 Offences by directors/agents	•			•	•		

Er = Employer

Se = Self-employed

Ee = Employee

Pr = Principal

Oo = Owner/operator

Dm = Designers, manufacturers, of plant, equipment

Ss = Sellers and suppliers of plant

Definition of "place of work"

A **place of work** is defined very broadly in the Act.

It is any place (including part of a building, structure or vehicle) where any person is to work, is working for the time being, or customarily works **for gain or reward**.

In relation to an employee, it includes a place, or part of a place **under the control** of the employer, where an employee:

- Comes or may come to eat, rest or get first-aid or pay;
- Comes or may come as part of their duties, to report in or out, get instructions, or deliver goods or vehicles; or
- May or must pass through to reach a place of work.

A person is in a place of work whenever and wherever the person performs work. A place of work may itself move (e.g. as a ship or vehicle), or an employee may move through a place of work (e.g. as a postal delivery person).

Vehicles, ships and aircraft are included in the definition of "place of work", and **mobile workers** are covered by the Act, regardless of whether they are working from or in a vehicle. **[refer to the fact sheet, Mobile workers]**

Domestic accommodation provided for employees is not considered a place of work.

The definition of place of work from the legislation is reproduced at the back of this guide.

Coverage in particular situations

Defence forces are excluded from some of the provisions relating to employee participation, an employee's right to refuse work that may cause serious harm, the inspection of high-security defence areas, and the investigation of accidents, as they have their own systems and requirements under the Armed Forces Discipline Act 1971.

Householders who hire people either as contractors or as employees — solely to work on or in their home — do not have any responsibilities under the Act. For example, if you employ a cleaner for your home, you do not have the duties of an employer under the Act. Similarly, if you hire a plumber to fix a blocked drain in your house, you will not be liable as a principal under the Act.

Aircraft

The Act applies to any person **employed or engaged to work** on board an aircraft, and to the person who employs or engages them (section 3A(1)).

The aircraft is a **place of work** when it is:

- Operating on a flight beginning and ending in New Zealand (but not as part of a flight beginning and ending outside New Zealand); or
- Operating outside New Zealand, and the person is engaged under an employment agreement or contract for services governed by New Zealand law (this includes a flight operating in New Zealand that began or ended outside New Zealand).

(section 3A (2))

Section 16 of the Act does not apply to an aircraft while it is taking off, flying or landing (section 3A (4)).

Ships

The Act applies to any person **employed or engaged to work** on board a ship, and to the person who employs or engages them, where the person is employed or engaged under an employment agreement or contract for services governed by New Zealand law.

The work may be on:

- A New Zealand ship (as defined by the Ship Registration Act 1992); or
- A foreign ship carrying coast cargo while on demise charter to a New Zealand-based operator; or
- A foreign ship carrying out petroleum operations in New Zealand continental waters.

In the above situations the ship is a **place of work**.

(section 3B(1)).

Where the Act applies in relation to a New Zealand ship it does so whether or not it is operating in New Zealand waters.

Section 16 of the Act does not apply to a ship while it is at sea (section 3B (3)).

Volunteers are covered by the Act [refer to 2.7, Volunteers, or the fact sheet]

Examples:

John works delivering automobile spare parts from a van owned by his employer, **Quick Bits**.

In terms of the Act, John has the duties of an employee — he has to look after himself and other people in his proximity.

Quick Bits have the duties of an employer in relation to John. They are responsible for his place of work — their depot, maintenance of the vehicle, and John's systems of work, but are unlikely to have any control over the streets, buildings or sites where the goods were to be delivered. In the latter case other employees, employers, and people in control of places of work have duties towards John.

Quick Bits are also responsible for any harm John does to others as a result of unsafe systems of work, equipment, etc.

Jill is a working mother who works three mornings a week in **Ann's Plant Shop**. At this time she is an employee in terms of the Act.

In between times, Jill works from home as a telemarketer for two merchandise companies. Because she is employed as an independent contractor at this time, she has the duties of a self-employed person, and her home is her place of work in terms of the Act.

Every third week Jill works as a volunteer delivering "meals on wheels". As a volunteer, her health and safety is covered by the Act as though she were an employee.

Rangi manages a back country sheep station for a family trust, of which he is a trustee. A shepherd, **Jock**, and two other farm employees, **Bert** and **Chloe**, live in two houses just behind the homestead on the farm. The houses themselves are not considered to be places of work in terms of the Act. Rangi, as trustee, is the employer of Jock, Bert and Chloe, and they are employees in terms of the Act.

*Every year a shearing contractor, **Lucy**, brings her employees to work in the woolshed. Rangi is responsible for the duties of the principal to the contract. He is also responsible for the woolshed as a person who controls a place of work.*

Sometimes trout fishers, mountain climbers, or whitewater rafters visit the property. When they have permission to be there, Rangi has the duties of a person who controls a place of work in relation to visitors.

***Naomi** is employed as a geologist for **Mountaincorp**, a Crown research institute. Her fieldwork takes her into the countryside, including Rangi's farm.*

Mountaincorp has duties to Naomi as her employer, and to the public for her activities. It also has duties as a "person who controls a place of work" in relation to Naomi's equipment and her activities if, for example, she digs a large hole and leaves it uncovered.

Naomi has the duties of an employee.

If Rangi has given Mountaincorp or Naomi permission to work on the farm, he has a duty to Naomi as a person who controls a place of work.

***Muriel** engages **Kapi** to replace the tile roof on her home. He hires a tile hoist from **Hire Co** so that he can do the job on his own.*

Muriel is not liable under the Act, because it is residential work.

However, it is Kapi's place of work, and he has duties as a person who controls a place of work and as a self-employed person.

Hire Co, in providing the equipment, also have the duties of a person who sells or supplies plant for use in a place of work.

1.5 "All practicable steps"

Many of the duties in the Health and Safety in Employment Act are qualified by the words "take all practicable steps".

This phrase applies to the general duties that must be carried out by employers, employees, self-employed people, people who control places of work, and "principals", who are people who engage contractors to carry out work for them.

The Act specifies that a person is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.

Where the circumstances are known, or ought reasonably to be known about, the dutyholder is required to take all steps that are **reasonably** practicable. A step is practicable if it is possible or capable of being done. Whether a step is also reasonable takes into account:

- The nature and severity of any injury or harm that may occur;
- The degree of risk or probability of injury or harm occurring;
- How much is known about the hazard and the ways of eliminating, isolating or minimising the hazard; and
- The availability and cost of safeguards.

The degree of risk and severity of potential injury or harm must be balanced against the cost and feasibility of the safeguard. The cost of providing safeguards has to be measured against the consequences of failing to do so. It is not simply a measure of whether the person can afford to provide the necessary safeguards. Where there is a risk of serious, or frequent injury or harm, a greater cost in the provision of safeguards may be reasonable.

Any judgement of whether a safeguard was "reasonably practicable" is to be made taking common practice and knowledge throughout the industry into account.

A claim by an individual person that he or she did not know what to do about a hazard would not be successful if the hazard was widely known to others in the industry and safeguards were in place, or if they chose not to use the current body of knowledge about the hazard.

The courts have referred to the current, "up-to-date" body of knowledge that is available to people. Failure to be familiar with this knowledge, or to follow it, is failing to take all practicable steps.

The concept of "reasonableness" is based on the legal principle of the hypothetical "reasonable person" and the way that he or she might behave in a particular situation. It is based on the values of society of the day and, in the end, will involve a value judgement.

The overall test is what would a reasonable and prudent person do in all the circumstances. There are no firm guidelines. The question of what is reasonably practicable is always a matter of fact and degree in each situation.

[Refer also to the fact sheet, Taking all practicable steps]

An example of a practicable step

A Crown health enterprise, Hokonui Health pleaded guilty to a charge under section 6 of the Act after two nurses, Dianne and Damion, were affected by exposure to glutaraldehyde, a chemical used widely in the healthcare industry to disinfect medical instruments.

Dianne and Damion suffered severe headaches and respiratory irritation, and were exposed while performing their duties in the sluice rooms attached to the hospital's four operating theatres. Used theatre equipment was placed in large open containers filled with 2% glutaraldehyde solution. Nurses and other staff working in the sluice rooms were exposed to glutaraldehyde fumes. There was no ventilation system.

The problem occurred in an old part of the hospital due for replacement. Closure of the operating theatres even temporarily was not practicable, leaving the hospital two options: installing ventilation (estimated to cost up to \$250,000) or replacing glutaraldehyde with an alternative chemical. The latter course was eventually adopted. Hospital authorities had recognised the problem posed by glutaraldehyde as far as providing respirators, gloves and aprons for the nurses to wear. However, the respirators were regarded as uncomfortable to wear for any length of time.

In summing up what was expected of Hokonui Health, the judge recognised the restraints of health budget requirements. However, he agreed that closing down the area where the fumes were affecting workers until the fumes were taken away, or providing some other disinfectant system were reasonably practicable steps available to the hospital that should have been taken.

1.6 How the Act sets more detailed standards

The Health and Safety in Employment Act sets out duties which are in turn supplemented by **regulations, approved codes of practice, and guidelines** developed by, or in conjunction with, the Occupational Safety and Health Service.

Regulations made under the Act describe some of the requirements which apply to specific work situations. Like the Act, regulations are enforceable, and breaches may result in prosecution and fines.

Approved codes of practice are guidelines which have been approved by the Minister of Labour under the Act. Their requirements are not mandatory or enforceable as such, but their observance is accepted in Court as evidence of good practice.

Guidelines developed by, or in conjunction with, the Occupational Safety and Health Service may not have undergone a formal approval process, but are nevertheless an important source of guidance for employers and others on how to meet the Act's requirements.

Where appropriate, New Zealand or other **Standards** may be cited in approved codes of practice or guidelines.

Sources of health and safety information

The following sources of guidance are arranged as a hierarchy according to the degree of strict compliance that the courts require.



Working with regulations

Regulations are made under the Act:

- To set minimum standards for the management of particular hazards where alternative control measures are not always effective;
- To deal with administrative matters provided for in the Act (such as appointment of inspectors); and
- To elaborate on some general duties in the Act.

Where a regulation exists, its requirements are mandatory. However, while regulations must be complied with, the overriding responsibility is to comply with the duties set out in the Act, and there may be instances where this involves taking further steps than meeting the regulations.

The Health and Safety in Employment Regulations 1995, applying to all workplaces, have been made under the Act. They cover:

- Facilities required for the safety and health of employees;
- Precautions to be taken with some particular hazards;

- Notification of hazardous construction and forestry work;
- Certificates of competence for some kinds of work; and
- Young people in hazardous places of work; and agricultural workers' accommodation.

In addition, regulations on the following particular matters have been made under the Act:

- Pressure equipment, cranes, and passenger ropeways;
- Asbestos;
- Mining;
- Petroleum exploration and extraction; and
- Pipelines.

Regulations passed on the following subjects were passed under earlier legislation and have been retained:

- Abrasive blasting;
- Amusement devices;
- Electroplating;
- First aid;
- Geothermal energy;
- Lead processes;
- Noxious substances; and
- Spraycoating.

Some regulations have also been made for administrative purposes. These cover:

- The appointment of inspectors, and forms for accident registers and reports; and
- The setting of a levy to fund the administration of the Act.

For more information, see 6.4, Regulations and approved codes of practice.

Working with approved codes of practice

The Act allows for the development and approval of statements of preferred work practice, known as "approved codes of practice". These are recommended means of compliance with provisions of the Act, and may include procedures which could be taken into account when deciding on the practicable steps to be taken. They are the result of consultation between the Occupational Safety and Health Service of the Department of Labour and affected industry members.

A code of practice applies to anyone who has a duty of care in the circumstances described in the code. This may include employers, employees, the self-employed, principals to contracts, owners of buildings or plant, and so on.

An approved code does not necessarily contain the only acceptable ways of achieving the standard required by the Act. But, in most cases, compliance would meet the requirements of the Act, in relation to the subject matter of the code.

It does not have the same legal force as a regulation, and failure to comply with a code of practice is not, of itself, an offence. However, observance of a relevant code of practice may be considered as evidence of good practice in a court.

As with regulations, codes of practice may not cover all hazards which may arise around a particular hazard or process in a workplace.

At the date of publication, codes have been approved under the Act for the following hazards or processes:

- Arboriculture
- Boilers — design, safe operation, maintenance and servicing of
- Cranes — design, manufacture, supply, safe operation, maintenance and inspection of cranes
- Demolition
- Excavation and shafts for foundations
- Dairy industry spray drying plant — prevention, detection and control of fire and explosion
- Forest operations
- Forklifts — training operators and instructors of powered industrial lift trucks
- Helicopter logging
- Isocyanates — safe use of
- Maintenance of trees around power lines
- Management of substances hazardous to health (MOSHH) in the place of work
- Managing hazards to prevent major industrial accidents
- Noise in the workplace — management of
- Operator protective structures on self-propelled mobile mechanical plant
- Paint, printing inks and resins — manufacture of
- Passenger ropeways
- Photoengraving and lithographic processes
- Powder-actuated hand-held fastening tools
- Power-operated elevating work platforms
- Pre-cast concrete — safe handling, transportation and erection of
- Pressure equipment (excluding boilers)
- Rigging — load-lifting
- Tree work
- Roll over protective structures on tractors in agricultural operations
- Scaffolding
- Sulphur fires and explosions
- Timber preservatives and antisapstain chemicals
- Visual display units in the place of work.

Examples of health and safety information

Joe and Pete are in business together. Joe is a panelbeater, while Pete is a spraypainter. They trade from their workshop as **J&P Panel and Paint Ltd**. They employ **Tim** full-time to help out, and two mornings a week **Julie** comes in to help with the paper work.

The Act applies generally to the whole team and workplace. To find out what they need to do to meet the Act's requirements, J & P Panel and Paint refer to various other documents.

Firstly, Pete observes the **Spraypainting Regulations**, which set minimum ventilation and other requirements that must be observed. When he uses isocyanate-based paints — which present special health risks — the **Approved Code of Practice for the Safe Use of Isocyanates** sets a standard of good practice. He keeps a copy of these documents on the premises.

The **Approved Code of Practice for the Management of Substances Hazardous to Health** sets out good practice for storing and using the range of paints, solvents and substances in the business generally. Noise is another workplace hazard, and reference is made to the **Approved Code of Practice for the Management of Noise in the Workplace**.

In setting up and maintaining their workshop facilities, reference was made to the **Guidelines for the Provision of Facilities and General Safety and Health in Commercial and Industrial Premises**.

Julie uses a computer for her work, and the workstation is set up in accordance with the **Approved Code of Practice for the Safe Use of Visual Display Units**.

Although they don't have copies of these documents, Joe and Pete have been made familiar with their contents through a trade association and contact with a health and safety inspector.

Lester is a logger who works for **EZ Logging Contractors Ltd**, which is owned and operated by **Leon**. Most of the company's work is under contracts to **Radiata Corporation**, forest owners. Each of the parties has obligations under the Act.

Lester fulfils his duties as an employee by following the safe logging practices set out in the **Approved Code of Practice for Safety and Health in Forest Operations**. He keeps a copy in the work truck. He knows the little book as "the bushman's bible".

Leon uses the code as a manual of good practice, and keeps a copy in his ute. He also refers to a copy of the **Guidelines for the Provision of Facilities and General Safety and Health in Forestry Work**. He is also familiar with the notification requirement for forestry work from the general **Health and Safety in Employment Regulations 1995**, which are reproduced in the guidelines.

The managers and overseers of **Radiata Corporation** are familiar with the Act itself, the regulations, and its obligations as principal to contractors, as employers of its own crews, and as forest owners.

They make reference to the approved code and the Forestry Guidelines regularly and ensure that their own employees, and contractors, observe the standards they set.

1.7 The difference between the Act and the common law

The law described in this guide is called statute law. Statute law is passed by Parliament and includes Acts and their supporting regulations. Statute law is enforceable, and breaches may result in prosecution by a state agency, or officials such as health and safety inspectors.

There is another body of law called common law, which has developed as a result of civil actions. This occurs when a person believes that he or she has been wronged by another party and takes that party to court, seeking justice. In other countries this means that people may use the courts to sue for **damages** where another person, perhaps their employer, has caused them personal injury or other harm through their actions or inaction. Often these cases are based on a claim of "negligence" on the part of the defendant, who has wronged the aggrieved person by failing to following a **duty of care**. Generally, harm needs to occur before the case for damages can be made out.

Usually the court case or claim for damages comes some time after an accident, incident or illness. It is a civil matter between the parties concerned and the state is not involved.

In New Zealand such actions seeking damages **for personal injury** are mostly excluded by accident compensation legislation. This arises out of the "no-fault" system of accident compensation introduced by statute in 1974.

On the other hand, as statute law, the Health and Safety in Employment Act describes behaviour required of people who affect safety and health at work. Its emphasis is on the **prevention** of harm, rather than settlement for damages after the harm is done. To do this, the Act imposes a similar duty of care to that of the common law to protect people at work from hazards and maintain safe and healthy workplaces.

Similarly, employees have a right to participate in the management of their health and safety at work, and are required to co-operate with employers in safety and health matters, so that employers are able to meet their responsibilities.

Health as well as safety

The Health and Safety in Employment Act is concerned with preventing all forms of harm that may arise from work activities.

The Act (section 2) defines "healthy" as unharmed. It also defines "harm" as "illness, injury or both, and includes physical or mental harm cause by work-related stress". This means that in providing an environment where employees are not exposed to hazards, employers must consider the traditional concepts of "health" as well as "safety".

"Safety" traditionally concerned a range of physical safety issues such as falls, strains, being hit by objects and electric shock.

"Healthy" is a broader concept. It includes avoiding work-related injuries and diseases, such as industrial deafness, dermatitis, occupational overuse syndrome, asbestosis, and occupational cancers. It may also include more general health problems, such as heart disease, high blood pressure and stress, where the work environment and procedures can be shown to be contributing factors.

The two concepts are combined for the purposes of the legislation, and the traditional distinction between "health" and "safety" is much less relevant than the Act's emphasis on the avoidance of harm through managing hazards.

Towards this, the Act simply defines "safe" as not exposed to hazards.

Part 2: Duties of employers

This part of the guide describes the duties of employers set out in part II of the Act, which contains preventative duties. That part also includes a general duty of care, set out in section 6.

There are other duties for employers set out under part 2A, Employee participation, and part IV, General provisions (relating to such matters as what to do after an accident, and inspections or notices issued by health and safety inspectors or departmental medical practitioners). Employers should refer to parts 4, 5 and 6 of this guide for information on their duties and responsibilities in these areas.

2.1 The meaning of "employer"

An **"employer"** is defined in the Act as any person (including a company, Crown organisation, or other legal entity) who employs any other person to do any work for **hire or reward**. This includes hiring workers under a contract of employment, apprenticeship or an industrial training agreement.

These workers are all referred to as "employees". The meaning of "employee" is discussed further in part 3, Duties of employees.

You may also be deemed by the Act to be an "employer" in relation to:

- **Voluntary workers** doing regular work for you (section 3C);
- People receiving **on-the-job training** or **work experience** (section 3E); or
- **Loaned employees** working for you (section 3F).

[Refer to the fact sheet, Volunteers]

Some other legislation (such as the Social Security Act and the Education Act), may also deem people to be employers for the purposes of the Health and Safety in Employment Act, even if the work is not being completed for hire or reward.

If you engage someone to **work on or in your own home**, you are not an employer in terms of the Act.

[Refer to the fact sheet, The home as a workplace]

Officers, directors or agents

The officers, directors, or agents of any body corporate are not considered employers in terms of the Act. They are, however, liable to prosecution if they "direct, authorise, assent to, acquiesce in, or participate in" a failure to comply with the Act (section 56). Prosecution can result whether or not the body corporate is prosecuted. Refer also to 1.4, Coverage is broad.

Principals to a contract

A principal to a contract (other than an employment agreement), is not an "employer" in terms of the Act. But he or she does have other duties, which are described in 4.2, Duties of principals and contractors.

Examples:

Carl is an apprentice electrician, indentured to **John of John's Electrical**. John is Carl's employer in terms of the Act.

Jenny grows peaches and apricots on her orchard. Throughout the year she employs **Jeff** on wages as a general hand. In terms of the Act, Jenny is Jeff's employer.

At the height of the season Jenny employs three or four local people to help pick, pack and despatch the fruit. They are employed on a **casual** basis and given the choice of either working on **piece rates** or an **hourly rate**. On either basis, Jenny is their employer in terms of the Act.

Chris is gaining work experience and life skills training in a programme organised by the **Great Breaks Trust**. The trust is funded to run the programme by a central government grant. The trustees employ **Marlene** as a supervisor and pay an allowance to Chris and the other trainees.

Because Chris is — like Marlene — working "for gain or reward", the trustees are his employer in terms of the Act.

While **Dave** is completing a pre-employment course at an Institute of Technology, he gains unpaid work experience with **Trevor** the self-employed builder. While **Dave** is at work, Trevor is his employer in terms of the Act.

Mary-Lou is a student at **Sunny Valley High**. She is not an employee in terms of the Act, although in certain situations her health and safety may be protected by it.

Philip is a history teacher at Sunny Valley High. His employer is the board of trustees of the school, and the chairperson of the board is **Lisa-Marie**.

The board is Philip's employer in terms of the Act. Lisa-Marie and the other trustees may also be accountable for the effects of their health and safety decisions on employees or others.

Ruth works at home sewing fashion garments for **Lavina**, who manufactures apparel and sells it from her shop **Lavina Modes**. Ruth works on piece rates, only for Lavina, who is her employer in terms of the Act. The part of her home where she works is a "place of work".

There may also be some circumstances where Ruth is an independent contractor to Lavina, and is therefore self-employed in terms of the Act. Whether this is the case depends on a range of factors, including the degree of resourcing, economic dependence, and the supervision or control exercised by Lavina over Ruth's work.

Denis is a superannuitant who helps out part-time in the office of his son **Graeme's** print works. Denis does not expect material gain or reward from Graeme, so he is a volunteer, but Graeme is deemed his employer in terms of the Act. **Jason** works after school for **Jessie**, delivering the **Dunedin Evening Mail**. Jessie is an independent contractor to The Mail, and the newspaper company is therefore not her employer. Jessie is, however, Jason's employer.

Tania, a retired nurse, works one day every other week for the **Blood Bank's** mobile service. The Blood Bank has some of the duties of an "employer" towards Tania, particularly with respect to hazard management and her right to information about the hazards of her voluntary work.

2.2 The general duty

Every employer shall take all practicable steps to ensure the safety of employees while at work.

This pivotal requirement of the Act is set out in section 6. It restates the object of the Act (from section 5) in terms of a **general duty** for employers.

The section then expands on this general duty by prescribing the following **particular duties** to:

- Provide and maintain a safe working **environment**;
- Provide and maintain **facilities** for the safety and health of employees at work;
- Ensure that **plant** machinery and equipment in the place of work is designed, made, set up, and maintained to be safe for employees;
- Ensure that **systems of work** do not lead to employees being exposed to hazards in or around their place of work; and
- Develop procedures for **dealing with emergencies** that may arise while employees are at work.

It is important to remember here that the **standard of care** that is required of all employers is that they take "all practicable steps". This is an important concept for employers, and others following the Act. It is discussed more fully at 1.5, All practicable steps.

Briefly here, "all practicable steps" means doing what is reasonably able to be done in the circumstances, taking into account:

- The severity of any injury or harm to health that may occur;
- The degree of risk or probability of that injury or harm occurring;
- How much is known about the hazard and the ways of eliminating, reducing or controlling it; and
- The availability, effectiveness and cost of the possible safeguards.

The standard applies in respect of circumstances that the person knows or ought reasonably to know about.

[For further information, refer to the fact sheet, All practicable steps]

For further discussion of "risk" see 2.3, Hazard management responsibilities.

Another consideration when observing the general duty is that it applies to all types of hazards, not only significant hazards. The extent of the duty is to take **all practicable steps** to keep employees free from harm at work. This means, for example, that a minor tripping hazard, or a sharp corner that juts into a walkway that presents a foreseeable likelihood of harm and is easily made safe, should be remedied under the duties of section 6. On the other hand, there may be no requirement to manage the hazard under sections 7-10 of the Act, because it is not considered to be "significant".

Particular duties

The general duty imposed by section 6 is expanded by particular duties to ensure that employees are not exposed to hazards at work. These are described in more detail below.

Approved codes of practice and guidelines to the Act and regulations published by the Occupational Safety and Health Service offer a ready compendium of information for employers meeting the particular duties.

However, an important point to consider with regard to these duties is that they specify the **result** that is required of employers. How the result is achieved is in large part open to the individual employer to choose.

Providing and maintaining a safe working environment

The focus of this duty is on the "working environment". The term is not defined in the Act, but it may be taken to include:

- The workplace itself — the building, structure, mine, vehicle, etc;
- All plant at the workplace;
- The physical environment — including lighting, ventilation, dust, heat, noise, etc;
- Access to and egress from the workplace;
- The work process, including expectations of what is done and how;
- Work arrangements, including the effects of shift-work and overtime arrangements; and
- The psychological environment, including overcrowding, deadlines, and other stress factors.

The duty relates to the physical work environment, as well as ergonomic, stress, and other psycho-social and "non-physical" aspects of the work environment.

The duty needs to be considered in conjunction with the definition of "place of work" discussed at 1.4, Coverage is broad.

Providing and maintaining facilities for the safety and health of employees at work

The aim of this duty is to provide facilities and equipment not covered by the concept of the "working environment" referred to above. It includes an obligation to provide and maintain first-aid facilities, mealrooms, personal protective equipment, emergency equipment and other ancillary facilities that keep employees and the place of work safe and healthy.

Regulations have been made specifying particular facilities, and the circumstances where they must be supplied.

Ensuring that plant used by employees in the place of work is designed, made, set up, and maintained to be safe for employees

Employers are required to provide and maintain workplace plant and systems of work so that, as far as is practicable, employees are not exposed to hazards.

Regulations have been made setting out requirements for designers, manufacturers and suppliers of plant to places of work. They require designers, manufacturers, and suppliers to give employers the information they need to fulfil this section 6 duty.

There may also be instances where "all practicable steps" will require an employer to take steps in addition to simply relying on manufacturers' instructions or guarantees as to safety. Additional steps may be required to ensure a particular item of plant is safe in the place of work. Approved codes of practice may apply.

This particular duty is closely related to the hazard management requirements of sections 7-10.

Ensuring that systems of work do not lead to employees being exposed to hazards in or around their place of work

This particular duty is distinct from the hazard management requirements of sections 7-10. It requires employers to design and plan safe systems of work.

The emphasis is on the co-ordination of work activity so that an activity or hazard does not endanger a person who is working in or on another part. This duty is extensive, and requires that systems of work take into account the "arrangement, disposal, manipulation, organisation, processing, storage, transport, working or use of things".

Hazards need not be significant, or even physical (including, for example, shift work or extended hours of work), and may be either in or near a place of work. If they are near the place of work, then they must be under the employer's control. (See 3.2, Duties of persons who control a place of work, for a discussion of what constitutes "control".)

It is implicit that for systems of work to be safe, the people carrying out the task need to have appropriate information, instruction, training and supervision (as required by section 13).

Developing procedures for dealing with emergencies that may arise while employees are at work

This provision does not apply only to fire, earthquake or civil defence emergencies. Unintended consequences or mistakes, or "mishaps" do occur, and employers need to consider the possibility. When the likelihood of mishaps can be predicted, they are "foreseeable" and employers have a duty to prevent them or limit their effects.

When considering the potential for mishaps, employers should take into account the risks of danger through inattentive work or work carried out without suitable instruction and training. Inadvertent acts by employees could result in injury to themselves and others, and, in situations where an employer can foresee that misjudgement or inattention is likely, the system of work should minimise these risks.

Experience in similar workplaces can alert employers to the sorts of problems that may occur in their own workplaces. Where appropriate, approved codes of practice also give guidance on the emergency procedures or equipment appropriate for particular work situations.

The requirement to develop emergency procedures needs to be read in conjunction with the section 19B duty to involve employees in ongoing processes for the improvement of health and safety in their place of work, and section 12's requirement to provide information to employees and their representatives.

Does an employer need a health and safety policy?

The Act does not require an employer to prepare a formal written statement of health and safety policies. However, in some workplaces it may be good practice to obtain written confirmation of agreed safety and health policies and the way they are to be implemented as a basis on which to proceed. Usually, the larger the enterprise and the numbers of people involved, the more useful it will be to prepare a formal statement of health and safety policies and procedures.

Where agreement is reached between the employer, employees and any union on the implementation and review of a system of employee participation in health and safety management, the agreement should be recorded (see [2.6, Employee participation](#)).

Examples:

Hector worked as a general hand at the factory of **Deluxe Woolscourers**. Part of his job involved unloading large bales of unprocessed wool from an elevator and wheeling them to the beginning of the production line. The wool was loaded into the lift by other workers below.

The wool arrived in batches, and Hector and his workmates were kept busy unloading the bales from the lift until each load was finished. Sometimes when the end of the load seemed imminent, the people unloading at the top looked down through a gap at the side of the lift shaft to the floor below to check on progress.

One day Hector was looking through the hole in the lift shaft when he decided to stick his head through the hole and see how many bales were left below. The point when he decided to do this coincided with the point in the cycle of the elevator when an iron bar passed across the inside of the shaft where Hector had placed his head. His head was caught and his neck broken, and he died of his injuries soon afterwards.

In the aftermath of the accident, the company placed a cover over the hole at the side of the shaft.

Deluxe were convicted for failing to meet the section 6 requirement to ensure that employees at work are not exposed to hazards arising out of the "arrangement, disposal, manipulation, organisation, processing, storage, transport, working or use" of things in the place of work.

Len was working the late shift at the factory of **Sunbeam Smallgoods**. Because he and a small group of co-workers were experienced and capable, they were working without their supervisor present.

Towards the end of the shift Len was using a hoist to load large quantities of bacon from one stage of the manufacturing process to another, when the hoist jammed.

The company had a policy of only using maintenance engineers to repair breakdowns, and after several incidents staff had been advised of the policy and management had removed the components of a lock-out system used for repairs to a maintenance shed. But, because the maintenance engineer would have had to be called out, and Len wanted to get home, he turned off the hoist, and began to try and un-jam a drive shaft with a very big spanner.

While he was doing this his co-worker, **Nian**, mistakenly turned on the machine. The driveshaft Len was freeing turned, making the big spanner rotate, and giving Len a violent blow to the head and neck, which saw him hospitalised.

Sunbeam were prosecuted for failing to meet the duty to provide safe systems of work, by not using a hold-out system for repairs.

This is despite the fact that Len — after he had recovered from his injuries — was prosecuted for failing in his duty as an employee.

Andrew was one of a pool of casual employees called on by **Dolphin Fisheries** to unload the catch from the refrigerated holds of the company's fishing trawlers. The work was sporadic, and Andrew's availability varied. On one occasion he arrived without adequately warm socks and clothing to wear under the company-supplied gumboots and overalls. He spent the shift in the frozen hold despite his discomfort, and by the end of it had frostbitten toes. He subsequently needed hospital treatment.

The company was prosecuted and found by the court to have breached section 6 of the Act in failing to provide a safe working environment for employees, and failing to train employees in safe systems of work.

Bob was using a gas torch in the scrapmetal yard of **Heavy Metals Ltd**. An accumulation of gas led to an explosion which badly burnt Bob's face and arms.

After the explosion, Bob's workmates **Hemi** and **Drew** came running to help. Hemi, who was trained as a first-aider, quickly decided that the best thing to do with such burns was to immediately immerse them in water. He sent Drew to fetch a bucket of water while he stayed with Bob.

Drew had difficulty finding a tap, and in the event had to run nearly 60 metres down the yard to the nearest one. When he found it, the only bucket or other containers nearby had sand or oil in them and he had to try to clean them out before filling them with water. It was nearly three minutes before any water was applied to the burns, which contributed to their seriousness, although they were not sufficient to be deemed serious harm in terms of the Act.

The company were convicted for failing to provide facilities required under section 6. To meet its duty as an employer, Heavy Metals Ltd should have provided and maintained first-aid facilities for such an accident, and developed procedures for dealing with emergencies.

Spinners Ltd owned and operated a metal turning lathe in their factory. Sharp metal offcuts fell from the machine onto the floor, where they remained uncollected for long periods.

Angela was an employee who had to walk past the machine as she went about her job. One day Angela was distracted while walking past the machine and did not see the pile of metal offcuts. She walked into it and a sharp piece of metal severely cut her Achilles tendon, requiring surgery.

Spinners Ltd were convicted for failing in its duty to provide the safe working environment required by section 6.

2.3 Hazard management responsibilities (sections 7-10)

Sections 7- 10 of the Act set out in more detail the steps an employer must take to manage *significant hazards* in the place of work.

These duties complement and describe a process for meeting the employers' general duties set out in section 6 of the Act.

The process for managing significant hazards is based on the ergonomic principle that the workplace should be modified to suit people, not vice-versa. The steps are:

Identifying hazards — involves recognising things which may cause injury or harm to the health of a person, for instance flammable materials, ignition sources, or unguarded machinery (section 7);

Assessing the hazard — involves evaluating whether the hazard is significant (section 7(1)(c)) and the likelihood and degree of injury or harm occurring to a person if they are exposed to a hazard; and

Controlling the hazard — by taking all practicable steps to eliminate, isolate, or minimise significant hazards (sections 8, 9, 10).

Monitoring any exposure — to a hazard that has been minimised (section 10).

The control of occupational injury and disease hazards should preferably be dealt with by design or redesign, substitution, separation or administration. These controls generally eliminate, isolate, or minimise hazards in a more reliable manner than personal protective equipment.

Controls may reduce the significance of a hazard or the likelihood of it causing harm to employees or others.

Where regulations require specific methods to control the hazard, these must be complied with (see 1.6, How the Act sets more detailed standards).

It is important to regularly review the steps of hazard management, especially if there are changes in the work environment, new technology is introduced, or standards are changed.

Involving employees in hazard management

Employers have a duty to provide reasonable opportunities to employees to participate effectively in ongoing processes for improvement of health and safety in their place of work (section 19B).

This applies in particular to the processes set out in sections 6-13 of the Act.

The Act specifies circumstances where a system is required to be in place to properly canvass the views of employees. Safety and health committees and representatives provide a means for such consultation and co-operation, and their establishment is encouraged.

[Refer to the fact sheet, Employee participation]

The legal responsibility for safety and health decisions at a workplace rests with the employer, but the consultation process should help employers to reach decisions which take into account information and recommendations provided by employees or a workplace health and safety committee or representatives.

Identifying hazards

Section 7 requires employers to have in place effective methods to systematically identify hazards to employees at work. Hazards may be:

- Previously existing;
- New; or
- Potential.

Having identified the hazards, employers must determine which are significant and require further action.

When an accident or serious harm occurs, an employer (and a self-employed person or principal) must notify the Occupational Safety and Health Service in the prescribed form (see 5.1, Recording and acting on accidents and serious harm). The employer must also take all practicable steps to investigate whether it was caused by a **significant hazard**.

What is a "hazard"?

The concept of a **hazard** is pivotal to the working of the Act.

A hazard is any actual or potential cause of **harm**.

It may occur inside or outside of a place of work.

It may be:

- An activity;
- An occurrence;
- An arrangement;
- A phenomenon;
- A circumstance;

- A process;
- An event; or
- A situation.

It includes a situation where a person's behaviour may be an actual or potential cause or source of harm to the person or another.

What is a "significant hazard"?

A **significant hazard** is one which may cause:

- **Serious harm** (an important concept, defined in schedule 1 of the Act, which is reproduced in the Definitions section at the back of this guide). This includes death and many occupational illnesses and injuries that may be sustained in a place of work; or
- **Harm — the severity of which may depend on how often or how long a person is exposed to the hazard** — such as occupational overuse syndrome; or
- **Harm that cannot be detected until a significant time after exposure.** This includes long-latency diseases caused by exposure to hazardous substances — such as asbestosis, neurotoxicity, emphysema, and other diseases of occupation.

Methods of hazard identification

The Act does not specify a particular method of hazard identification, only that the chosen method is effective. It does, however, require the consideration of all accidents or near-miss incidents which lead to, or could have lead to harm — to determine if they were caused by a significant hazard. (If the hazard is significant, all practicable steps must be taken to control it.)

There is a range of hazard identification methods in common use in industry. Frequently it is appropriate to use a combination of approaches.

In all but the smallest of workplaces, it is likely that to be effective the hazard identification process will need to be recorded.

Remember again the section 19B duty for employers to give employees reasonable opportunities to be involved in hazard management processes.

Four commonly used methods of hazard identification are:

Physical inspections

This is the traditional method of identifying hazards by walking around the place of work with the aid of a checklist.

Task analysis

It may be useful to look at the tasks in each job and observe the actions of employees, while identifying the hazards involved.

Process analysis

This involves following the production or service delivery process from start to finish, and identifying the hazards involved at each stage.

Analysis of accident investigation details

This is mandatory under section 7(2) of the Act. Whenever there is an accident, "near miss", or the incidence of harm, the employer must take all practicable steps to determine the cause and whether it was a significant hazard. This corresponds with the requirement for employers to keep a register of every accident or incident.

Depending on the approach used and other factors, such as the type and size of the workplace, procedures may range from a simple checklist for a specific piece of equipment or substance, to a more open-ended appraisal of a group of related work processes.

Whichever method(s) is used, it may be useful to develop a hazard checklist for the particular place of work or process.

Information from designers or manufacturers, material safety data sheets, product labelling, or other sources of information should all be systematically reviewed as part of the hazard identification process.

Where appropriate, advice should be sought from specialist practitioners or representatives.

In summary, to meet the requirements of section 7 an employer should expect to produce a list of hazards present in each place of work — with significant hazards clearly identified.

Some guidance on the classification of hazards

The definition of "hazard" used in the Act is very broad. At the most basic level of analysis, hazards may be considered as:

- Physical;
- Biological; or
- Mental.

Some hazards are inherent in the work process, such as mechanical hazards, noise, or the toxic properties of substances. Other hazards result from equipment or machine failures and misuse, control or power system failures, chemical spills, or structural failures.

It may be useful to think of work-related hazards in terms of the **agents** and/or the **mechanisms** of harm. This will ensure that a wide range of potential hazards are considered. Table 2, below, summarises categories of the physical agents of harm. Table 3, following, provides an alternative approach by describing categories of the mechanisms of harm. Used together, or separately, the categories provide a starting point for the identification of particular hazards in a place of work.

Table 2: Agency of harm categories

Group 1: Machinery and (mainly) fixed plant	
11 Cutting, slicing, sawing machinery	16 Electrical installation
12 Crushing, pressing, rolling machinery	17 Radiation-based equipment
13 Heating, cooking, baking equipment	18 Filling and bottling/packaging plant
14 Cooling, refrigeration plant and equipment	19 Other plant and equipment
15 Conveyors and lifting plant	
Group 2: Mobile plant and transport	
21 Self-propelled plant	25 Rail transport
22 Semi-portable plant	26 Air transport
23 Other mobile plant	27 Water transport
24 Road transport	29 Other transport
Group 3: Powered equipment, tools and appliances	
31 Workshop and worksite tools and equipment	34 Garden and outdoor powered equipment
32 Kitchen and domestic equipment	35 Pressure-based equipment not elsewhere classified
33 Office and electronic equipment	39 Other powered equipment, tools and appliances
Group 4: Non-powered handtools, appliances and equipment	
41 Handtools, non-powered, edged	44 Furniture and fittings
42 Other handtools	45 Other utensils
43 Fastening, packing and packaging equipment	49 Other non-powered equipment
Group 5: Chemicals and chemical products	
51 Nominated chemicals	53 Chemical products
52 Other basic chemicals	
Group 6: Materials and substances	
61 Non-metallic minerals and substances	63 Other substances
62 Other materials and objects	
Group 7: Environmental agencies	
71 Outdoor environment	73/74 Underground environment
72 Indoor environment	
Group 8: Animal, human and biological agencies	
81 Live four-legged animals	84 Human agencies
82 Other live animals	85 Biological agencies
83 Non-living animals	
Group 9: Other and unspecified agencies	
91 Non-physical agencies	99 Other and unspecified agencies

Table 3: Mechanisms of harm

Group 0: Falls, trips and slips of a person	
01 Falls from a height	03 Stepping, kneeling or sitting on objects
02 Falls on the same level	
Group 1: Hitting objects with a part of the body	
11 Hitting stationary objects	13 Rubbing and chafing
12 Hitting moving objects	
Group 2: Being hit by moving objects	
21 Being hit by falling objects	25 Being trapped by moving machinery
22 Being bitten by an animal	26 Being trapped between stationary and moving objects
23 Being hit by an animal	27 Exposure to mechanical vibration
24 Being hit by a person	28 Being hit by moving objects
Group 3: Sound and pressure	
31 Exposure to single, sudden sound	39 Other variations in pressure
32 Long-term exposure to sounds	
Group 4: Body stressing	
41 Muscular stress while lifting, carrying, or putting down objects	42 Muscular stress while handling objects other than lifting, carrying or putting down
43 Muscular stress with no objects being handled	44 Repetitive movement, low muscle loading
Group 5: Heat, radiation and electricity	
51 Contact with hot objects	55 Exposure to non-ionising radiation
52 Contact with cold objects	56 Exposure to ionising radiation
53 Exposure to environmental heat	57 Contact with electricity
54 Exposure to environmental cold	
Group 6: Chemicals and other substances	
61 Single contact with chemical or substance	63 Insect and spider bites and stings
62 Long-term contact with chemicals or substances	69 Other unspecified contact with chemical or substance
Group 7: Biological factors	
71 Contact with, or exposure to, biological factors	
Group 8: Mental stress	
81 Exposure to mental stress factors	
Group 9: Other and unspecified mechanisms of injury	
91 Slide or cave-in	98 Other and multiple mechanisms of injury
92 Vehicle accident	99 Unspecified mechanisms of injury

Other sources of information on hazard management

Information or ideas on control measures can come from:

- Regulations, approved codes of practice or guidelines (see 1.6, How the Act sets more detailed standards);
- Industry or employer associations;
- Unions;
- OSH;
- Specialist practitioners and consultants;
- Material safety data sheets;
- Manufacturers and suppliers; or
- Other publications or reference databases.

Examples

Carl was the driver of a mobile waste compactor for **Rubbish Ltd**, a national company with a fleet of similar vehicles. His work would regularly take him to the local landfill, where he could meet other company vehicles and their drivers. One day he had parked and unloaded a truck full of compacted rubbish at the landfill, when he got out of his cab and walked to the back of the truck to check that the inside of the compactor was empty. Having seen that it was, he went back to the cab and pressed the control to lower a large swinging door at the back of the compactor.

Meanwhile, **Sid**, in another company vehicle, had stopped nearby. His attention had been turned to the back of Carl's truck and he had walked over to look inside while Carl was walking back to his cab. When Carl pressed the control for the door to swing down, he did not know Sid was there. Sid was struck by the swinging door and died soon after of his injuries.

After the accident was investigated **Rubbish Ltd** made several changes in recognition of the significant hazard that had been highlighted by Sid's death. The speed at which the doors on its trucks closed was reduced from 4 seconds to 20 seconds to give people time to get clear. Warning lights and alarms were installed, and operating procedures were changed so that vehicles could be driven slowly forward while the door was closing.

The company was convicted for failing to meet the general duties of care and for failing to systematically identify hazards under section 7(1) (a).

Dan worked as a scourman in the processing area of **Devine Woolscourers**. Part of his job involved keeping the entrance to a wool cleaning machine free of a build-up of wool around the point where a conveyor belt entered it. While doing this he followed common practice in the plant and climbed onto the top of the machine to clear it.

One day he used a step ladder that had been placed next to the machine and slipped while he was climbing it. While trying to steady one foot against the machine, he pushed his arm inside the opening. Dan lost his right hand and forearm.

Two days earlier, two rollers which guarded the opening of the machine had been removed.

Devine Woolscourers were convicted for failing to meet the general duty and for failing to identify the significant hazards presented by climbing up on the machine and leaving the machine opening unguarded.

Robyn worked at the airport as a freight hand for **Eclipse Airlines**. One day she was coming past a jet which was being loaded on the tarmac, when, amidst a lot of noise and activity, she walked close between a mobile freight lifting platform and another trolley. Unexpectedly, the platform, which had a container on it, began to move. The driver could not see Robyn, and she could not hear the machine move because of the surrounding noise. Her leg was caught and crushed, with injuries which eventually required amputation above the right knee.

The machine was not intended for the conveying of cargo, only lifting. It did not have proper brakes, a horn, warning lights, or a reversing beeper fitted.

Eclipse Airlines were convicted for failing to observe three sections of the Act, including the requirement to systematically identify hazards to employees at work. In court the company conceded that it had no systematic method of hazard identification.

Tom worked as a machine operator for the packaging manufacturers **Moa Pack**.

Because of the danger from the large machinery in constant use at the plant, the company had an active safety policy. It had a formal health and safety consultative committee and a system of checklists which designated staff to inspect and maintain the safety of machinery and other potential hazards.

Tom worked a large rotary die-cutting machine. Part of his job involved sweeping away offcuts from nip rollers at the entrance to the machine. One day he was brushing offcuts away when he slipped and his hands were caught in the rollers, crushing four fingers, which afterwards had to be amputated.

After the accident, Moa Pack were convicted for failing to have effective methods in place to identify hazards in the place of work. The court noted that although the company had a committee in place, its activities had become routine and it had not been effective in this case. It also found that there were no engineering staff with the required expertise in machinery involved, and this limited the committee's ability to systematically identify hazards.

Controlling hazards

When a significant hazard is identified

Where a significant hazard is identified, the Act sets out the steps an employer must take:

1. Where practicable, the significant hazard must be **eliminated** (section 8);
This may involve removing the hazard or hazardous work practice from the workplace. Elimination is the most effective control measure. It should be noted that substitution — replacing a hazard or hazardous work practice with a *less* hazardous one — does not necessarily result in elimination;
2. *If elimination is not practicable*, the significant hazard must be isolated (section 9);
This may involve isolating or separating the hazard or hazardous work practice from people not involved in the work or the general work areas. It could be done by marking off hazardous areas, or installing screens or barriers;
3. *If it is impracticable to eliminate or isolate* the hazard completely, then the employer must **minimise** the likelihood that the hazard will harm employees (section 10). In addition, the employer must, where appropriate:
 - Provide, make available to, and ensure the use of suitable clothing and equipment to protect the employees from any harm arising from the hazard;
 - Monitor employees' exposure to the hazard;

- Seek the consent of employees to monitor their health; and
- With their informed consent, monitor employees' health.

This includes introducing work practices that reduce the risk. It could limit the amount of time a person is exposed to a particular hazard, or involve the use of protective equipment.

Protective clothing and equipment

The clothing and equipment required by section 10 is broadly defined to include much more than personal clothing and equipment, but also such other equipment as guarding or arresting devices, rails, covers, damping, filtration and dust collection systems, shields, screens, etc.

The "all practicable steps" standard requires that the employer should choose the control that most reduces employees' exposure to the hazard.

"Providing" protective clothing and equipment is not enough. It must be "available" to the people who need it, and "used". This will usually mean employers are required to provide protective clothing and equipment which is fit for the purpose, clearly instruct employees to use it, and ensure that they do. "Available" means readily and easily available. Instruction should cover not only when and where to use the equipment, but also how to use it.

The requirement to instruct employees in the use of protective equipment should be read in conjunction with that of section 12, which requires that employers are advised of the hazards they may experience in their work, and the steps needed to overcome them (see 2.4, Information for employees). This allows employees to know "why".

See also 2.5, Supervision and training.

The employee's duty of care (section 19) also contains a specific requirement that employees use the protective clothing and equipment provided to them.

[Refer to the fact sheet, Personal protective clothing and equipment.]

Personal protective equipment should only be used to minimise exposure to hazards as a last resort, and be used only in circumstances where other methods of control are not practicable. There may be times when it is used to increase protection and in addition to other methods.

The factors which determine the appropriateness of using personal protective equipment include:

- The nature of the work or the work process concerned;
- The severity of any potential injury or disease;
- The state of knowledge about the injury or disease related to the work or process;
- Information available to employers about methods of preventing injury or disease associated with a particular hazard or risk;
- The availability and suitability of methods to prevent, remove or mitigate causes of injuries or diseases associated with a hazard or risk; and
- Whether the costs of preventing, removing or mitigating that injury or disease are prohibitive in the circumstances. This may include:
 - Where it is not technically feasible to achieve adequate control of the hazard by other measures. In these cases, the hazard should be reduced as far as practicable by other measures and then, in addition, suitable personal protective equipment should be used to secure adequate control;

- Where a new or revised hazard assessment indicates that personal protective equipment is necessary to safeguard safety and health until such time as adequate control is achieved by other methods, for example, where urgent action is required because of plant failure; and
- During routine maintenance operations. Although exposure to hazards occurs regularly during such work, the infrequency and small number of people involved may make other control measures impracticable.

The employer must provide and, where necessary replace, all personal protective clothing and equipment, free of charge to the employee. Ownership of the personal protective clothing rests with the employer.

Employers should consider the individual needs of each employee. For example, employees with disabilities may require additional protective clothing and equipment for use at work.

Another example is respirators. When a respirator is placed over a worker's nose and mouth, it must form a good seal where it fits against the skin, so that all fumes in the air are drawn in through the filters and not through a "leaky" seal.

In workplaces where workers require respiratory protection, employers may need to provide different types of respirators to ensure that each employee is supplied with suitable fitting equipment which does not "leak".

Equally, facial hair may prevent a proper seal being formed and it may result in a worker being exposed to hazardous substances. The employee in this instance would be required to assist by remaining clean shaven (to the extent necessary for the proper fit of the respirator).

Monitoring employees' exposure to hazards

Where elimination or isolation are impracticable and a significant hazard is minimised, there is a requirement to monitor employees' exposure to the hazard (section 10(2)).

Section 10 does not require monitoring of hazards which have been isolated, but this is worth considering as part of a process of regular revision.

Monitoring for exposure does not reduce the requirement for the employer to first take all practicable steps to minimise the likelihood that the hazard will be a source of harm to employees.

The focus of section 10's requirements is on the monitoring of individual employees' exposure to any hazard. There may be monitoring of general workplace levels of exposure, but monitoring should primarily be targeted at the degree of exposure individual employees are likely to experience.

Monitoring employees' health

In some industries, for example in a lead process, employers are expected to monitor the health of all employees at risk. The purpose of this monitoring is to identify any health effects at an early stage and to provide the necessary medical care.

It is also a way of checking the effectiveness of measures taken to reduce the exposure to hazards. The sudden appearance of health problems in employees in a work area may indicate a breakdown in safety precautions, procedures or supervision.

The monitoring of employees' health should be closely related to the monitoring of the conditions at each workplace.

Consent. The Act requires employers to take "all practicable steps" to obtain the employees' consent to the monitoring of their health in relation to the hazard. This means an employer needs to be proactive in seeking approval, and take responsibility for informing and encouraging employees about health monitoring where appropriate. However, consent must be granted voluntarily and without any form of coercion or duress on the part of the employer seeking consent.

Taking "all practicable steps" to control hazards

The standard required of employers in the control of significant hazards is "all practicable steps". This concept is outlined in section 1.5 of this guide.

[Refer also to the fact sheet, All practicable steps]

A procedure for the control of significant hazards

Hazards in a workplace are controlled by a combination of "local controls" specific to a hazard, and "management controls" for ensuring that these are implemented and remain active.

The implementation of local controls to fix a specific hazard, e.g. chains to prevent gas cylinders toppling over, or hearing protection to reduce exposure to noise, must be supplemented by management activities to ensure they are being implemented, that they are adequate, and that they remain effective.

The mechanism for the control of a hazard may not necessarily be a physical one, but may be a rule or practice designed to reduce the risk from the hazard.

It is necessary to ensure that once hazard controls are put in place they stay in place and are used, and it is also necessary to provide a feedback mechanism for ensuring whether or not the controls are adequate and responsibilities are understood by all.

Management control activities that are common to all hazards include:

- Employee participation in the development of health and safety procedures (sections 19A-I).
- An information system to ensure employees are informed about and understand the risks from hazards they work with (section 12).
- An accident reporting and investigation system (section 7).
- Regular surveys of the workplace (sections 6 and 7), supplemented by the use of hazard notices where applicable (section 46A).
- Responsibilities being assigned to ensure hazard controls are implemented and remain effective (section 7).
- An audit system for checking that the controls for specific hazards are in place and working (sections 6 and 7).
- An adequate training programme and adequate supervision for all staff (section 13).
- Implementing emergency procedures, perhaps in conjunction with local emergency services, to limit the consequences of an emergency (sections 6 and 12).

Responsibilities are assigned to ensure that the existence of each hazard is made known to all those exposed to it, and that people affected are instructed in the use of the correct procedures when exposed to the hazard.

Cost. There may be a variety of control methods for different hazards. The degree of control agreed upon will involve a consideration of the cost, the severity of the consequences, and the probability of the injury/illness/damage.

To determine the most appropriate of the proposed options for the identified hazard, the estimated cost of the corrective measures is weighed against the degree that the risk is reduced. Again, the test of "all practicable steps" is critical.

Changes. There needs to be a system in place that, before processes are changed or new processes/activities undertaken, will ensure potential hazards resulting from these changes are identified, assessed and controlled if necessary.

Outline of a process for hazard control

Hazards that are assessed as "significant" present such a degree of risk that the Act requires a more formal approach in dealing with them.

The primary aim is the elimination of significant hazards if practicable.

Sections 8, 9 and 10 of the Act contain specific requirements for the control of significant hazards.

Once the significant hazards in the workplace have been identified, it is necessary to decide which of the three steps of elimination, isolation or minimisation is to be used to control each hazard.

Deciding on control options

For each of the identified significant hazards the following questions must be asked in order:

- Can the hazard be eliminated?

If so, list the steps to achieve this.

If the hazard cannot be eliminated, why not?

TEST YOUR REASONS FOR NOT ELIMINATING IT AGAINST THE "ALL PRACTICABLE STEPS" REQUIREMENTS.

OR, IF NOT, THEN:

- Can the hazard be isolated from the employees?

If so, what steps are needed or, if not, then why not?

TEST YOUR REASONS FOR NOT ISOLATING IT AGAINST THE "ALL PRACTICABLE STEPS" REQUIREMENTS.

OR, IF NOT, THEN:

- What will be done to minimise the likelihood of harm from the hazard?
- What equipment and clothing are needed to protect employees from the harm?
- **How will employees' exposure to the hazard, and their health in relation to the exposure be monitored?**

List the answers and then:

TEST YOUR STEPS FOR MINIMISING THE LIKELIHOOD THAT THE HAZARD WILL CAUSE HARM AGAINST THE "ALL PRACTICABLE STEPS" REQUIREMENTS.

The hierarchy of steps above ensures that providing employees with protective equipment to guard against the hazard is not done without first considering and evaluating the other more effective options.

Constantly reviewing control measures is important to ensure continuing prevention or control of exposure to hazards or hazardous work practices.

Controlling hazards not determined to be significant

Sections 8-10 do not impose a hierarchy of controls for hazards other than those determined to be significant. However, employers are still required to take all practicable steps to control such hazards under the general duties of section 6, and the approach of sections 8-10 may be applicable.

Examples:

Arthur had a long employment history in the business of wholesaling spraypaints to the automotive industry. Over the years he gained considerable knowledge and experience in mixing and supplying paints. He also developed health problems relating to his exposure to the solvents and other chemicals associated with the work.

Eventually, and to help reduce exposure to the chemicals causing his health problems, Arthur moved from the company he had been with to a sales representative role with another supplier, **Shiny Paints**. After a period in the new job, his experience and abilities mixing paints was needed in their warehouse, and, despite his employer's knowledge of Arthur's health problems, he was again exposed to the solvents and chemicals that had caused them.

A new employer bought the business and was also advised of Arthur's health problems. By this time Arthur was experiencing headaches, breathing problems and mood swings as a result of inadequate ventilation, excessive use of solvents as cleaning agents, and inadequate personal clothing and equipment in the workplace.

A replacement employee was hired to take over Arthur's paint mixing duties, but this did not work out and Arthur was recalled to the work.

An OSH inspector had issued an improvement notice under the Act, but Shiny Paints ignored its requirements.

Finally, after recurring asthma and chest infections Arthur's doctor declared him medically unfit for work.

Shiny Paints were convicted for failing to meet the general duties under the Act, and for failing to monitor an employee's exposure to a significant hazard (section 10 (2)(c)).

Elaine worked part-time doing data entry work with garden products company **Florina Ltd**.

After a few months she began to develop asthma, and when the condition worsened Elaine visited her doctor. The doctor suspected that Elaine's work environment contained fungal and bacterial agents from potting mixture dust in the atmosphere. He provided a note about his concern, and Elaine raised the issue on several occasions, which the company ignored. After a while Elaine was laid off.

Florina Ltd were subsequently convicted for failing to monitor an employee's exposure to a hazard (under section 10(2)(c)) and also the employee's health in relation to the hazard (section 10 (2)(e)).

In the case of monitoring the employee's exposure to fungal or bacterial hazards, the monitoring could have been completed quickly and easily at minimal cost.

2.4 Information for employees and health and safety representatives

The Act requires employers to provide employees with a range of information on the **hazards** they may encounter or create in their work (section 12).

More specifically, it also requires employers to make available to employees the **results of workplace health and safety monitoring** (section 11).

Information on hazards

Before an employee begins work of any kind their employer must inform them of:

- Emergency procedures (developed under section 6(e));
- Hazards the employee may be exposed to while at work;
- Hazards the employee may create while at work which could harm others;
- How to minimise the likelihood of these hazards becoming a source of harm to others; and
- The location of safety equipment.

This information requirement applies to the employee:

- Doing work of any kind;
- Using plant of any kind; or
- Dealing with a substance of any kind,

in that "place of work". ("Place of work" is further defined at 1.4, Coverage is broad.)

The obligation to provide information relates to all existing or potential hazards, not only "significant hazards". The requirement is not qualified by the "all practicable steps" standard, which makes it particularly stringent.

The information must be "given" by the employer, and remain "readily accessible" to the employees.

Section 12 also stresses the need for employees to be able to understand the information they are given. It requires that the information must be presented in such a form and manner that the employee is reasonably likely to understand it. This may lead to technical information — such as a material safety data sheet, or operating manuals — being interpreted or abridged to meet the needs of employees in a particular place of work.

Where employees are not fluent in the English language, or are unable to read English, employers may need to find an alternative method of providing information. This could apply to employees who speak English as a second language, or to workers who for physical, intellectual, cultural or other reasons are unable to read. Methods which may be used include:

- Organising information to be provided for people in groups with the same language;
- Using interpreters;
- Audio-visual aids, pictograms or other graphics; or
- Using written materials in the appropriate language.

Checks should be made to ensure all information is understood.

Information for health and safety representatives

Where health and safety representatives are appointed in a place of work, section 12(2) requires that the employer ensure that all representatives have ready access to sufficient information about health and safety systems and issues in the place of work to enable them to perform their functions effectively.

Information on health monitoring

An employer is required by section 11 to inform employees of the results of any health and safety monitoring undertaken to meet the hazard management requirements of the Act (i.e. under section 10).

This relates both to:

- Individual health monitoring; and
- Workplace exposure monitoring (in relation to an individual's place of work).

Where an employee's health or their place of work is monitored — as an individual or one of a group of individuals — the employer has a duty to provide the results of any monitoring to them. The information need not be requested.

Other employees in a place of work where general monitoring is carried out may request the results of the monitoring. Where this happens, the employer should make available the results, and in doing so, must protect the privacy of individual employees.

The duty to provide information may overlap with that to provide training and supervision described below.

Examples:

Len operated a small timber moulding manufacturing business, **Timbercraft Ltd**. An important piece of machinery for the business was a timber profile cutter, which kept a young employee, **Rex** busy operating the machine much of the time.

Timber milling machinery presents particular hazards to employees, and it is a priority area for health and safety inspectors visiting workplaces. This meant that one day Len's premises were inspected by a health and safety inspector, **Errol**, who determined the timber profile cutter to be unsafe and issued a prohibition notice against its use. The notice required that access to the timber cutting heads of the machine be guarded, along with the machine's transmission and a flywheel attached to it. Errol said the machine could not be used until these things had been fixed and a clearance given.

After the visit, Len, placed a guard over the flywheel only, and then — without telling Rex about the danger of the other hazards that he had been advised of — told Rex to start using the machine again.

After not having heard anything, Errol visited Timbercraft again and found Rex using the machine, unaware of the hazards it presented to him. Timbercraft were prosecuted and pleaded guilty to three charges, including the failure to provide information to an employee under section 12(b).

Mana, **Warwick** and **Colin** were employed on a casual basis by **Direct Shipping Ltd** to load and unload ships' cargo. One day they were called in to load a cargo of frozen goods into a refrigerated hold. The produce was lowered into the ship's hold on pallets by crane, and then moved by forklift to where it was to be stacked. The company's supervisor, **Stan** supplied two LPG-powered forklifts for use in the hold, but no instructions or information were given other than where to put the cargo. None of the men had used LPG lift-trucks in a refrigerated hold before.

When they began their shift, they would turn off the forklifts between loads, but after a while they stopped doing this and kept the engines running.

They stopped for "smoko", and on the way back they noticed that the hatch over the hold had been closed. They kept working, and after another hour Warwick and Mana both had splitting headaches. Warwick said he was so unwell he had to stop. He climbed up a ladder and out of the hold, and by the time he got to the top he felt dizzy and exhausted, and the headache was intense.

Mana and Colin stayed on below to stow two last loads. They both continued to feel worse, and after they had finished Mana struggled to climb out of the hold. Colin was found unconscious at the bottom of the ladder. All three men were suffering the effects of carbon monoxide poisoning and were hospitalised.

Before the shift, Stan, who had previously seen an OSH hazard alert, briefly mentioned to Colin that there could be a danger of exhaust fumes, but only to him, and with no reference to the specific danger of carbon monoxide poisoning — how it occurs or what could be done to avoid it, or in the event of an emergency.

Direct Shipping were convicted under section 12 for failing to provide employees with information about a hazard arising out of their work, and what to do in the event of an emergency. The company was also convicted for failing to meet the general duty of section 6.

2.5 Supervision and training

Employers must ensure employees are either **sufficiently experienced** to do their work safely or are **supervised** by an experienced person (section 13 (a)).

Also, the employee must be adequately trained in the safe use of all plant, objects, substances, protective clothing and equipment that they are or may be required to use or handle (section 13 (b)).

The purpose of this section is the avoidance of harm to employees and others by ensuring that employees have the **knowledge and experience** that they need to safely:

- Carry out their work;
- Use plant; or
- Deal with substances;

in their place of work.

The provision applies to people receiving on-the-job training or work experience and deemed “employees” by the Act, but it doesn’t apply in relation to volunteers doing regular work.

If employees do not have sufficient knowledge or experience themselves, then they must be **supervised** by someone who has.

Towards ensuring that people do have adequate knowledge and experience, section 13(b) further requires that employees are **adequately trained** in the safe use of all plant, objects, substances, and protective clothing and equipment that they may be required to use or handle.

The standard to be met by the employer is taking "all practicable steps" to ensure these requirements are met (see 1.5, All practicable steps).

Examples:

Jake began a new job in a sawmill. He had been hired by **Bart**, the manager of **Woodcutters Ltd**, who trained and set him up in his first job — feeding timber into a band re-saw, a machine for cutting up large planks of timber. Despite the fact that Jake had never worked in a sawmill before, the training he received was limited to Bart turning on the machine, feeding a few pieces of timber through the blade, and then watching Jake put a few pieces of timber through. To check that training was complete, Bart asked Jake if everything was "OK". Jake said it was and began work full-time on the band re-saw.

Two days later, Jake was feeding timber in along the rollers at the entrance to the saw when his arm became caught in the rollers and drawn into the machine. It was subsequently amputated.

Jake had not been trained how to use an emergency stop device that was fitted to the machine and with which he would have saved his arm.

Woodcutters Ltd were convicted on two charges under section 13 for failing to provide adequate training or supervision.

Keith had been employed for some months as a process worker at a small foundry operated by **Bold as Brass Ltd**. One day his supervisor, **Ross**, instructed him to stop working in the area that he had been, and to stand in and operate a hot-forging press while another person was away.

Keith had used the machine only once a month or two before, and then only for about 15 minutes and under supervision. At the time he had been shown how to place hot brass ingots in the die and to press the foot pedal to activate the press and stamp out the product. He was not an experienced worker and his understanding of the machine had not improved by the time he used it a second time — he still did not fully understand how it worked, or know how to turn it on or off.

After Keith had been working the machine a short time, an ingot jammed in it. He didn't know what to do, but he didn't want to ask Ross, because the last time he had asked a question Ross said "If you don't know what to do then you might as well go home". Another worker told him to take the tool apart with a spanner, and he was in the process of doing this when his foot slipped on to the activating pedal, causing the machine to cycle and partially amputating three of Keith's fingers

Bold as Brass Ltd were convicted under section 13 for failing to adequately train or supervise an employee.

Wilma was employed as a process worker at **Wag Pet Foods**. Her job involved mixing quantities of raw materials in large cooking cylinders and cooking them ready for canning or packaging.

After each batch had been cooked the cylinder would need to be cleaned to a high standard. The method used at the factory was to turn on the cold water supply to the cooking cylinder and, while the water was running, climb to a hatch at the top of the cylinder and add a 25 kg bag of caustic soda in powder form. The cylinder would then be heated and steam applied, before being emptied and cleaned. Wilma had followed this procedure numerous times.

One day Wilma followed the procedure but added only half the bag. She then went for a tea break while the cylinder heated. When she got back to the cylinder she climbed up with the remaining contents of the bag of caustic, opened the hatch, and added it. The effect of adding the caustic to the heated water was a violent chemical reaction, which blew back on Wilma, causing severe burns to two-thirds of her body and causing her to lose one eye completely, and almost all of the sight from the other.

Wag Pet Foods were convicted under section 13 for failing to train and supervise an employee, and for failing to have in place systematic methods for identifying hazards.

Knowledge and experience

The focus of section 13 is on the ability of the individual employee to complete the task safely at any given time. This is consistent with the Act's performance-based approach, where the employer may choose how the result is best achieved. In general, employers should ensure that employees do not undertake any work unsupervised unless they are satisfied that the employee has the necessary knowledge and experience to perform it safely in that place of work. In the case of younger or inexperienced workers, it may not be enough for an employer to simply ask the employee if they are competent and receive a "yes" in answer. Where an employer is unfamiliar with an employee's competency level or an employee is unfamiliar with the work, plant, substances, or the setting where the work is being carried out, there may be an onus on the employer to have the employee demonstrate their competency.

Similarly, the fact that an employee holds a formal qualification, or experience at another place of work may not be enough — further training or supervision may be required.

Supervision

Supervision is only required where an employee or group of employees does not have appropriate knowledge or experience. The degree of supervision required is a matter to be decided in each case. Depending on the circumstances, supervision may be direct, or as a group; immediate, or remote; or it may relate only to particular aspects of the work.

Providing supervision may include a requirement to control "skylarking" in some cases where an employer is aware of behaviour that is likely to cause harm to employees or others. This requirement should be read in conjunction with that of section 15.

Supervision may also include the provision, enforcement and maintenance of safety procedures, such as a lock-out system.

Training

In addition to employees having sufficient knowledge and experience, the Act requires that employees are "adequately trained" so that they can safely perform any particular work or task.

Section 13's requirement applies equally to **all categories of employee**: part-time, full-time, permanent, temporary, or casual.

Case law suggests that, while it is useful that a **formal record of training and skills and competencies** is kept, it is not essential. Instead, as stated above, the emphasis is on the ability of the individual to perform the task safely at the time.

The level of training required is "**adequate**", not exemplary. The emphasis of the section is on the safe use of all:

- Plant;
- Objects;
- Substances; and
- Protective clothing and equipment

that employees are, or *may* be, required to use.

The duty of employers to train employees needs to be read in conjunction with employee's duties to follow instruction and not to endanger themselves or others. This means, for example, that an employer is not required to train an employee in the use of equipment or substances where the employee has been instructed not to carry out that activity. Such a situation is more likely to be a matter of the employer exercising adequate supervision.

Section 13(b) is, on the other hand, clear on the need to train in the use of equipment or substances that employees may be reasonably likely to need to use.

Induction training

Induction training is essential for new employees, and some training will need to be repeated with every significant change of an employee's duties or work environment. Induction, or basic "on-the-job" training should include:

- How to carry out the job in a safe and healthy manner;
- Information on hazards and hazardous work practices (section 12);
- Where applicable, details of any isolation or "tag-out" procedures;
- Reporting of accidents or incidents (sections 7 and 25);
- Selection, use, fitting, storage, and maintenance of protective clothing and equipment (section 10);
- Where to obtain occupational safety and health information; and
- Emergency procedures.

The requirement to provide induction training should be read in conjunction with the requirements to provide information on hazards and on emergency procedures (section 12).

Supervisors or managers

The position of employees as managers or supervisors could also affect the nature of the training provided. An employee may be responsible for supervising others, or the management, or control, of some parts of the work process. This level of responsibility would require more comprehensive training in the administration of safety and health and the organisation of systems of work so that employees are not exposed to hazards.

Examples:

*Tane was an experienced mill hand employed at a laminated veneer board mill operated by **Optima Wood Products Ltd**.*

At the end of one working day, Tane was told to report to an area of the mill where he did not normally work to help out. For the last half hour before the end of the shift, he worked at a cutting table under limited supervision.

The next day he reported for work at the cutting table at the start of his shift. Five minutes later he mistakenly stepped into a pit beside the machine, lost his balance and fell against a revolving shaft, and was injured. The pit had previously been covered by a board, but it had been removed at some time before he started work.

Optima was convicted for failure to provide adequate training under section 13(b), and for failing to meet the general duties.

***Libby** worked as a secretary for a group of consultants at the accountancy firm **Costa and Plenty**. Her career began as an office junior and, after a while she was promoted to a position as a secretary.*

Libby's new job meant she had to type for long periods, beyond her level of competency as a non-touch typist. After about a year she began to notice early symptoms of OOS. She had been given no training in OOS prevention or practical help to re-organise her workstation, or adjust her systems of work. After a further period, and attempts to reorganise her own workstation, Libby's health deteriorated and she began to lose time off work with OOS. About 18 months after the first appearance of symptoms, and subsequent physiotherapy, reduced working hours, attempts at rehabilitation, etc. the company medically retired her from the position.

Costa and Plenty were convicted for failing to meet the general duties and under section 13(b) for failing to adequately train an employee in the safe use of a visual display unit.

2.6 Employee participation

Part 2A of the Act is based on the principles that:

- All persons with relevant knowledge and expertise can help make the place of work healthy and safe; and
- When making decisions that affect employees and their work, an employer requires information from employees who face the health and safety issues in practice.

In recognition of this, the Act creates a duty for employers to provide reasonable opportunities to employees to participate effectively in ongoing processes for the improvement of health and safety in their place of work (section 19B). This applies in particular to the hazard management, information, training and supervision processes set out in sections 6-13 of the Act.

The Act specifies circumstances where a system is required to be in place to allow the contributions of employees. Safety and health committees and representatives provide a means for such consultation and co-operation, and their establishment is encouraged.

The duty to involve employees is also supported by a new part 2A and schedule 1A of the Act, which contain default provisions for where there is not agreement on a system of employee participation.

The legal responsibility for safety and health decisions at a workplace rests with the employer. However, employee participation will help employers to reach decisions that take into account information from and the recommendations of the people who are often closest to and most familiar with workplace hazards — and most likely to be harmed by them.

The section 19B duty

What is meant by “reasonable opportunities”

The Act defines what is “reasonable opportunities” for employee participation as those that are reasonable in the circumstances. Regard must be had to relevant matters concerning the place of work, and how work is organised, such as:

- The number of employees that an employer has;
- The number of different places of work run by the employer, and the distance between them;
- The likely potential sources or cause of harm in the workplace;
- The nature of the work and the way that it is arranged;
- The nature of the employment arrangement, including the extent and regularity of employment for seasonal or temporary employees;

Regard must also be had to:

- The willingness of employees and unions to develop an employee participation system; and
- The overriding duty to act in good faith.

(section 19B(5))

When a formal employee participation system must be developed

If an employer has **fewer than 30 employees**, and one or more of those employees requires the development of an employee participation system, then a system must be developed.

If an employer has **more than 30 employees** (whether or not in a single location), a system of employee participation must be developed.

Where an employee participation system is required, it must be developed with the involvement of any employees who wish to be involved, and unions representing them (section 19C(2)).

The parties must co-operate in good faith “to seek to develop, agree, implement and maintain” an employee participation system.

The duty applies in relation to all employees, but not to volunteer workers, people receiving on the job training or work experience, or loaned employees (deemed “employees” under sections 3C-3F). It does not apply with respect to the armed forces.

It should also be noted that, for the purposes of determining the number of employees in terms of section 19C, and the training entitlements of health and safety representatives (see below), only employees who have worked 180 hours or more over the previous 12-month period are counted as “employees” (section 19I).

Agreeing on a system of employee participation

There is an obligation for all parties to act in good faith in reaching agreement on a system of employee participation. The agreed system must encourage co-operation between employee and employer representatives on issues — with particular emphasis on systems for identifying and managing hazards. Consideration will also need to be given to the means that employers have in place for providing information to employees and health and safety representatives about health and safety issues.

Every agreed system must contain a process for its review.

Elements of a system of employee participation

An employee participation system may include whatever the parties agree on, although it needs to give effect to the essential section 19B duty, in that it gives reasonable opportunities for the employees to participate effectively in ongoing processes for the improvement of health and safety. In addition, the Act gives some examples of matters that could be included. These are:

- Electing health and safety representatives, and deciding whether they should act individually or as part of a health and safety committee; and
- Developing processes for ensuring regular and co-operative interaction between the representatives of employer and employees on health and safety issues.

A practical part of the system may be about employees’ role in **hazard identification**.

A system developed by an employer with numerous or diverse workplaces, may allow for more than one health and safety representative or committee. Each health and safety representative or committee may represent a particular type of work, or place of work of the employer, and the Act does not set a minimum or maximum number of either.

Where a system includes the appointment of **health and safety representatives**, it may increase or decrease the number of days' paid leave that an employer must allow the representative to train for their role.

Maintaining an existing system

The amending legislation which introduced employment participation requirements also allows the retention of existing systems — with agreement.

Where an employer had an employee participation system in place at 5 May 2003, and the employer, employees and their unions agree to keep it, then it may continue in use.

However, the system will need to contain a process for review that has been agreed to by the parties.

Where there isn't agreement

The Act sets out default provisions if the employer is required to seek to develop an employee participation system, and agreement cannot be reached within 6 months of the requirement taking effect (as set out in section 19C). These provisions are set out in part 3 of Schedule 1A of the Act.

Where there are less than 30 employees

If one or more employees, or a union representing them, requires the development of a system and it is not agreed on and implemented within six months of the request, then the employees (together with their union(s)) must elect at least one health and safety representative. The representatives will be elected to carry out functions defined by the Act. The process of election is also defined by the Act.

Instead of holding an election themselves, the employees, with their union, may in turn require the employer to hold an election. The election must occur within 2 months of the employer being notified of the employees' request. Requirements for the election of health and safety representatives are the same as for employers with more than 30 employees. See, Employee health and safety representatives, below.

Where there are more than 30 employees

An employer of more than 30 employees is required to develop a system (section 19C(1)(b)). Where the employer employed more than 30 people from 5 May 2003, and agreement on the nature of the system is not reached by 5 November 2003 the employees are required to hold an election for health and safety representatives. The representatives are to carry out the mandatory functions. Alternatively, the election may be for up to 5 representatives to function as employee members of a health and safety committee. The process of election is also defined by the Act.

Instead of holding an election themselves, the employees, with their union, may in turn require the employer to hold an election. The election must occur within 2 months of the employer being notified of the employees' request. See, Employee health and safety representatives, below.

The requirement also applies six months from any given time when an employer first employs 30 employees.

Electing representatives where a system has not been agreed to

Where an election for a health and safety representative is required, the Act describes who is eligible to be a candidate and how the election is to be conducted (clause 7 schedule 1A).

To be eligible, candidates must:

- Work sufficiently regularly and for sufficient duration to be able to carry out their functions effectively; and
- Be willing to take on the position.

The election must provide all employees in the particular type or place of work, or other grouping (under section 19C(5)) with a reasonable opportunity to vote.

An election is not required for any position where there is only one candidate, or there is no suitable candidate. Where there is no suitable candidate, the position remains unfilled.

Where a vacancy arises, the employees and their union(s), are required to hold an election to replace the representative. As discussed above, the employees can, in turn, require the employer to hold the election instead (clause 5, schedule 1A).

Employee health and safety representatives

Functions of health and safety representatives

Where an agreed employee participation system allows for the appointment of health and safety representatives, the Act suggests the following examples of functions that a representative may have:

- To foster positive health and safety management practices in the place of work;
- To identify and bring to the employer's attention hazards in the place of work and discuss with the employer ways that the hazards may be dealt with;
- To consult with inspectors on health and safety issues;
- To promote the interests of employees in a health and safety context generally and in particular those employees who have been harmed at work, including in relation to arrangements for rehabilitation and return to work; and
- To carry out any other functions conferred by the particular system of employee participation, a code of practice, or by the employer (with the agreement of the representative or a union representing them).

These functions are set out in part 2 of schedule 1A of the Act. They are mandatory where there has not been agreement on the employee participation system and the Act's default provisions have been invoked to require the election of employee representatives. The election of candidates in these circumstances is described above.

Training and information for health and safety representatives

The Act encourages the training of representatives to better carry out their role. The requirement for information provision is described at 2.4, Information for employees and health and safety representatives.

The training may be "approved" or otherwise.

Representatives elected under the default provisions are eligible for up to two days' paid leave each year to attend training that has been approved by the Minister of Labour by notice in the *Gazette* (sections 19E and 19F). This entitlement may be increased or reduced under the terms of an agreed system of employee participation, but if there is not specific reference to the amount of training available then the requirement of two days' leave under section 19E will apply, subject to maxima specified in section 19F.

A process of applying for and taking leave to complete approved courses — which is consistent with leave for employee delegates under the Employment Relations Act — is set out sections 19E and 19F.

If a representative has completed an approved training course, then he or she may issue hazard notices (see below).

Hazard notices

A trained health and safety representative may issue a hazard notice under section 46A of the Act.

A representative is considered “trained” in terms of the Act if they have either:

- Achieved a level of competency specified by the Minister of Labour in a *Gazette* notice; or
- Completed an approved course (see above).

A hazard notice is intended as a communication tool between a health and safety representative and the employer. Its purpose is to describe a hazard in a place of work that has been identified by the representative, but where there is not agreement on how the hazard should be managed.

A hazard notice contains no penalty and there is no requirement to forward a copy to OSH or any other agency. However, if it refers to a breach of the Act, which continues, it may form prior warning for an infringement notice.

Before the hazard notice is issued by a trained health and safety representative:

- The representative must believe on reasonable grounds that a hazard exists; and
- The employer and the trained health and safety representative have discussed the issue in good faith; and
- The parties cannot agree on how to deal with the hazard, or a timeframe within which to deal with it.

To be valid, a hazard notice must:

- Describe a hazard in a place of work; and
- Be in the prescribed form.

It may or may not set out suggested steps to deal with the hazard.

Representatives and the right to refuse dangerous work

A trained health and safety representative may validate an employee exercising the right to refuse unsafe work under section 28A. This is achieved by their advising the employee that the work is likely to cause serious harm (s 28A (3)). The representative’s decision must be formed on reasonable grounds. See 3.2, The employee’s general duty.

Dispute resolution with respect to employee participation

Employers who breach the employee participation provisions are potentially committing an offence under the Act.

Section 50 (1) makes it an offence for an employer to breach the section 19B duty to provide “reasonable opportunities” to participate, or not to hold an election for a health and safety representative when required to under clause 6 of schedule 1A.

All other breaches or disputes with respect to the Act’s employee participation requirements are considered employment relations matters and disputes are resolved under the processes of the Employment Relations Act 2000.

There is provision under that Act for the parties to apply to the Employment Relations Authority for a compliance order in relation to the development or maintenance of an employee participation, hazard notices, or an employee's right to refuse work that is likely to cause serious harm. A health and safety inspector may apply for a compliance order in relation to the implementation of a system of employee participation in any workplace.

[Refer to the fact sheets, What is employee participation? Employee participation, and Health and safety representatives]

2.7 Volunteer workers

General duty

The Act recognises that volunteers doing work activities for other persons should have their health and safety protected because their wellbeing and work are as important as the wellbeing and work of employees. All people, regardless of whether or not they are employers, who use volunteers have a duty to take all practicable steps to ensure the health and safety of the volunteers while they are carrying out the work activity. In particular, they should take hazards into account when planning the work activity (section 3D). The duty is not enforceable.

Enforceable duties

Where an employer or self-employed person engages a volunteer worker on a regular and ongoing basis, the volunteer may be deemed an employee in terms of the Act and the employer or self-employed person their "employer". Where this is the case, sections 6-12, 19 and part IV apply as if the volunteer were an employee (section 3C). The duties are enforceable against both the employer and the volunteer.

There are exceptions for the following voluntary work (section 3C (3)):

- Participation in a fundraising activity;
- Assistance with sports or recreation for a sports club, recreation club or educational institution;
- Assistance with an educational institution outside the premises of the institution; or
- Providing care for another person in the volunteer's home.

[Refer to the fact sheet, Volunteers]

2.8 People who are not employees

Employers also have a duty to people who are not their employees. An employer must take all practicable steps to ensure that the actions or inaction of an employee while at work does not harm any other person (section 15).

The non-employees covered under section 15 include groups such as customers, hospital patients, contractors or other visitors to the workplace, an employee's family, passers-by and any other person who may be affected by the work activity.

It includes a duty to stop employees harming others through skylarking or other actions or inaction by an employee where it is reasonably foreseeable that harm will be caused to another.

As an example, work involving hazardous substances has the potential to harm members of an employee's family. Safety and health policies and procedures should ensure that employees do not transport substances, such as contaminated dust or fibres, to their homes or other places on work clothes, in vehicles, etc.

Where hazardous substances, such as paint stripper, solvents or rust removers are stored in a work vehicle which may be at or near the family home, procedures should ensure that children do not have access to the substances. The system of work should include the provision of information on which substances may be harmful, proper storage in the vehicle to prevent spillage, locks to ensure that substances are secure, training on action to be taken in an emergency, and regular checks that safe work practices are followed.

The same applies to plant, such as power tools or hazardous substances, which are taken to the family home at the end of each working day.

The case law suggests employers must go to some lengths to meet the "all practicable steps" requirement. This means that it is not sufficient to have a rule or procedure — the employer must enforce it. Where non-compliance could have serious consequences, there may be a need for back-up procedures.

Section 15's duty should be read in conjunction with section 19's duty of employees not to cause harm to themselves or others.

The section 15 duty *does not* apply to employers who engage volunteers.

It *does* apply to the activities of those deemed employees because they are undertaking on-the-job training or are loaned employees.

Example:

Rolf operated a business known as **Flush and Brush Ltd**. It specialised in sandblasting houses and other buildings before painting them, and usually involved Rolf or his employees doing the work as a complete deal. One day he was approached by **Jim** about a quote for sandblasting and painting his family home. After some discussion Rolf and Jim came to an arrangement where, instead of the complete package, Flush and Brush would only sandblast the house in preparation for Jim to paint it himself. The company was paid on an hourly rate, and it was agreed that Jim would clean up the residual sand after the sandblasting of the older home's exterior.

Rolf then sent his employee, **Ned** along with the equipment to do the job, and the house was sandblasted. Ned then left the residual sand for Jim to clean up, and that was the last contact the company had with Jim.

Because it was an older home covered with lead-based paint, the blasting sand left lying around the house was contaminated with lead. Mention of this hazard had been made by Rolf to Jim. However, the sand wasn't cleaned up after Ned left.

Instead it was left lying around and Jim's young children played in it. They quickly began to suffer the effects of lead poisoning, and had to be hospitalised. Jim's wife, Trish, was also treated for abnormally high blood-lead levels.

Flush and Brush Limited were convicted for failing to ensure that the action or inaction of an employee does not harm any other person, and for failing in their duty as a "person who controls a place of work". The court found that, although the company was not contractually obligated to clean up the contaminated residue, it is not possible to contract out of the duty set out in the Act. The company was expected to take all practicable steps to ensure that the hazard it had created was in fact removed. This would have involved at the very least a follow-up visit to the house.

Part 3: Duties of employees

This part describes how the Act applies to employees, in terms of duties and rights. Employees also have duties in relation to:

- Accidents (see part V of this guide); and
- Assisting health and safety inspectors and/or departmental medical practitioners as appropriate (see part VI).

3.1 The meaning of "employee"

An "employee" is defined in section 2 of the Act. An employee is any person who is employed to do any work for **hire or reward** under a contract of service.

In addition, some regular voluntary workers, and workers who do not receive any payment, such as family members helping in a family business, or students or trainees gaining unpaid work experience, may be deemed "employees" under the Act (sections 3C- 3F).

People receiving training assistance are "employees", and their employing agency or host employer has the duties of an employer in relation to them.

An employee may be permanent, temporary, casual, full-time, or part-time. They may be of any age, or have any degree of experience or responsibility in the workplace — the Act applies to an apprentice or new employee as well as a senior executive.

The duty applies to employees in all industries and occupations.

Exemption

An important exemption is that someone employed to work in or on the residence of the employer is not an employee in terms of the Act.

See 1.4, Coverage is broad.

3.2 The employee's general duty

What the Act expects of employees is summarised in the employee's general duty of care, set out in section 19. It requires that if you are an employee, then you should take all practicable steps to ensure:

- **Your own safety** at work; and
- That no action or inaction by you while at work causes harm to any **other person**.

More specifically, the section states that where suitable protective clothing or equipment is provided by the employer, the employee must use it.

These responsibilities do not detract from the duties of the employer or others. Where there are breaches of the law, more than one party may be subject to enforcement action as a result of any incident.

When an employee suspects work is unsafe

The effect of section 19 is to create an obligation for employees not to undertake work which is unsafe, or which involves unsafe practices. Where an employee becomes aware of an unsafe work situation or practice, they should make it safe, or if they cannot, inform their supervisor or manager. There may be occasions when this involves refusing unsafe work (see below).

The extent of the employee's general duty

The employee's general duty applies to all people who are within the definition of "employee" given above.

The scope of the duty is wide, because it extends to not causing harm to "any other person" — whether fellow employee, employer, visitor, or member of the public. For an employee to have failed in the duty, harm does not need to have occurred to themselves or another person. The action or inaction only needs to have been likely to have caused harm, and the standard of care required is "all practicable steps" (see 1.5, All practicable steps).

Because the standard of care is "all practicable steps", the degree of care and responsibility that is expected may vary from one employee to another. A surgeon leading an operating team, for example, is expected to exercise the "reasonable skill and care" of his or her profession, as is a shearer, or a clerical assistant — but in a practical sense, the reasonable expectation of an employer, or the law, varies in each case.

It is important to note that the duty applies to acts or omissions. Section 19 therefore refers to any action by an employee and other things that an employee may forget to do or choose not to do (i.e. an omission) in the place of work.

Managers and supervisors. The duty to avoid causing harm to others may also place greater responsibilities on managers and supervisors, where the number of people who may be affected by their decisions on safety and health matters could be considerable.

When employees come into contact with the public. There are also likely to be occasions when managers, supervisors or employees in contact with the public represent the health and safety interests of their employer. Employees should be aware when this situation arises. The general duty of employees not to cause harm to others, should be considered alongside the employer's duty to ensure their employees do not cause harm to others (section 15).

Particular duties

Below is an expansion of what the employee's duty under section 19 means in a practical sense, and when read in conjunction with the corresponding duties of employers set out in other sections of the Act.

Following the employer's instructions regarding hazards in the place of work

This requirement corresponds with the employer's duty to identify and manage hazards (sections 7-10), provide the necessary information on hazards (section 12), and provide adequate supervision and training (section 13).

Employees are also required to follow improvement or prohibition notices (see 3.3, below).

Reporting hazards

Where an employee becomes aware of a hazard, and is unable to correct it, they should report it to their supervisor or manager. Any procedure that sets up a chain of command or delegates the task of receiving hazard reports should ensure there is prompt action to fix the problem or refer it on to someone who can address it.

The legal responsibility to ensure that employees are not exposed to hazards rests principally with employers. In addition, supervisors who do not follow an agreed reporting procedure could be affecting the safety and health of other people through an omission at work, and may be failing to meet their duty as employees.

Using and caring for protective clothing and equipment and emergency equipment

Section 19 contains a specific duty for employees to use suitable protective clothing and equipment provided by the employer.

This duty corresponds with the employer's duties to, provide any necessary protective clothing and equipment and ensure its use (section 10(2)(b)), and to provide information and training in its use, care and storage (sections 12 and 13) — also with the duty to develop emergency procedures (section 6).

An employee must not misuse or damage equipment. For example, it would be an offence to deliberately render fire-fighting equipment inoperative, or to remove guards from the dangerous parts of machinery without good reason. This requirement will usually apply when an employer has provided the necessary information on hazards (section 12), and supervision and training (section 13), and an employee's actions to misuse or damage are quite deliberate.

[Refer also to the fact sheet, Personal protective clothing and equipment.]

Co-operating with the monitoring of workplace hazards and employees' health

Where a significant hazard is minimised (i.e. not eliminated or isolated) an employer is required to monitor employees' exposure to the hazard and — with the employees' permission — their health.

It is mandatory for an employee to follow the employer's instructions and co-operate in the monitoring of workplace hazards.

However, for an employer to monitor an employee's health as required by section 10, the employee must give their permission. An employer is required to take "all practicable steps" to gain an employee's permission to monitor an employee's health, although an employee may refuse. Where this is the case, it does not limit the employer's responsibility to monitor other employees, and to continue to take all practicable steps to minimise employees' exposure to the significant hazard.

Employees are also required to comply with monitoring by departmental medical practitioners (see 3.3 below).

Reporting work-related injuries or ill health

Employers are required to record and evaluate all accidents or harm, including "near misses" where injury or harm could have occurred (section 25). They are then required to investigate whether the incident was caused by a significant hazard (section 7(2)), and, if so, control the hazard.

If employers are to meet this requirement, employees need to report all occurrences of harm or incidents to their immediate supervisor or manager.

This applies to physical injuries, and to the early symptoms of illness or disease that may be connected with work. For this reporting to occur, employees should have received information from the employer about the early symptoms of which they should be aware (section 12). For example, keyboard operators should be aware of the symptoms of occupational overuse syndrome, or a spraypainter aware of the symptoms of being sensitised to isocyanate-based paints.

Situations where an employee may face enforcement action for failing to meet the general duty

Infringement notices may be issued to employees where there has been prior warning.

It is OSH's policy that prosecution of employees for breach of section 19 does not occur unless the employer has provided the employee with the opportunity to perform at the required safe level. This usually means that an employee prosecuted will have:

- Disobeyed clear instructions;
- Acted recklessly;
- Been grossly negligent;
- Been "skylarking"; or
- Wilfully ignored an obvious hazard.

Harm does not need to have occurred. The action or inaction only needs to have been likely to have caused harm.

It is important to remember too, that employers and employees may both face enforcement action from the same incident. Negligence on the part of an employee does not mean the employer will not face enforcement action, or that a court will turn a blind eye to an employer's failure to meet their duties.

[Refer to 6.5, offences and penalties, and the fact sheet, Infringement notices.]

The right to refuse to do work that is likely to cause serious harm

An employee may refuse to do work if they believe that the work they are required to do is likely to cause serious harm to him or her (section 28A).

Having formed a belief that the work is likely to cause them serious harm, the employee may continue to refuse to do the work if:

- They attempt to resolve the matter as soon as practicable after their refusal; and
- The matter isn't resolved; and
- The employee believes, **on reasonable grounds**, that the work is likely to cause serious harm to him or her.

The Act specifies that "reasonable grounds" for refusing work exist if a health and safety representative advises the employee that the work is likely to cause serious harm to that him or her. The health and safety representative must also have "reasonable grounds" for offering any such advice (section 28A(3) and (4)).

The "right to refuse" cannot be exercised where the particular work inherently, or usually carries an understood risk of serious harm —unless the risk has materially increased beyond the understood risk (section 28A (5)). This means for example, that a firefighter accustomed to fighting single storey house fires would not be able to refuse to do that work, unless another additional hazard, such as flammable liquids were present. Similarly, a rigger equipped and accustomed to work at heights would need the addition of another hazard, such as high winds, or a risk of lightning strike, to exercise the right.

Where the right to refuse is exercised by an employee, that employee must do any other work within the scope of their employment agreement that the employer reasonably requests (section 28A(6)).

The right to refuse work under the Act does not limit the employee's right to refuse work under other legislation or the common law (section 28A (6)).

The Act explicitly requires employers, employees and their representatives to deal with each other in good faith in any situation involving the right to refuse unsafe work.

Any dispute or question about the application of the right to refuse is an employment relationship problem for the purposes of the Employment Relations Act 2000 (section 28A (8)).

[Refer to the fact sheet, Right to refuse dangerous work]

Examples:

Desmond worked as a skilled and experienced electrician servicing substations and other facilities for his employer, power authority **MegaEnergy Ltd**. The company had a set of stringent protocols for assessing and planning jobs, and to ensure the safety of its workers and others from day to day. Desmond was familiar with these procedures, and was technically competent.

One day Desmond and his co-worker, **Les** were given instructions to service a particular component of a substation. They chose the tools and equipment they needed from their depot, including a stepladder for gaining access, and drove to the substation to begin work.

When they arrived, Desmond realised that the stepladder wouldn't provide adequate access to the disconnectors he needed to service, unless he stood it on top of part of some related circuit breaker equipment. It also meant placing the stepladder adjacent to a 33,000 volt supply line, which was contrary to safety requirements. A properly positioned extension ladder would have provided an alternative, safe means of access, but also meant a trip back to the depot to get it. Because he had not completed the required checklist evaluation of the task beforehand, Desmond probably made the decision to use the stepladder prematurely.

While he was standing on the ladder, working on the disconnectors, Desmond caused a "flashover" between the equipment he was working on and the high-voltage line. He received an electric shock causing burns to his face and arms, and cuts to his shoulders. He spent three days in hospital.

Desmond was convicted and fined for failing to ensure his own safety as required by section 19(a).

Josh worked as a rigger for **Column'n'Beam Steel Fabricating Ltd**, which was contracting for the supply of structural steel to a large construction project.

To give access to an area where steel was being fabricated, the principal to the contract had built an elevated catwalk. However, it had become a matter of pride for Josh — who was experienced with work at heights — to ignore the catwalk and walk across to the elevated place of work along a narrow steel beam, and without any restraint or fall arrest device. Column'n'Beam's supervisor on the site was aware of the action, when one day a health and safety inspector saw Josh make his entry.

Josh was convicted for failing to ensure his own safety under section 19(a).

Column'n'Beam Ltd were also convicted for failing to ensure employee safety as required by section 6.

Gordon managed several staff at a regional distribution depot for a manufacturing company, **Topstuff Ltd**. It was company policy to encourage youth training and employment, and Gordon co-operated with local secondary schools to provide work experience for pupils.

This meant that one day secondary pupil, **Tania** was working at Topstuff's depot under the supervision of Gordon. Tania helped unload materials from a forkhoist, and when that task was done, Gordon instructed her to ride on the forks of the forkhoist to another part of the depot. While the forkhoist was being driven there, it came in contact with some shelving, and the end of Tania's thumb was crushed, leading to its eventual amputation.

Gordon was convicted and fined for failing to ensure the safety of others under section 19 (b).

3.3 Requirements by health and safety inspectors and departmental medical practitioners

Inspectors

The Act provides for health and safety inspectors to issue improvement notices or prohibition notices to employees, employers, or others who control a place of work.

Improvement notices are issued by inspectors to employers, but may also be served to an employee. They are issued when an inspector believes an employer or employee has failed or is failing to observe a particular provision of the Act, and that the failure will continue. A notice contains a description of which section of the Act is being breached, how it is being breached, a statement of what needs to be done to rectify it, and a date for compliance.

Where an employee is issued with an improvement notice, it is an offence not to comply (section 39 (5)).

For more information, see 6.3, Improvement and prohibition notices.

Prohibition notices are issued by inspectors when they believe that failure to comply with a provision of the Act could lead to serious harm. They prohibit the use of a particular machine, process or other source of the hazard.

Prohibition notices are fixed near to the part of the place of work that they relate to. A copy is also given to the person in charge of the "activity, building, place of work, plant, process, situation, structure or substance" — and this person may be an employee.

When an employee is issued with a prohibition notice, they are responsible for ensuring that the prohibited action does not occur (section 42 (2)).

An employee who is aware of the existence of a prohibition notice also commits an offence if they do not comply with it (under the general duty of section 19).

For more information, see 6.3, Improvement and prohibition notices.

Departmental medical practitioners

The Act provides for the monitoring of employees' health by departmental medical practitioners (doctors employed by the Department of Labour to enforce health requirements of the Act).

Where a departmental medical practitioner is satisfied that an employee's health is affected by exposure to a significant hazard, they may issue a written notice (under section 36), requiring the employee to:

- Be examined by a medical practitioner and their fitness for work assessed; and/or
- Provide a sample for testing or analysis.

Suspension notices. Where a departmental medical practitioner is satisfied on reasonable grounds that an employee has been harmed by exposure to a significant hazard, they may issue a suspension notice requiring an employee to stop doing anything that "constitutes, causes, or enhances" their exposure to the hazard (section 37).

A suspension notice may also be issued where an employee's exposure is suspected and the employee has refused to be medically examined or to provide a sample.

Whenever a suspension notice is issued to an employee, a copy is also given to the employer, who is required to ensure that it is complied with.

For more information, see 6.2, Departmental medical practitioners.

3.4 Rights of employees and health and safety representatives in relation to information

The Act requires employers to provide employees with information on the **hazards** they may encounter or create in their work (section 12).

It also requires employers to make available to employees the **results of workplace health and safety monitoring** (section 11).

Information on hazards

Before an employee starts work of any kind, their employer must inform them of:

- Emergency procedures (developed under section 6(e));
- Hazards they may be exposed to while at work;
- Hazards they may create while at work which could harm others;
- How to minimise the likelihood of these hazards becoming a source of harm to themselves or others; and
- The location of safety equipment.

This applies to the employee's:

- Doing work of any kind;
- Using plant of any kind; or
- Dealing with a substance of any kind.

The information must be in a form that each employee who needs the information can reasonably easily understand — whether or not English is their first language. Technical information — such as material safety data sheets, or operating manuals — may also need to be interpreted or explained further.

When employers give information on hazards to employees, they are required to check that it has been understood. This is an important issue for employees, and although there is no legal obligation for employees to "speak up" when information may not be fully understood, it is important to do so to help the employer meet their obligations.

The employer must also ensure that having provided such information, the employee has ready access to it.

Information for health and safety representatives

Where health and safety representatives are appointed in a place of work, section 12(2) requires that the employer ensure that all representative have ready access to sufficient information about health and safety systems and issues in the place of work to enable them to perform their functions effectively. (refer to 2.6, Employee participation.)

Hazard notices may be issued to employers by trained health and safety representatives, who may also advise employees of the existence of any such notice.

Refer to 2.6, Employee participation.

Information on health monitoring

Employers are required (by section 11) to inform employees of the results of any health and safety monitoring undertaken to meet the hazard management requirements of the Act (i.e. under section 10).

This relates both to:

- Individual health monitoring; and
- Workplace exposure monitoring (in relation to an individual's place of work).

Where an employee's health or place of work is monitored — as an individual or one of a group of individuals — the employer is required to provide the results of any monitoring to them, whether or not they request it.

Other employees in the place of work where general monitoring is carried out may request the results of the monitoring. Where this happens, the employer is required to make available the results, and in doing so, protect the privacy of those monitored.

The duty to provide information may overlap with an employer's duty to provide training and supervision. For more information see 2.4 and 2.5 above.

Examples:

Mahia worked as an apprentice boilermaker at **Tycho Brahe Ltd**, a small engineering business of which **Peter** was the managing director.

One day Mahia decided to use arc welding equipment to cut the tops off two steel drums. He had not been told by Peter, or anyone else, that it was an activity that required a special procedure to avoid the risk of explosion.

Mahia managed to cut the top off the first of the drums, but while he was cutting the second it exploded, causing him to suffer third-degree burns to his face, hands and shoulders.

Tycho Brahe Ltd were convicted for failing to provide information on hazards to an employee (section 12), and for failing to ensure employees are not exposed to hazards (under section 6).

Lesley and **Sid** worked at the engineering works of **Blacksmith's Engineering Ltd**. They did a variety of semi-skilled work surrounding the assembly and finishing of structural steelwork. This involved the use of flammable solvents for vapour degreasing or paint application.

One day Lesley was using a hand-held grinder to remove burrs from a tubular portal. Sid was preparing the equipment and materials needed for applying a coating, when a spark flew from the grinder into the midst of the materials and caused a small fire.

Because neither Sid nor Lesley knew of any emergency procedures, or where the appropriate extinguishers for a solvent fire were kept, they were unable to control the fire and it burnt the workshop down.

Blacksmith's Engineering were convicted for failing to meet the requirement to provide information to employees under section 12.

3.5 Participating in the improvement of health and safety

Employers have a duty to provide reasonable opportunities to employees to participate effectively in ongoing processes for improvement of health and safety in their place of work (section 19B).

This applies in particular to the processes set out in sections 6-13 of the Act.

Employees therefore have a right to participate in this process in their place of work. The Act specifies circumstances where a system is required to be in place to properly canvas the views of employees. Safety and health committees and representatives provide a means for such consultation and co-operation, and their establishment is encouraged.

[Refer to 2.6, Employee participation, and the fact sheet, Employee participation]

Part 4: Other people with duties

The Act prescribes a range of duties on others who — although they may not be employers — have a role to play in the prevention of harm to employees and others in or about places of work.

4.1 Duties of persons who control a place of work (section 16)

Section 16 of the Act describes the duties of "persons who control a place of work" in relation to people in the vicinity, and to visitors. These duties are intended to meet the gap in coverage of the Act when an employer/ employee, contractor/principal relationship does not exist.

"Person who controls a place of work" includes a person who owns, leases, subleases or occupies a **place of work**, or who owns, leases or subleases **plant or equipment** used in a place of work. It is discussed below.

"Place of work" is another important definition. It is also discussed below.

There is a duty to all people in the vicinity of a place of work

A person who controls a place of work is responsible for taking all practicable steps to ensure people in the vicinity are not exposed to harm — regardless of the purpose for which they are in the vicinity.

The extent of the duty to visitors depends on the purpose of the visit

The extent of the duty that is owed to visitors is determined by the activity or purpose for which the visitor is present.

Where a visit brings some benefit to the controller

Broadly, where people are visiting for work-related reasons, pay to be there, or are present for the benefit of the controller, the person who controls the place of work is responsible for taking all practicable steps to ensure they are not exposed to harm. This includes people in the place of work:

- Working as employees, contractors, subcontractors (or their employees) for the person who controls the place (section 16(1)(b)); or
- With express or implied consent, and who have paid to be there, or who are customers or potential customers (section 16(2)).

Other authorised visitors

There is a duty to authorised visitors not included in the above categories — to warn all people who are to be in the place of work of known significant, out-of-the-ordinary hazards arising from the work that has been, or is being, carried on there. For this duty to apply, the visitors must have:

- The express authorisation of the occupier to be in the place of work (subsection 16(3)(c)(i)); or
- Have given the controller of the place oral advice that they will be working there under statutory authority (subsection 16(3)(c)(ii)).

When there is no duty to visitors

People visiting a place of work under any other circumstances are owed no duty under section 16 by the controller. This includes people visiting for the purpose of recreation or leisure.

People who are working in the place of work — but not as employees or contractors of the occupier — are owed only the warning duty under subsection 16(3), and then only if they have express or statutory authority to be there.

People who control a place of work have no duty to trespassers.

Definition of "person who controls a place of work"

Section 16 uses the definition of "person who controls a place of work" in section 2 of the Act.

It includes any:

- Owner, occupier, lessee, or person in possession of a place of work; or
- Owner, lessee or bailee of plant used in a place of work.

The section does not apply to residential premises. This means that, in the case of farms and some other businesses with accommodation attached, those parts of the property used for domestic accommodation are not a "place of work".

Several people may simultaneously have duties under section 16. This is made clear by section 2(2) of the Act. However, what each person must do to fulfil those duties may be very different, and the steps that it may be reasonably practicable for one person to take may not be for another.

The term "person in possession" needs some explanation. A person who is not an owner, occupier or lessee would be in possession of a place if they have been given the right to use the place by the owner, occupier or lessee. For example, a construction contractor frequently takes possession of a construction site for the duration of the project. Or, alternatively, a self-employed truck driver, by license from the business owner with whom they are dealing, may take possession of the place where a truck is parked while it is being loaded or unloaded.

The extent of each of the respective duties is set out below.

Duties to people in the vicinity of a place of work (section 16(1)(a))

A person who controls a place of work must take all practicable steps to ensure that people in the vicinity are not harmed by hazards arising from the place of work.

The reason for this duty is that people outside a place of work (or in the vicinity of plant or equipment) have no reason to expect that they will be harmed. People at work should conduct their operations in a way which is not likely to harm people outside the place of work. In contrast, people entering a place of work must accept some responsibility for their own safety once they are inside the place.

The duty under subsection (1)(a) extends to taking practicable steps to ensure that people do not enter a hazardous place of work unintentionally. This may mean the person who controls a hazardous place of work needs to place signs or notices warning people who may enter the place about hazards in the place, or to erect fences or other barriers to restrict entry. In determining what steps are reasonable, consideration needs to be given to the significance of any hazards and the likelihood that people may enter the place of work — warning notices and barriers are not always needed.

The section is intended to cover situations such as objects falling from a construction site into the street below. Two examples of such cases are set out below. It is noteworthy that in neither case was any person actually harmed, illustrating that the duty is a proactive one and that harm need not have occurred before an offence is committed.

The application of subsection 16(1)(a) is obvious when there is a clear boundary to the place of work. If, on the other hand, there is no clear boundary, the place of work should be considered to be the surrounding area where hazards would normally arise from the work — while good work practice was being observed. For example, if blasting was taking place to remove tree stumps, the place of work would include all areas where debris might be thrown, when the explosives are used properly, plus a safety margin. Similarly, if trees are being felled, the place of work would be an area with a radius twice the height of the trees.

In practice, therefore, this duty will be complied with so long as good work practices are followed. Alternatively, and using the example above, if an excessive charge was used, or charges were not placed properly, people in the vicinity may be harmed. Similarly, if trees were felled in such a way that they could land on vehicles travelling along a road or track, the duty is probably not being met.

As people in the vicinity of a place of work are likely to be harmed only if poor work practices are used, failures to comply with section 16 (1)(a) may arise where there has also been failure to comply with sections 15, 17 or 19 of the Act.

Examples:

Greywacke Quarries Ltd operated a quarry where rock was extracted for crushing as aggregate. It bordered housing and an industrial area.

One day the company's foreman, **Jock**, prepared to fire three sets of charges into a rock face. Fellow employee, **Jim**, had drilled holes along the rock face, while Jock charged them with explosives.

Two set of charges were fired as planned, although some smaller stones were noted as flying out into the immediate area at the time of the second charge. This blast also removed slightly more rock than was intended. However, Jock decided to use the holes that had been predrilled, plugging them to allow for the decreased amount of spoil to be removed.

When the third set of charges was fired there was a cloud of flying rock which caused some minor damage to neighbouring cars and premises. One boulder was flung across the road into industrial premises, where it damaged buildings and vehicles, although no one was hurt.

A similar incident had happened two months before. This time people whose property had been affected contacted a health and safety inspector, who investigated the incident and prosecuted Greywacke Quarries under section 16.

The court found that the company should have paid more attention to the consequences of each charge that it placed and that it should have changed their direction and or intensity.

The company was convicted and fined.

PV Smellie Fumigants Ltd was a firm of horticultural fumigators who were engaged by **Granny Smith Ltd** to fumigate the soil of two paddocks before an apple orchard was planted on them.

The soil fumigation was required to ensure there was no bacteria in the soil which could harm the trees.

The fumigation agent used contained the active ingredient chloropicrin, a dangerous poison. To be effective and safe it must be applied to wet soil and covered with either polythene or a water seal.

Before application, **Paul**, the owner -operator of PV Smellie Fumigants Ltd, checked the soil's moisture content and determined it to be high enough. He carried out fumigation from a tractor towing an applicator which injected the poison into the soil as a liquid. Paul drove the applicator, while **Rose**, a Granny Smith employee, followed behind with another tractor towing a roller to compress the soil and, supposedly, create a seal.

Application took all day. Early on, the raising of some dust suggested the ground was too dry, and by the end of the day Rose's eyes were streaming.

At the end of the day, the soil was neither covered with polythene nor sealed with a layer of water in order to prevent the release of the gas from the ground — as required by the directions on the product.

After application the chloropicrin began escaping from the soil. This resulted from a combination of factors, including the soil being too dry to apply and an inadequate seal being applied to retain the gas. In addition, the fumigated area was low lying and prone to mists.

By about 7pm that evening nearby residents began to develop symptoms consistent with exposure to chloropicrin. These included sore and watery eyes, respiratory problems and nausea. Emergency services were called, and residents in the affected area were evacuated at about 9.30pm.

The all clear was given for residents to return at 8.30am next morning. That evening however some residents again began to display symptoms of exposure and they evacuated again at about 9pm. Those worst affected by the initial exposure were more susceptible to becoming symptomatic from any lingering traces of the chloropicrin which remained in the area.

PV Smellie Fumigants Ltd were convicted and fined for a breach of section 16(1)(a).

The use of the fumigant constituted a significant hazard to residents in the vicinity of the fumigated land. The company had failed to take all practicable steps to ensure that chloropicrin did not harm these residents and consequently a number of them suffered harm and serious harm.

Duties to employees, contractors and subcontractors (section 16(1) (b))

Duties to employees

A person who controls a place of work must take all practicable steps to ensure that employees of the person in control of the place of work are not harmed by hazards in or arising from the place of work.

This subsection should be read in conjunction with sections 6 to 13, which relate to the duties of an employer to employees.

Duties to contractors and subcontractors

A person who controls a place of work must take all practicable steps to ensure that contractors and subcontractors engaged by the person who controls the place of work, and any employees of a contractor or subcontractor, are not harmed by hazards in or arising from the place of work.

Distinction between sections 16 and 18

Section 18 requires a person (the principal) who engages a contractor, to take all practicable steps to ensure that contractors and subcontractors, or their employees, are not harmed as a result of any work the contractor is engaged to do. In most circumstances, it would be more applicable to the safety of contractors and subcontractors than the duties of section 16.

The distinction between the two sections is that section 18 deals with the work that a contractor is engaged to do while section 16(1)(b) deals with the environment in which that work is done (although there is inevitably some overlap). Under both sections, it is the person who engages the contractor (the principal) who has the duty.

Section 16 will apply to situations where a contractor, subcontractor — or any employees of a contractor or subcontractor — may be harmed by hazards other than those arising from the work the contractor is engaged to do. For example, section 16 would apply ahead of section 18 in a situation where a contractor needs to take a heavily-laden vehicle on a track or across a bridge, the person engaging them must ensure that the access routes they control are suitable for the purpose, and inform the contractor if they are not.

Example:

*Mark, a self-employed plasterer, had been engaged by **Giant Construction Limited** to carry out gib-stopping work on a high-rise contract.*

*He and another plasterer, **Ross**, were working from a platform across a lift shaft, when a wooden bearer, used to support the planks providing the work surface, collapsed.*

Ross managed to hang on and scramble to safety, but Mark fell 13 metres to the bottom of the lift shaft. He suffered fractures to his ribs, two vertebrae, right elbow and three parts of his pelvis.

When the remains of the platform were investigated after the accident they showed evidence of serious rot and a lengthwise fracture about a metre long, which was present before the collapse.

Investigation also revealed that Giant Construction periodically cleared its yard and destroyed bad planks, but no individual was designated to carry out the task. The site supervisor had viewed the platform after it had been constructed by a company employee, but had not inspected it closely.

Giant Construction Limited was convicted and fined under section 16.

Duties to customers and clients (section 16(2))

A person who controls a place of work must take all practicable steps to ensure that customers and clients are not harmed by hazards in or arising from the place of work.

Those who are owed the duty are people who:

- Have paid the person in control (either directly or indirectly) to be there or to carry out some activity in the place; or
- Are buying or inspecting goods for sale and from the sale of which the person in control would derive some gain or reward (either directly or indirectly).

In relation to **properties**, it includes such situations as:

- Shops and shopping malls;
- Fruit and vegetable stalls;
- Pick-your-own fruit and vegetables;
- Where a property owner or occupier provides an activity (either as the principal business or a secondary business) for which clients are charged. For example, a swimming pool or "tag-war" game;
- Where a property owner charges people to use part of the property. For example, farmstay holidays or picnickers; or

- Where a property owner or occupier grants a concession (and receives payment from the concessionaire) to another company or organisation that provides an activity on the property.

If the person who controls the place of work does not receive any financial benefit from the visitor, then there is no duty under subsection 16(2). The only duty in such situations is the duty to warn of known, significant, out-of-the-ordinary, work-created hazards, under section 16(3), and discussed below.

What constitutes payment?

The payment for the purposes of subsection 16(2) (a) does not have to be monetary — it could be in goods or services. Nor must it involve financial benefit to the person owing the duty — it may be a reimbursement of expenses that would not have been incurred if the visit had not taken place.

The benefit to a person who controls a place of work may be indirect. For example, the proprietor of a shopping centre may not receive any payments directly from shoppers, but benefit from their patronage through rents. The section 16(2) duty applies.

Donations, gifts and koha

Broadly, when there is an invitation to make a "donation" the offering should be considered payment — although this may differ in the circumstances. A "gift" is not considered payment, but would generally need to be unsolicited or unrequested. It may be difficult to separate "gifts" from payment, and each case needs to be considered on its merits. "Koha" needs to be considered in this light, and when it is unsolicited it should be considered as a gift, i.e. not payment.

Consent

In all cases, for the full duty to be owed under subsection 16(2), the person must be on the property with express or implied consent. If any person comes on to the property outside notified hours, they may not be there with consent. Similarly, if a person comes on to the property for a particular purpose, but goes somewhere not necessary for the purpose of the visit, there may be no consent for them to be in that part of the property and consequently no duty under the Act.

Consent for the purposes of subsection (2) may be express or implied. This contrasts with subsection (3) where only express consent is involved, see below.

The visit must be to a "place of work"

The duty does not apply where a place of work is also the home of the person who exercises control over it.

A place is not a "place of work" unless work is being carried out there — whether at the time, recently, or soon after.

If, for example, a property owner or occupier charges people to picnic or camp in a quiet spot, the picnic or camp site itself may not be a place of work if work is not going on there. Alternatively, the picnickers or campers may have to pass through a place of work to get access to the site.

Extent of the duty

If a person taking part in an activity (or buying or inspecting goods) on a property injures themselves entirely through their own actions, then the person who controls the place is not liable. The duty is limited to taking "all practicable steps" to prevent harm — see 1.5, All practicable steps. If the person who controls the place could not reasonably have been expected to do anything to prevent harm, then they are not liable if such harm occurs.

For example, if a visitor trips over a tree-root or stone, a property owner or occupier is unlikely to be held responsible for the other person's carelessness. Also, if the property owner or occupier could not reasonably have been expected to know of a hazard, they cannot be held responsible for any harm that occurs to any customer or client.

Property

In practical terms, the sorts of things that will be necessary to comply with subsection 16(2) are:

Consider the parts of the property where a customer or client is likely to need to go. If work activities take place in those parts of the property, what hazards are created by that work?

Can the work be rescheduled to avoid contact? If not, make sure that customers or clients are informed of the hazards and make sure that the work is carried out in a way that will minimise the likelihood of harm to any customer or client.

Is there safe access (including bridges or other structures)? Place limits on times and places where a customer or client may go, and make sure they are informed of these limits (for example, by erecting signs or posting notices).

Consider what a customer or client would expect to find in a place of work of this kind. If there are hazards that would not reasonably be expected, inform them of these hazards either directly or place warning signs. For example, place weight limits on bridges.

Examples:

*Every Thursday night the **Diggers' Arms Hotel** offered karaoke entertainment in one of its bars. The management engaged an operator with their own staging, lights and sound equipment to carry out the entertainment.*

The performance was staged in an area above a stairway leading down to a floor below. One Thursday night a stage had been placed in front of a handrail protecting against falls into the stairway. The added height of the stage had the effect of converting the handrail from a barrier to a fulcrum.

*The hazard went unnoticed throughout the evening, until it was the turn of the patron **Philip** to perform. He put on a spirited performance, but in the course of it fell backwards, tripped over the handrail and fell to the bottom of the stairs. He died of his injuries soon after.*

The Diggers' Arms Hotel was convicted under section 16.

***Marlene** was stacking cartons on shelving above an aisle in the **BestBuys Supermarket**. When she pushed in one carton a little hard, it caused boxes on the other side of the rack to fall on **Rolf**, a customer walking along that aisle.*

Rolf was knocked to the ground and, after he was picked up, was taken to hospital. There he was x-rayed before being fitted with a neck-brace and discharged.

Investigation of the BestBuys premises showed that the rack in question did not have a central barrier fitted to prevent goods from one side dislodging goods on the other, despite OSH earlier advising the company of the hazard, and suggesting a top-of-rack barrier.

Bestbuys was convicted and fined under section 16.

Curt was a polytechnic engineering student who was visiting and observing the work of an engineering contractor, **Grills' Engineering Ltd**. The firm was sub-contracting to a civil engineering company which was in turn contracting to a power company to build a spillway on a hydro dam.

Curt was watching the managing director of the company, **Charles**, installing a galvanised web grating over a dam sump.

In a moment of absent-mindedness, Curt walked backward along the grating and fell through a hole into a chamber below, breaking his neck in one place and his back in three places.

When OSH investigated the accident it found that no contractor on site had any hazard identification process in place, there was no evidence of suitable training or supervisory measures take by any contractor in respect of active safety management, nor was there any active control, co-ordination, or monitoring measures in place. An environmental consultancy and a firm of architects had also been involved as agents for the power company.

A manhole cover suitable for guarding the hole which caused the accident was available on site and rudimentary precautions would have prevented the accident.

Grills Engineering Ltd was convicted under section 16.

Plant and equipment

A person who controls a place of work containing, or comprising plant or equipment should ensure that it is fit for the purpose for which it is being used, is properly maintained, and that adequate instruction is provided to the people who will be using it.

Warnings and/or signage should indicate safe working limits, and any particular hazards arising out of the plant or equipment.

This applies to situations such as the provision of lifts or lifting equipment, access equipment, heating, cooling, electrical or any other plant or equipment that may be present or used in a place of work.

Sellers or suppliers of plant and equipment have specific duties under section 18A. [Refer to section 4.4, below].

Alternative provisions

Subsections 16 (1) and (2) need to be read in conjunction with sections 15, 17, 18, 18A and 19 of the Act.

There are also some express requirements in the Health and Safety in Employment Regulations 1995 — in particular, regulation 25, Excavations of hazardous depth, and regulation 59, Presence of young persons.

Examples:

Anton was one of a group which had hired the **Starlight Convention Centre Ltd** and were decorating it before a university ball.

Anton was using a one-person vertical lift to fit a strobe light when it toppled over. He fell 5 metres to the floor before the machine landed on top of him, causing multiple injuries from which he died the next day.

The hoist had been made available by the venue owners for the use of hirers. Although safety instructions were posted to the side of the machine, Anton had not put in place the outriggers of the lift before raising himself. Both the defendant's duty manager and health and safety co-ordinator were on site at the time and advised that they had seen people using the machine without outriggers beforehand and had instructed the operators to use them.

No one had instructed Anton on the use of the machine, which was available on the day for anyone to use.

Starlight Convention Centre Ltd was convicted and fined under section 16.

Duty to warn visitors (subsection 16 (3))

Visitors to a place of work that are not covered by subsections (1) or (2) above may be owed a duty to be **warned of known significant hazards**, if they:

- Have been given express authorisation to be in the place; or
- Have given oral advice that they will be working in the place under statutory authority.

Known significant hazards

The duty to warn relates only to hazards that:

- Are "significant" (see 2.3, Hazard management responsibilities);
- Are in, or likely to arise in, the place of work;
- Arise from work that is, or has been, carried on for gain or reward in the place of work; and
- Would not ordinarily be reasonably expected to be found in that type of place of work.

Construction activity is one example of a hazard or hazards that would not normally be expected to be found in most places of work. Other examples are: sludge ponds in a quarry, cyanide baiting on a farm, felling shelter belt trees, prospecting for minerals or oil, spraying toxic substances, or the use of explosives in or around roadworks.

There is no liability to warn visitors of natural hazards on a farm or other property, such as bluffs, tomos, landslides, rivers, swamps, wasp nests, and so on.

Express authorisation

Express authorisation means that a person must ask for, and be given, permission to enter the place of work.

Subsection (5) applies in the case of visitors given express authorisation. It describes the timing and extent of the warning required.

The extent of the warning

Any necessary warning must be given at the time that the authorisation is given.

If a group of people are seeking entry, the authorisation may be given to a representative or member of that group.

There are officers who have statutory authority to enter places of work, without consent — such as government inspectors, medical officers of health, police officers in some circumstances, and electricity workers. Such people must give the person who controls the place oral advice of their intention. This advice may be given either by the person who is to enter the place or by their employer. The person who controls the place of work is required to give any necessary warning at that time.

A warning only needs to be given once

Where an individual or group has ongoing authority to enter a place of work, they need to be given a warning only at the time they sought that authority — or gave oral advice, in the case of persons with statutory authority (subsection (3)). This means that if a new significant, work-related, unusual hazard arises in the place of work, the section does not require a new warning. (There may be a common law duty in some circumstances — see 1.7, The difference between the Act and the common law.)

However, if the visitors seek to renew their authorisation (or give a new oral advice) then the duty to warn arises again.

How section 16 relates to educational institutions

Children at school, kindergarten, etc. are covered by section 16(2) and all practicable steps must be taken to ensure they are not harmed by any hazard in the place of work.

Section 16(2) is also relevant when children on organised school trips visit a place of work away from the classroom. In such a case, if the person who controls the place of work receives gain or reward, then they must take all practicable steps to ensure the children or others are not harmed by any hazard.

Section 16(3) applies where children on organised school trips don't pay to visit a place of work, but have express authority to be there. In this case, they must be warned by the person giving express authority of significant, out-of-the-ordinary work hazards in the place. The warning can be given through the teacher or other person in charge.

Where a student gains work experience for an employer or self-employed person, the Act deems the trainee an "employee" in terms of the Act, and they have most of the rights and duties with respect to health and safety as the people they are working alongside.

Where schools use volunteer workers to do work on the school premises, and on a regular and ongoing basis— the volunteers may be deemed "employees" in terms of the Act (section 3C). However, there is an exemption for any volunteers who are assisting with sport or recreational activities, whether on or off school premises.

In all cases where a school uses volunteer workers, the non-enforceable duties of section 3D apply.

There is no duty to unauthorised visitors to school grounds (including after school hours).

4.2 Duties of the self-employed

Most of the specific duties in the Act are to encourage employers to manage hazards and provide safe and healthy workplaces. Although many of the specific duties do not apply to the self-employed, section 17 does create a general duty for the self-employed to maintain their own safety and health, and that of others who may be affected by their work.

The meaning of "self-employed"

The Act does not define "self-employed", other than through the wording of section 17 itself — a person who is "at work" in any place of work.

"At work" is defined in section 2 of the Act as a person present for gain or reward in their place of work. For a discussion of "place of work", see the definitions at the back of this guide.

A self-employed person may therefore have duties under the Act as a principal, or in the performance of a contract for services — as long as they are not employing any other person. (For comparison, see 2.1, The meaning of "employer", or 3.1, The meaning of "employee".)

It should be noted that a self-employed person may have the same duties as an employer in relation to volunteers, people receiving work experience or on the job training, or loaned employees (sections 3C-3F)

The duty applies to the self-employed in all industries and occupations.

An important exemption is when someone works in or on their own residence.

For clarification of the situation when someone is working in or on the home of another, see 1.4, Coverage is broad.

It is important to note that as soon as a person employs another, the duties of an employer apply to them.

The duty

Section 17 requires that if you are self-employed, then you must take all practicable steps to ensure:

- **Your own safety** while at work; and
- That no action or inaction by you while at work causes harm to any **other person**.

The nature of the duty is similar to that owed by employees (under section 19) but it is more strictly enforced. It is in addition to any responsibilities as a principal or contractor (section 18), and as a person who controls a place of work (section 16).

Where there is a breach of the law, more than one party may be prosecuted as a result of an incident. This means, for example, that as a result of any breach, a self-employed contractor or subcontractor may be charged in addition to the principal, or a person who controls the place of work.

When work is suspected to be unsafe

The hazard management requirements of sections 7-10 of the Act do not apply to the self-employed. However, section 17 creates an obligation for the self-employed not to undertake work which is unsafe, or which involves unsafe practices. This implies a need to identify hazards, and there may be situations — such as beginning a contract or establishing a place of work — where there is an obligation to implement systems for identifying and managing hazards.

Where a self-employed person becomes aware of an unsafe work situation or practice, then they have a duty to make it safe (see 4.1 above). If they are contractors or subcontractors, then they should make the principal or head contractor aware of the situation and seek a solution before proceeding with any work that could be unsafe. If they are in control of the place of work, then they will have duties to visitors, people in the vicinity, and others.

The extent of the duty

The scope of the duty is wide, because it extends to not causing harm to "any other person" — whether fellow subcontractor, employees of others, visitors to, or the public in the vicinity of a place of work.

Because the standard of care is "all practicable steps", the degree of care and responsibility that is expected may vary from one self-employed person to another. For example, a self-employed roofing contractor would be expected to follow proper methods and, before fixing tiles, to stack them on a roof safely and without endangering passers-by. However, that would not necessarily make the roofer responsible for any failure due to factors beyond their control, such as the design of the roof, or construction methods they were instructed to follow.

Alternatively, a self-employed scaffolder may be expected to design and install scaffolding that is fit for its purpose and meets the relevant code.

Many self-employed people have particular skills or attributes that they bring to a place of work, such as tree surgeons, technical consultants, chimneysweeps, or pet groomers, or providers of professional services. In each of these cases, the self-employed person would be expected to exercise a high degree of skill and care in taking "all practicable steps".

It is important to note that the duty applies to acts or omissions. Section 17 therefore refers to any action by a self-employed person or *anything they may forget to do or choose not to do* in the place of work.

Harm does not need to have occurred for there to be a breach of section 17. The action or inaction only needs to have been likely to have caused harm, and the *standard of care* required is "all practicable steps" (see 1.5, All practicable steps).

Section 17 also requires a self-employed person to take all practicable steps to ensure that hazardous substances, plant or equipment used or stored in a place of work, including a vehicle such as a van, does not cause harm to others. This duty equates with that of employers under section 15 (see 2.8, People who are not employees).

Accident recording and reporting requirements

Self-employed people are required to maintain a register of accidents and occurrences of harm to themselves or others affected by their work activities, and to notify and report any occurrences of serious harm to OSH. See part 5, Accidents.

[Refer to the fact sheets, Self-employed people, Recording and reporting serious harm, and Serious harm.]

Requirements by health and safety inspectors

Self-employed people may be issued with improvement or prohibition notices by health and safety inspectors.

Improvement notices may be issued when an inspector believes a particular provision of the Act is not being observed, and that the failure will continue. A notice contains a description of which section of the Act is being breached, how it is being breached, a statement of what needs to be done to rectify it, and a date for compliance.

Prohibition notices are issued by inspectors when they believe that failure to comply with a provision of the Act is likely to lead to **serious harm**. Such a notice prohibits the use of a particular machine, process or other source of the hazard.

A self-employed person issued with a prohibition notice is responsible for ensuring that the prohibited action does not occur (section 42 (2)).

A self-employed person that is aware of the existence of a prohibition notice also commits an offence if they do not comply with it (under the general duty of section 17).

For more information, see 6.3, Improvement and prohibition notices.

Infringement notices may be issued by inspectors to self-employed people for infringement offences under the Act. They require the defendant to pay a fee of up to \$4,000. See 6.5, Offences and penalties.

Examples

Coolwall Ltd gained a contract for the manufacture and erection of a coolstore wall for a meatworks operated by **Muscles Corporation**.

Although Coolwall operated principally as a manufacturer of insulation walls and panels, to gain the supply contract, the company undertook to erect them on site. This work was in turn subcontracted to a construction company, **I M Frizen Ltd**, which then undertook two further subcontracts — with a self-employed builder, **Peter**, who was to attend to the construction of the wall, and another with **Straightup Scaffolding**, who was to supply the scaffolding needed. The scaffolding subcontractor in turn sub-contracted **Horace**, who was self-employed, to build the scaffolding.

The scaffolding structure, while adequate for access, was also required to support the new wall, but Horace's structure didn't allow for this. Before work was finished, the scaffold and the wall were together blown over by wind, seriously injuring two workers.

Horace, was convicted as a self-employed person under section 17.

In court it was found that he had failed to identify the purpose of the scaffold and to notify the purpose of the structure once he had determined that it was to support a free-standing wall.

The plans had contained information which should have alerted him to the fact that there was something unusual about the scaffold, and that he was obligated to find out the purpose of the scaffold.

I M Frizen Ltd was also convicted as a principal under section 18.

A health and safety inspector visited a house building site where workers were clearing up material from a landslip that was covering an area of foundation. He noted that there was still substantial loose material sitting on a bank above the work area.

After further inspection and discussion with **Bill**, of **W and B Job Ltd** — the site foreperson — a prohibition notice was issued to the company as principal contractor. The notice prohibited any further work in the area affected until an engineer had checked the stability of the material.

The extent and effect of the prohibition was discussed with workers on site, including a self-employed blocklayer, **Otto**.

Two days later, and before an engineer had checked the landslip, Bill contacted Otto and asked him to return to the site and build a concrete block wall in the area affected. Bill said that the wall's non-completion was holding up work on the site, and that the engineer's inspection would occur in the course of the wall being built.

Both W and B Job Ltd and Otto were charged as a result of this action. W and B Job Ltd were charged for breach of its duty as a principal. Otto for breach of his duty as a self-employed person, under section 17.

Terence, a self-employed concrete cutter, was contracted by a concrete cutting company, **PowerCut Ltd** to cut grooves in the floor of a bank for cabling. The work was part of work being completed for the bank by a principal contractor, **Retrofit Interiors Ltd**.

It was a warm summer's day when Terence used his petrol-driven water-fed cutting machine inside the building. The cutting was first carried out in a small room adjacent to a larger room where four workers, **Suzy, Wayne, Darryl** and **Garth** were working. Terence then began to complete the work in the neighbouring larger room. He had positioned two fans, and opened outside doors to allow airflow to avoid the build-up of fumes in the area.

After a while all four workers nearby began to complain of headaches and nausea, and had to stop work. They were eventually diagnosed as suffering from carbon monoxide poisoning and required treatment in a decompression chamber.

Investigation after the incident showed that Terence should have taken steps to ensure others in the area were not exposed to the fumes by:

Positioning more fans in the area to further increase air flow;

Installing a monitor to establish the level of carbon monoxide in the rooms, given that it is a colourless, odourless gas; and

Advising the other workers that fumes would be emitted from the cutter, and advising them that if they developed any symptoms such as headaches, lethargy, dizziness, blurred vision, nausea or light-headedness, to evacuate the area.

Terence was convicted and fined under section 17 for causing serious harm to each of the four injured workers.

Arnie, a self-employed builder, was using a gas-powered nail gun on the roof of a house he was building in a suburban area.

Beth was weeding in the garden of her house next door, when a nail from the gun flew past, narrowly missing her and landing on the ground nearby. Beth retrieved the nail and found two others before contacting a health and safety inspector.

The health and safety inspector spoke to Arnie, who said the nails had ricocheted from a piece of timber after they had passed through another. However, this was questioned by the inspector because binding tape was still attached to each nail.

It was suggested instead that the nail gun may have been fired into the air to clear a blockage — also considered an unsafe practice. To do this, the operator would have had to hold back the safety platen.

The cause of the flying nails was never settled in court — Arnie pleaded guilty to a section 17 charge and was fined.

4.3 Duties of principals and contractors

The Act places a duty on a principal to a contract to take *all practicable steps* to ensure that contractors, subcontractors and their employees, are not harmed while undertaking any work under the contract. This duty is set out in section 18.

A principal or contractor may also be an employer (with the duties set out in part 2 of this guide), a self-employed person, or a person who controls a place of work (with duties under section 16).

A principal's duty under the Act is limited to matters which they can reasonably be expected to control. There are situations where control of a place of work may be shared by the principal and by contractors. For example, an electrical subcontractor working on scaffolding may not be subject to the control of the main contractor (a "principal" in this case) regarding the electrical work he or she is doing, but the use of the scaffolding may be under the control of the principal.

Section 18 is intended to cover situations where either:

- The contractor does not have full control because of conditions in a contract or because hazards are under the control of the principal; or
- Work is being carried out where there is no employer/employee relationship, and the principal retains control of the place of work.

The meaning of "principal"

An individual or company who engages any person (other than an employee) to do any work for gain or reward is a "principal" in terms of the Act.

The major exception is when a householder contracts with someone to do work on their home.

As an example, if you hire a plumber to fix a blocked drain in your home, you are not liable under the Act for the safety and health of the plumber while he or she carries out the work.

If, on the other hand, you contract a builder to do a major alteration to your home, and they subcontract a plumber, then the builder is a "principal" in terms of section 18.

Contracts for services

Section 18 applies to "contracts *for* services", as distinct from employment agreements (which may be described as "contracts *of* service"). Reference can be made to a substantial body of employment agreement case law for determining when a person is an "employee", or alternatively, an "independent contractor". Where there is a contract of service (i.e. an employment agreement) in existence, then the duties of an employer/employee relationship apply. On the other hand, where there is a contract *for* services, the duties of a principal under section 18 apply.

The Act does not apply to a contract for the sale of goods, although there are occasions when a contract is for goods *and* services — for example, a company may have a contract for the purchase of a piece of plant, which includes a service agreement. In such a situation, if a service technician is required to visit the purchaser's premises to repair the plant, then the purchasing company has the duties of a principal.

This duty should be read in conjunction with the duties of designers, manufacturers and suppliers of plant set out in regulations 66 and 67 of the Health and Safety in Employment Regulations 1995.

"For gain or reward"

The contractor must be engaged "for gain or reward", and the case law has found that the "gain or reward" must move directly from the principal to the person or company engaged through a contract. The contract need not be written, and all the terms do not need to be explicit, but there must be contract formation in the normal legal sense.

The "gain or reward" need not be financial. It could be payment in kind, an exchange of labour or services, or the benefit gained from a service or warranty agreement. (For a discussion of what constitutes payment, see 4.1, above.)

The association between the principal and the contractor must be clear and direct. The use of an agent or a management facility by a principal does not mean that they avoid their duty under section 18. This means that in situations where, for example, a building owner asks a letting agency to organise a contractor to repair a roof, and the account is forwarded by the agent to the building owner, then the owner has the duties of a principal.

Alternatively, if the agency commissions the work and pays the bill, then it is a principal in relation to the contractor. Individuals acting as authorised agent of a principal may also commit an offence under section 56 if they "direct, authorise, assent or acquiesce in" a breach of the Act (see 1.4, Coverage is broad).

There are situations where a designer/adviser is engaged to manage a project, or as an agent. In such a case, where the designer contracts directly with a contractor, and makes payments, they have the responsibilities of a principal.

The extent of the duty

The standard of care required of a principal is that they take "all practicable steps" to ensure no contractor or subcontractor or their employees is harmed while carrying out the work they are engaged to do. See 1.5, "All practicable steps".

What this means in terms of any given contract depends on:

- The size and nature of the contract;
- The type of work the contractor was engaged to do;
- The contractor's and the principal's respective knowledge of the work being undertaken; and
- The nature of hazards in the place of work.

The steps expected of a principal to a photocopier service contract, for example, are different to those expected of the principal to a contract for a major building alteration or plant installation. The photocopier owner may only require a brief verbal exchange of relevant health and safety information. On the other hand, the practicable steps expected of the principal to a major building contract or subcontract will usually be extensive.

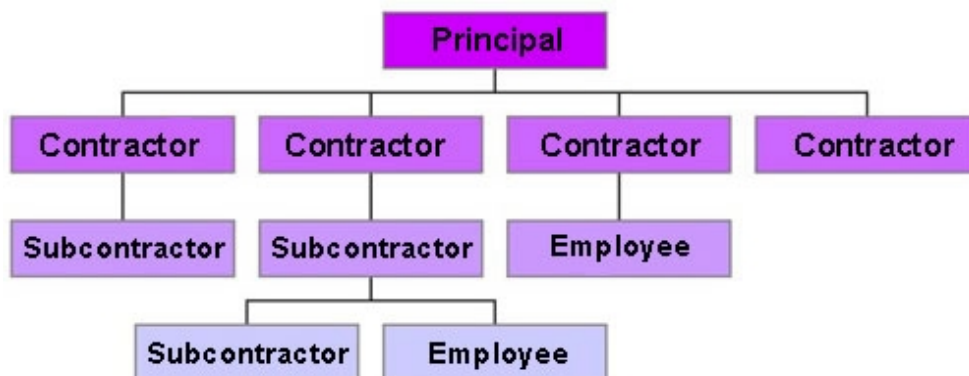
The duties of employers and principals will often be interrelated

Frequently the contractor's responsibilities as an employer will be greater than the practicable steps expected of a principal, and the steps expected of an employer will often not be practicable for a principal.

The case law has shown, however, that when there is a step which it would be practicable for the principal to take in the circumstances, that step is required to be taken irrespective of what steps might be required of the employer.

Typical contractor / principal relationships

The following diagram illustrates some of the typical relationships which will arise in the course of a significant project, such as the construction of a building.



A principal to a contract cannot distance themselves from what is occurring in a place of work simply because the employer is more directly related to and responsible for the employees carrying out the work. Nor can the principal always satisfy their obligations under section 18 simply by retaining a contractor who is competent. There may be occasions when this is the case, or where a principal may stipulate in advance the safety standards that are to be observed — and not be required to monitor — but this depends on the circumstances.

The steps required of a principal which, for example, has its head office in another city, may not be the same as the steps required of a head contractor working on site.

Principals or contractors cannot "contract out" of their liability under section 18.

Contractual clauses that attempt to do this will not be accepted by the courts.

The "all practicable steps" requirement for principals can be discussed under the following headings:

- Contractor selection and negotiation of terms;

- Information sharing; and
- Monitoring contractors.

Contractor selection and negotiation of terms

Case law has set a high standard for principals to include health and safety issues in the negotiation of contracts. A Court of Appeal judgment has stated*:

.... in contract negotiations between principal and contractor or subcontractor — no matter how informal — safety is as critical factor as the contract price or duration. As between principal and employer who will supply and maintain safety equipment; who will bear any losses if that equipment fails or is unavailable, who will negotiate directly with the employees to ensure the safest working methods and conditions in the circumstances of the contract. If a principal lets a contract to an employer which does not incorporate and allocate responsibility for such features, the principal may well assume the burden of assuring that workers are not harmed.

** Central Cranes Ltd v Department of Labour [1997] 3 NZLR 694*

There may be some circumstances where it is practicable for the principal to prescribe safety requirements in advance without subsequent monitoring, but this is dependent on the particular facts of any case. When negotiating any contract covered by the duty of section 18, the principal must turn their mind to the question of, and be satisfied that, the contractor is competent to perform the work being contracted for in a safe and healthy manner.

The principal may do this by deciding whether the contractor is a well-established and competent firm or person, and that the contractor is qualified to do the work (e.g. is the holder of the appropriate certificate of competence, such as a registered electrician). As part of the process, the principal should consider evaluations from earlier contracts, references provided by the contractor from previous clients, or other evaluative material as appropriate.

Is the principal responsible for advising on the appropriate safety standards to be observed?

The short answer to this question is, "yes". Depending on the nature of the work being undertaken, where a principal is required to take all practicable steps to avoid harm to contractors and their employees, this should involve an awareness of the required standards. The degree of prescription expected is high in cases such as the operators of a major electrical substation, or an oil depot, engaging contractors to carry out service work. It would be lower, for example, in the case of a self-employed potter engaging an electrical contractor to install a pottery kiln. But even in the latter case, the principal is unlikely to be able to avoid all responsibility for ensuring health and safety standards are met.

The contractor should submit a health and safety plan

For any significant contract, the contractor should submit a plan on how they intend to manage health and safety in relation to the proposed work — before the contract is formed. What is a significant contract will depend on the circumstances. For example, in the forestry industry, a contract to fell and remove several trees from an isolated farm paddock would probably not require a formal plan. But, to clear a similar stand of trees from beside a busy highway, or to extract a woodlot by a cable-logging operation, would both require a detailed plan.

Similarly, in the construction industry, the building of a single office partition might require elementary health and safety considerations, but for the refitting of an entire floor of an office building, or the construction of a new building, the courts would likely require a detailed plan.

This plan should as a minimum contain the following details:

- Hazards identified and control measures to be taken;

- Emergency procedures;
- Training, experience and qualifications of employees (including OSH certificates of competency where required); and
- Procedures for reporting and recording of accidents/incidents.

The health and safety plan or policy needs to be adequate, and appropriate to the hazards and circumstances of a particular contract. As mentioned above, this means that a standard policy that is intended to apply to all contracts is unlikely to be appropriate. The plan should describe the lines of accountability, and responsibilities for supervision. It is related to the information-sharing responsibilities described below.

Evaluation

Post-contractual evaluation by the principal should cover the safety and health performance of the contractor. Where appropriate, evaluation information should be included in the selection process for new contracts.

Information sharing between principals and contractors

The "practicable steps" required in the exchange of information varies according to the nature of any given contract.

In a situation where the contractor is employed for their particular expertise and the principal has little effective control over the place of work, the principal would not be expected to take many steps in relation to the contractor's specialised functions — and this *may* reduce the need for information sharing. This is in contrast to a situation where the nature of the work may be well known to the principal, or where the principal may exercise a high degree of control over the place of work — perhaps providing specialised plant or equipment for the use of the contractor — and there is associated information sharing.

Whatever the situation, effective information is critical, and the principal and contractor should discuss and share information about the work and the area the work is to be carried out in. This information should include the following details:

Reporting arrangements

Nominated contact persons for both the principal and contractor

Representatives nominated should have the appropriate level of knowledge for the role and be at a level of authority within the organisations that allows them to be effective. They should also be resourced and available to carry out the role effectively.

The planning and running of joint meetings

Meetings should be regular, and conducted in a format that allows a free and open exchange of information. It may be efficient to incorporate safety and health issues in other administrative meetings, but only where appropriate personnel and resources are available and the forum allows the subject to be covered sufficiently.

Procedures for reporting hazards

Although principals are required to take all practicable steps to monitor and manage hazards, there may be situations where they are reliant on the contractor to report hazards. Alternatively, there will often be situations where a contractor is dependent on the principal's control of hazards, or on their provision of information on hazards. For effective hazard management, there needs to be efficient transfer of information between the parties. This can only be achieved with any certainty through clearly designated reporting lines.

Contractors or principals who are employers are required to follow the formal hazard management processes of sections 7-10, see 2.3, Hazard management responsibilities.

Responsibilities where work is notifiable to OSH

The Health and Safety in Employment Regulations 1995 require employers to notify OSH of certain categories of work at least 24 hours before work begins. Much of this type of work — such as construction and forestry operations — is commonly performed by contractors. For a list, see the definitions at the back of this guide, under "notifiable work".

Section 18 requires that the principal to any contract involving such work be aware of the notification requirements and ensures the contractor complies.

Method for reporting accidents and incidents to the principal

The principal should ensure that they are advised by contractors of all accidents and incidents with respect at least to the hazards or potential hazards that they exercise control over.

Principals and self-employed persons have accident recording and notification duties under section 25(1A) and 25(3).

As is the case above, any principal or contractor who is also an employer has duties for the recording, investigating and reporting of accidents in the place of work.

(see part 5, Accidents, below).

[Refer also to the fact sheet, Recording and reporting serious harm.]

Information to be given by the principal about the workplace or procedures

Information to be given by the principal may include the following categories:

- Hazards that are known to exist in the place of work and may affect the contractor or their employees;
- Restricted areas;
- Any work permit procedures, e.g. hot work permits;
- Any company rules that the contractor will be required to comply with during the contract;
- Emergency procedures that exist and first-aid facilities available; and
- Specific job instructions and work methods.

The practicable steps are unlikely to include instruction on any specialised work for which the contractor has been employed. This means that, for example, having taken sufficient care to engage a competent diving contractor to inspect the piles of an estuary bridge, and that the work is notified to OSH, a principal would not usually be expected to provide instructions on diving practices or equipment. However, the principal would be expected to advise on such matters as traffic volumes over the bridge, a likelihood of flash flooding, or peculiarities in the method of construction that may create hazards for divers.

See also section 2.3, Hazard management responsibilities. Where a principal is also an employer, and is required to manage hazards in the workplace, it would be expected that any information on hazards acquired in this process would be readily made available to contractors. The section 18 duty also means there is a duty to inform of any known hazards, even when the principal is not an employer.

Information to be given by contractor about the workplace or procedures

Information to be given by the contractor may include the following categories:

- Information on hazards that the contractor is bringing onto or may be creating on site, e.g. hazardous substances, noise, dust, electrical hazards, etc;
- Safety provisions for other people who may be affected by the work, including the public;
- Safety equipment that may be necessary, including means of access to an appropriate standard; and
- Restricted areas.

Monitoring contractors' performance

The case law has established that there is a positive duty for principals to monitor contractors' and subcontractors' performance.

This is not a duty to constantly check for hazards, but at least to bring to the attention of the contractor any unsafe practices or conditions.

The principal may not have directly engaged subcontractors, but they still have a duty to ensure their safety at a level that could be reasonably expected — for example, by the provision of a safe power supply or access on a construction site.

What it is practicable for a principal to do will usually decrease the further the principal is removed from the subcontractor's engagement, but they are still required to do what could reasonably be expected in the circumstances.

As mentioned above, a head contractor is usually more able to influence general site safety, and less able to influence how subcontractors carry out specialist tasks for which the contractor has no expertise.

Interrelationship with the contractor's duty as an employer

A principal is required to monitor a contractor's performance in relation to employee's exposure to hazards. This is in addition to the contractor's responsibilities to their employees.

What is practicable for the principal will often differ from that expected of the contractor/employer in the circumstances. But if there is a step which it is practicable for a principal to take, then there is a duty to take that step. The principal cannot distance themselves from what is occurring in the workplace simply because the employer is more directly related to and responsible for the employees carrying out the work. It is a matter of fact and degree in each case, but the positive duty means "wilful blindness" is not acceptable.

There are few situations when simply appointing a competent contractor is all that is required. The following steps are therefore recommended to monitor contract work that is being undertaken, and identify problems before accidents or incidents occur:

- Raising issues that require attention by the contractor for any unsafe work practices that are observed;
- Regular inspections;

- Investigating accidents and incidents;
- Regular meetings to review health and safety performance;
- Effective management of the principal /contractor relationship, with all parties being aware of their roles and responsibilities;
- The principal having overall responsibility for the control and co-ordination of the contract; and
- Post-contract evaluation of performance.

Examples:

Associated Roofing Ltd had contracted to a large construction and development company, **MegaSite Ltd** for the supply and fixing of roofing to a major commercial building project. Associated Roofing then sub-contracted the work to **Ray**, who employed **Jack** and **Jeff**.

One day Jack and Jeff were fixing the roof, finishings and guttering to the building when a health and safety inspector visited the site. They were working without a suitable working platform or any other safety device such as a harness to protect them from the risk of a fall of more than 10 metres. No protection had been provided by Ray or Associated Roofing.

Associated Roofing had provided the workers with a "cherry picker", which had been removed from the site because it was too small. Another cherry picker on the site had been used to lift the guttering into place. This machine, which did not have a current certificate of fitness, was sitting in mud, which resulted in instability.

Access to the roof was by way of an extension ladder. This ladder was not secured in any way, and it did not extend above the working platform.

Associated Roofing Ltd's supervisor, **Mick**, when asked for an explanation, advised the inspector that he would pick up some safety harnesses. He said that no hazard identification had been completed for roofers. During the previous month OSH had conducted two seminars on the requirements of the Act for subcontractors on site.

Associated Roofing Ltd was convicted for breach of section 18 (1) (a).

Graham was employed in the evenings as a cleaner by the **Immaculate Cleaning Company Ltd**, which had a contract to clean an export meatworks, **Exco**. The work involved the cleaning of machinery as well as work areas, surfaces and amenities.

Graham's job included the thorough cleaning of a recently installed skinning machine. It was a large machine, which was used to remove membrane from meat. It worked when meat was fed into it through rollers, after which the machine would grip the meat and a fixed blade would remove the membrane.

Cleaning the machine involved hosing it down with hot water, then opening an infeed guard to expose a toothed roller and blade while the machine was still running. One day, four weeks after the machine was installed, Graham was completing this cleaning when his glove was caught by the machine — but he avoided injury. He told his supervisor, **Jed**.

A week later, his hand was caught in the machine and he lost the tips of two fingers.

Exco, as the owner of the machine and principal to the cleaning contract, was convicted under section 18 (1) (b) for failing to take all practicable steps to ensure the safety of a contractor's employee.

The Immaculate Cleaning Company Ltd was convicted under section 13 for failing to train Graham.

Tack and Flack Ltd were a firm of building contractors engaged to build an apartment block.

It engaged a rigging company, **Highwires Ltd**, to complete work on site.

One day, Glenn, an employee of Highwires, needed to shift a gas bottle and trolley set from the 5th floor to the 6th floor of the site by crane. He slung the load, and was helping the contractor's dogman, **Anaru**, to move it by lifting it over a wooden guardrail at the edge of the floor. The crane was taking the weight of the load when it became caught against the handrail, and Anaru asked Glenn to free the snagged load by lifting it over.

In the course of this, the load released with great force, pulling Glenn through the railing to a fall of five storeys. He suffered multiple internal injuries and fractures of the lower limbs, leading to the amputation of one leg.

Investigation determined the cause of the accident to be a combination of the victim's own inexperience in using cranes, poor lifting technique encouraged by a Tack and Flack employee, and an absence of safety devices.

Tack and Flack had control of this aspect of the place of work. The company had identified workers inexperienced in using cranes as a potential hazard on site, but had taken inadequate steps to eliminate the hazard. By allowing the inexperienced worker to complete dangerous tasks under their supervision, they had breached their duty under section 18. The company was convicted and fined.

High and Dry Ltd was a well-established roofing company. Based in one region, in another it employed a regional manager, **Bryn**, and conducted its business by employing subcontractors.

It obtained a contract to supply and fix roofing and external cladding to an industrial building, and subcontracted a roofing contractor, **Mato**, to perform the work. There was verbal negotiation and agreement was reached between Mato and Bryn on how the work would be done, including health and safety issues, and particularly with regard to the height of the operation. Mato required a scaffolding truck to be provided for the installation of wall cladding, guttering and wire netting on site.

High and Dry Ltd had a health and safety policy, which required, among other things, the use of safety harnesses. However, there was no requirement for supervision, or that High and Dry provide the recommended safety equipment. Mato had indicated to Bryn that he did not support the use of harnesses when installing the long-run roofing being installed.

While standing on purlins and working with an employee laying building paper in preparation for the sheets of long-run roofing, Mato suffered a heart attack and fell through the wire netting, on to concrete 10 metres below. He died soon after from injuries arising out of the fall.

High and Dry Ltd was convicted and fined under section 18 for failing as a principal to ensure the safety of a self-employed contractor.

4.4 Duties of persons selling or supplying plant for use in a place of work

The duty

The Act contains duties for any person who sells or supplies plant that *can be* used in a place of work (section 18A). The intent of the section is to ensure that any plant used in a place of work is designed and made, and has been maintained, so that it is safe for its intended use.

Towards this, the Act imposes similar, but distinct, duties on people who:

- Hire, lease or loan to another; or

- Otherwise sells or supplies

plant that can be used in a place of work.

Where a person hires, leases, or loans plant to another

The Act imposes a duty on any person who hires, leases, or loans to another person plant that *can be* used in a place of work (section 18(1A)).

In such a case, before hiring, leasing or loaning the plant to another person, they must first ascertain from the person:

- Whether the plant is to be used in a place of work; and, *if so*
- The intended use of the plant.

Where the plant is to be used in a place of work, the person hiring out, leasing or loaning the plant must take all practicable steps to ensure that the plant is designed and made, and has been maintained so that it is safe for its intended use.

This places a clear onus on hire companies and others to ask about the intended use of the plant they are hiring, leasing, or loaning. Also, because the Act refers to the “loan” of plant, in other situations — where money may not change hands — the same duty will apply when plant moves from one place of work to another.

Where a person sells or supplies plant (other than for hire, lease or loan)

Where the above duty doesn’t apply, and a person sells or supplies plant to another person that can be used in a place of work, they have a duty to ensure it is safe. The duty is to take all practicable steps to ensure that the plant is designed and made, and has been maintained, so that is safe. It applies to:

- Any intended use that the seller/supplier **knows of**; or
- Any use that the seller/supplier could **reasonably expect**.

(section 18A (2))

As is the case with hirers, etc, the duty applies to plant that *can be* used in a place of work. The standard required is that the person selling or supplying the plant take “all practicable steps”.

Although there is no explicit duty to enquire into the use of the plant being sold or supplied, the duty applies not only to any known use, but also any use of the plant “that the person could reasonably expect”. This is an objective standard, the assessment of which will be based on the “reasonable person” test. For further explanation, see 1.5, “All practicable steps”. This means for example, that if a supplier provides a woodcutting saw to a woodworking shop, and it is subsequently used to cut metal and fails, then the supplier is unlikely to be held liable for a breach of the duty. If, on the other hand, they supply the same saw to a metalworking shop, then they could well be liable.

Installing or arranging plant

Where the above duties apply to a person who, hires, leases, sells, or otherwise supplies plant to another person for use in a place of work, and agrees to install or arrange the plant, the person completing the work must take all practicable steps to install or arrange it so that it is safe for its intended use (section 18(3)).

“Plant” defined

The term “plant” is defined in section 2 of the Act. The definition is very broad, and includes, but is not limited to, any:

- Appliance;
- Equipment;
- Fitting;
- Furniture;
- Implement;
- Machine;
- Machinery;
- Tool; or
- Vehicle.

The plant must be of a nature that can be used in a place of work. So, for example, while a mountain bike is a vehicle or machine, it is unlikely to be used anywhere other than for leisure activities. Conversely, a forklift truck is unlikely to be used anywhere other than a place of work.

The term also includes part of any plant, its controls, or any thing connected to the plant. This further extends the duty. It means, for example, that if a person hires out a trailer-mounted concrete mixer for use in a place of work, the duty applies to the trailer assembly and coupling to a vehicle, the motor, the mixing bowl and transmission, the controls, and any guards or covers attached to the mixer. If electrical leads or connections are supplied with it, then the duty applies to them as well.

Refer to the definitions section at the back of this guide.

Goods sold “as is” are exempt

The duties do not apply to the sale of plant, whether or not in trade, to plant sold second-hand and “as is” — i.e. without any representations or warranties about its quality, durability, or fitness, and with the entire risk in those respects to be borne by the buyer (section 18A (4) and (5)).

Relationship with consumer protection legislation

Section 18A (6) states explicitly that the duty contained in the Act does not limit the Consumer Guarantees Act 1993, which provides consumer protection for the purchase of goods and services other than in trade.

Example:

Squashers Ltd leased a waste compactor to a supermarket, **TopBuys Ltd**, whose employees were responsible for its day-to-day operation.

The compactor had been manufactured to an American standard and imported by Squashers Ltd. When it was operated, there was a trapping point between a ram head and a hole through which employees fed refuse into it.

One day, a young TopBuys employee, **Ed**, was using the machine, when it became clogged with refuse. He climbed into the machine to force down the cartons that had become stuck, and was crushed to death between the ram and the refuse.

The compactor comprised a self-enclosed bin, into which rubbish was forced from above by a hydraulic ram in a separate compactor unit. Squashers' management had noticed that it was possible for employees operating the unit to climb on top of the housing and into the hopper on top of the compactor. An industry committee had been established to provide guidelines. Since 1989, literature available to the company had recommended secure fencing to prevent entry while the machine was operating, an automatic cut-out, should the guard be removed, and a continuous pressure switch.

Squashers Ltd was charged under section 16. The court found that accidents caused by careless use were foreseeable. Squashers Ltd was found to have actual knowledge, and although American standards had been applied, this was not considered adequate to meet the New Zealand Act's requirements in the circumstances. The company was convicted and fined. Today the charges would be laid under section 18A.

Superb Painters hired a sky lift platform from **Hyper Hire Ltd** to provide access for a contract to paint a warehouse.

*Superb's employees, **Yosef** and **Zac** were painting from the platform when it collapsed. Yosef was thrown 6 metres from the platform on to a concrete floor, receiving facial injuries, lacerations, a skull fracture, fracture to the left tibia and a fractured pelvis. Zac received severe bruising to his legs.*

Investigation by a health and safety inspector showed that a director of Hyper Hire had added an extra scissor to the hydraulic platform to enable greater use. The welding was of a poor quality, and led to the collapse.

Hyper Hire Ltd were convicted and fined under section 16. (Today any prosecution under similar circumstances would be taken against the company under section 18A.)

Part 5: Accidents

The Act requires employers the **self-employed** and **principals** to record all accidents and incidents in places of work. It requires employers to investigate all accidents and incidents to determine whether or not they were caused by a significant hazard, and if so to manage the hazard.

The Act also requires immediate notification by employers, the self-employed and principals of all accidents or cases of occupational illness involving serious harm to employees to the nearest OSH, MSA or the CAA (as appropriate), followed by a written report in a prescribed form within seven days.

5.1 Recording and investigating occurrences of harm

Employers, the **self-employed** and **principals** are each required to keep a register of all accidents and incidents, and any other occurrences of serious harm that arise from workplace hazards (section 25(1)).

The Act defines "accident" broadly, as any event that —

- Causes any person to be harmed; or
- In different circumstances, might have caused any person to be harmed.

(section 2)

Record keeping for employers

Accidents involving employees

A record must be kept of:

- Every **accident or incident** that harmed or might have harmed any employee at work (section 25(1)(a)(i)); and
- Every occurrence of **serious harm** to an employee at work, or as a result of any hazard to which the employee was exposed while at work and in the employment of the employer (section 25(1)(b)).

It is important to note that the requirement is to record accidents and incidents where any degree of harm of has occurred or could have occurred, i.e. it need not have been serious harm.

The requirement to record serious harm overlaps with the requirement to record accidents and incidents. However, serious harm may have arisen from exposure to hazards that cannot be linked back to particular events. Exposure must have occurred while in the employment of the employer. It need not be the only exposure which the employer has had for the employer to be required to record or report the occurrence (see 5.2 below).

The requirement for employers to record is intended to lead to greater awareness of, and investigation of the causes of occupational illness and disease. It applies equally to "biologically" derived illness, such as leptospirosis, or hepatitis B, as it does to "physically" caused conditions, such as noise-induced hearing loss, occupational overuse syndrome, or solvent-induced neurotoxicity.

Most occupational diseases are classified as "serious harm". For further explanation, refer to the definitions at the back of this guide.

Accidents involving other people in a place of work

Employers must also keep a record of every accident or incident that harmed or might have harmed any other person in a place of work controlled by the employer (section 25(1)(a)(ii)).

Record keeping for self-employed persons (section 25(1A))

Self-employed people must maintain a register of accidents and serious harm and keep in the register details of:

- Every accident or incident that harmed (or might have harmed) themselves while at work; and
- Every accident or incident that harmed (or might have harmed) any other person while at work; and
- Every occurrence of serious harm to themselves while at work, or as a result of any hazard they were exposed to while at work.

Record keeping for principals (section 25(1B))

Principals to a contract (defined at 4.3, Principals and contractors) must maintain a register of accidents and serious harm and keep in the register details of:

- Every accident or incident that the principal becomes aware of that harmed (or might have harmed) a self-employed person while at work and contracted to the principal; and
- Every accident or incident the principal becomes aware of resulting from a self-employed person at work and contracted to the principal that harmed (or might have harmed) any other person while at work; and
- Every occurrence of serious harm to a self-employed person while at work and contracted to the principal, or as a result of any hazard they were exposed to while at work.

The duty is in addition to any record keeping duties the principal may have as an employer.

The duty does not apply to the occupier of a home who contracts a self-employed person to work on or in it.

Format of the register

The required form of register is the same for each of the above duty-holders, and must contain information prescribed by regulation. An entry must be completed for every accident or incident, or any occurrence of serious harm which results from exposure to a hazard in a place of work.

The categories of information required to be recorded in the register are set out in the Health and Safety in Employment (Prescribed Matters) Regulations 2003. See below.

Information to be recorded in the register

Regulation 4 of the Health and Safety in Employment (Prescribed Matters) Regulations 2003 requires the recording of the following information in a register of accidents and incidents (so far as they are relevant and known to, or ascertainable by, the employer, self-employed person, or principal concerned):

1. Particulars of employer, self-employed person, or principal (business name, address and telephone number).
2. Whether the person reporting is an employer, self-employed person, or principal.
3. Location of the place of work where the accident/harm occurred.

4. Name, home address and details of person injured (employers or self-employed only).
5. Occupation or job title of the injured person.
6. Whether the injured person is an employee, contractor, the person reporting or other.
7. Period of employment of injured person (employees only).
8. Treatment of injury.
9. Time and date of the accident/harm.
10. Mechanism of accident/harm — what happened.
11. Agency of accident/harm — what caused it.
12. The part of the body affected.
13. The nature of the injury or harm.
14. A description of where and how the accident/harm happened.
15. Whether or not an accident investigation has been completed by the employer, and whether or not a significant hazard was involved.
16. Name and signature of the employer (and position in company if their representative).

A form for recording and reporting accidents is available on the OSH website www.osh.dol.govt.nz/report/accident/index.shtml and suitable accident registers can also be purchased from suppliers of books and stationery.

Employers do not have to use a pre-printed register form. They may use their own form (including an electronic register) so long as it includes at least all of the information required to be recorded or reported.

Extent of the employer's duty

Employers are responsible for the recording and investigation of accidents and illness affecting their employees. The duty is not qualified by the "all practicable steps" requirement — meaning that in any prosecution there are few defences the court may consider where there has been a failure to record, notify or report (see 6.5, Offences and penalties).

Employer's duty to investigate

Section 7(2) of the Act requires that all accidents and occurrences of harm that are required to be recorded are investigated by the employer to determine whether it was caused by, or arose from a significant hazard. This is regardless of whether or not the person exposed to the hazard was an employee.

The standard of care required of the employer is "all practicable steps".

Any significant hazards identified as a result of this process must then be eliminated, isolated or minimised as required by sections 8-10 of the Act (see 2.3, Hazard management responsibilities).

Others exercising control over places of work

Principals and self-employed people, while required to record and notify, are not legally obligated to investigate accidents.

The duty to record does not apply to a person who controls a place of work. However, it is likely that in many situations, such as a farm or small business, where the "person who controls the place of work" is not an employer, they are likely to be self-employed..

Employees

There is an implied duty for employees to report accidents and incidents to their employer (see 3.2, The employee's general duty). Supervisors, on the other hand, usually assume at least some of the responsibilities of their employer.

All accidents should be reported to the employer immediately. This means, among other things, that an investigation can be conducted. Telecommunications today mean that even accidents at a remote place of work can and should be reported to the employer within a short time.

Reporting of all incidents or "near misses" to the employer is also important. Recording of these incidents provides valuable data to improve safety and health, and allows for steps to be taken to prevent injury.

5.2 Notification and reporting requirements

Employers, self-employed and principals with the duty to record accidents must also notify OSH of occurrences of serious harm (section 25(2) and (3)).

Where **serious harm** occurs to any person as a result of work activities, the person recording is required to notify the Secretary of Labour at the nearest OSH regional office (or CAA, in the case of the aviation industry or MSA in the case of ships) as soon as is reasonably possible after its occurrence or detection. For a definition of **serious harm**, see the definitions at the back of this guide.

Notification should be made by telephone, or by fax — not mail. It should describe:

- What has happened;
- To whom; and
- Where.

The seriousness of the event may determine how rapidly notification occurs. In the case of a fatality, grave injury, or significant property damage, notification should occur immediately after the event. Alternatively, in the case of serious harm arising from occupational illness or disease, it may be sufficient to send a written report after an initial diagnosis is made.

The purpose of the notification is so that OSH, or the appropriate designated agency, can determine whether or not to investigate the serious harm. Also, so that OSH can authorise the release of the accident scene (refer to 5.3, below).

Within 7 days after the occurrence, and in addition to the notification described above, the employer must provide **written notice** to their nearest branch of the Occupational Safety and Health Service, or to the MSA or CAA as appropriate. The notice must be in the manner prescribed in the Health and Safety in Employment (Prescribed Matters) Regulations. Pre-printed forms are available, see above, but the required information may be provided in an alternative form.

Additional regulatory requirements

Additional requirements may be prescribed by regulations covering specific high-hazard industries. For example, the Health and Safety in Employment (Pressure Equipment, Cranes and Passenger Ropeways) Regulations 1999 require some non-injury accidents involving boilers, pressure vessels, cranes and passenger ropeways to be notified to OSH.

What happens to notification advice

When an Occupational Safety and Health Service regional office, or designated agency, is advised of an accident, incident, or other occurrence of serious harm, a health and safety inspector decides whether or not to investigate the cause to determine if there has been a breach of the Act.

In suspected or confirmed cases of occupational illness or disease an occupational health nurse or departmental medical practitioner will usually investigate the place of work. They may recommend changes in facilities or work practices.

OSH also uses information gained from written notices to monitor the levels of compliance with the legislation, maintain, and contribute to injury databases. Such data is used to establish trends before developing strategies aimed at particular hazards or industries. Information supplied and used in this way is subject to the Official Information Act and privacy legislation.

Examples:

Dougal was a casual employee of **ShipAhoy Services Ltd**, and was working the night shift, loading logs in the hold of a ship.

Towards the end of the shift, several of the logs were lying in a pile between two hatches on the deck, and ShipAhoy foreman, **Ike**, instructed Dougal to place a cable around the end of the logs to allow a crane to move them. While Dougal was positioning the block of the crane, it hit the log on the top of the pile, causing it to slide downwards, striking Dougal and knocking him to the deck, with the log on his left leg.

Other employees went to Dougal's aid, but he made light of his injury and refused help after the log had been removed from him. The other employees, including two who were trained in first aid, were content to leave him alone. He got up and returned to the wharf before limping home.

Later that day Dougal visited an A and E clinic, where a fracture of the fibula was diagnosed. Dougal's wife, **Mavis**, advised Ike of this, but he did not take any action as a result.

Later on, the company manager, **Boris**, was advised, but he did not talk to Ike about the incident until two days later. Then he rang Ike, before ringing Dougal, and asking him to provide a written report. Boris then notified the local OSH branch later in the same day, and followed this up with a written report.

In the meantime, the ship had sailed before an OSH inspector could investigate the accident.

The company was convicted and fined for a breach of section 25. The court found the company staff to be ignorant of procedures following an accident, and the OSH reporting requirements. A booklet had been prepared, but the company had not checked whether or not people had read it.

Charlie was contracted to work in a refrigerated storage facility managed by **Moo Dairy Company**, who were in turn managing the facility for a producer board.

Charlie employed four casual employees to work with him in the refrigerated warehouse. One day they were all affected by carbon monoxide fumes, and three were too unwell to continue even trying to work. Not realising the extent of the illness, Charlie allowed three of them to leave the workplace without any form of treatment, and continued to work with the remaining employee, before experiencing severe symptoms himself. It was then that the nature and extent of the illness became clear, and all five men were hospitalised with carbon monoxide poisoning, and received compression treatment.

Before he went to hospital, Charlie had a discussion with two Moo Dairy Company managers, and it was decided that the dairy company, as principal, would notify the incident to OSH. This was done by telephone, and followed up with a written report within the 7-day period required.

Charlie was discharged from hospital two days later, but as an employer of the four men, did not notify, record, report or investigate the incident. He was charged under section 25 for failure to notify the incident to OSH. The judge held that he could not be released from his obligations as an employer, and should have advised the nearest OSH office of the occurrence of serious harm at the first reasonable opportunity on his release from hospital.

5.3 No interference at scene of an accident

When there has been an accident involving serious harm to a person at work, the scene may not be altered without the permission of an inspector, unless to:

- Save life, prevent harm or relieve the suffering of any person;
- Maintain access of the general public to essential services or utilities (such as water, electricity or gas); or
- Prevent serious damage or loss of property.

The requirement (contained in section 26) does not apply where the accident:

- Involves a motor vehicle on a public highway;
- Is being investigated by the police; or
- Is being investigated under other law, such as transport, electricity and gas legislation, or the Armed Forces Discipline Act 1971.

The restriction on altering an accident scene is extensive, and means that no one may remove or in any way interfere with or disturb any wreckage, article or thing related to the incident.

The duty applies to all people — not only employers or employees — and this includes people who control a place of work, contractors or principals, or members of the public.

Release of an accident scene

An investigating health and safety inspector will release the scene of an accident when her or his examination is complete and they are satisfied that the hazard that caused the accident is no longer present, or if the inspector is satisfied on the basis of information supplied that there is no need for OSH to carry out an investigation.

How long an accident site is held for an investigation depends on the nature of the accident, but is usually less than 24 hours.

Release of the site need not be written, and may be verbal. It will be issued to the person in control of the place of work.

Example:

Richard was an employee of a ski hire and adventure tourism company, **Whoosh Enterprises**, which had set up a grass-ski facility.

Richard was in the process of dismantling the hillside facility, and was using a wheel loader which had been hired by Whoosh from **MoreforHire Ltd**, when the loader rolled and pinned him underneath. He received broken bones in his right hand and left foot and severe bruising.

Richard had received little instruction in the use of the wheel loader.

After the accident, a representative of MoreforHire Ltd removed the wheel-loader from the scene and modified the operator protective structure.

Investigation found that an awning on the machine fell well short of the requirements of the code of practice for operator protective structures on such machinery — a copy of which had been supplied to the hire company by an OSH inspector a year before.

MoreforHire Ltd was convicted and fined under section 26(1) for interfering with the scene of an accident.

5.4 Investigation of accidents and illness

Investigation by employers

The duty to record all accidents, incidents and cases of occupational illness is set out above, and applies to all cases, whether the harm occurred to an employee or to another person. This includes any accidents or incidents where serious harm does not result, and is in addition to any accident investigation completed by OSH.

Having recorded the occurrence, section 7 of the Act requires that the employer then investigate the cause of any harm. This is to determine whether or not any recorded incident or illness was caused by a **significant hazard**. The standard required is "all practicable steps". This is an important element of the hazard management requirements of the Act (see 2.3, Hazard management responsibilities).

If the hazard is significant, it must be eliminated, isolated or minimised under the hazard management requirements of sections 8-10. The investigation of all accidents in this way is an important requirement of the Act. It should also be remembered that although the harm done in any particular incident may not be "serious harm", there may have been the potential for serious harm, and the incident may point to a significant hazard.

Two examples illustrate the point. Firstly, a roofer without fall protection slipped down a roof he was installing and was caught in wire netting, narrowly avoiding a fall of 10 metres and only cutting his finger. Clearly, the harm suffered was not serious, but the hazard of the unprotected fall was significant.

In the second example, two sewer workers emerged from a manhole with headaches and mild nausea, and, having reported their symptoms to their supervisor, investigation revealed the significant hazard of a dangerously high build-up of methane and carbon monoxide in the section of the sewer network they were working in. Again, the workers were lucky not to suffer serious harm, but the confined space hazard was significant.

When OSH, the CAA or MSA investigates accidents, incidents or illness

The Occupational Safety and Health Service, and designated agencies, investigate most occurrences of serious harm. Health and safety inspectors use the powers set out under sections 31-33 of the Act.

The powers of inspectors are described in more detail in section 6.1, Health and safety inspectors. For the purposes of investigations, an inspector may enter any place of work and conduct inquiries into the causes of any accident and into the health and safety of people at the place of work.

Investigation and evidence gathering

An inspector's investigation begins with their determining what happened, and whether or not the Act has been complied with. This may, in turn, lead into the gathering of evidence for a possible prosecution.

While carrying out the investigation, the inspector may take any photographs, measurements, sketches or recordings as are necessary for the purpose of determining the cause of the accident (section 31(1)).

The Act (section 33) also provides for the taking or removal of a sample of any substance or thing for analysis, and for the seizure of any material, substance or thing to:

- Monitor conditions in the place of work; or
- Determine the nature of any material or substance in the place of work.

When any such sample or other item is taken as evidence or otherwise, there are notice requirements and other limitations which the investigating inspector must meet — see 6.1, Health and safety inspectors.

As mentioned above, while any examination or test is carried out, the investigating inspector may require the employer or any other person in control of the place of work or any place or thing in the place of work not to be disturbed for a reasonable period.

The inspector may also require the employer, or any other person who controls a place of work, to produce documents or information relating to the place of work or the employees who work there. The inspector may make copies or extracts of the documents and information.

In the course of any accident investigation or inquiry, no person is required to give any answer or provide information that may incriminate them (section 31(6)).

Investigation of occupational illness and disease

Where there is a notification of serious harm resulting from occupational illness or disease, the occurrence may be investigated by a health and safety inspector or a departmental medical practitioner.

Departmental medical practitioners have many of the powers of entry and inspection of health and safety inspectors, and may complete investigations into cases of occupational illness or disease and prepare reports. They may also monitor conditions in the place of work and require the medical examination of employees and suspend employees in certain cases. See 6.2, Departmental medical practitioners.

Any prosecutions arising out of matters investigated by a Departmental Medical Practitioner must be begun by an inspector.

Availability of accident investigation reports

When an accident report is completed by an inspector, it is available to the individual or company investigated, and to the individual who has suffered the harm. The requirements of both the Official Information Act 1982 and the Privacy Act 1993 apply.

Where the report is to be used in evidence in a prosecution it becomes subject to the pre-trial process of "discovery" by legal counsel.

Decisions to prosecute after accidents

After any accident, a decision to prosecute is made after a report has been completed, and where:

- A prima facie case has been made out that there has been a breach of the Act; and

- It is in the public interest to prosecute.

The decision whether to prosecute is made by the investigating inspector, after discussion with their manager and a solicitor.

About 80 percent of prosecutions taken by OSH under the Act follow accidents, incidents and cases of serious harm. However, since the legislation was enacted, only 4 percent of investigations have resulted in prosecutions. For further discussion of OSH's prosecution policy, see 6.5, Offences and penalties.

An example of an accident investigation

An accident investigation in the construction industry illustrates the investigation process after a serious harm accident or, as in this case, fatality.

The accident

*A viaduct on a state highway was being constructed in a remote mountain setting by construction company, **Highway Constructors Ltd**. The completed viaduct was to have three large concrete piers supporting reinforced concrete spans. At the time of the accident two piers were nearly complete, and deep foundations were being drilled into rock for the third pier. The company employed an average of 35 people on the project, and, depending on the work being done, two shifts were being worked — 4am–2pm, and 2pm–midnight.*

*One morning **Lyall** and **Serge** had just begun work on the day shift at the excavation of the third pier. The excavation was a hole in solid rock, 12m in diameter and 18 m deep, which filled with water unless electric pumps were regularly used to clear it.*

The two men, who were the only employees present on the site at the time, were using a 150-tonne crawler crane to remove a submersible electric pump from the hole for maintenance. The crane was slung with a hook, attached to the pump, and while Serge operated the crane from the cab, about 15 metres back from the edge of the hole, Lyall was directing him.

While the pump had been lifted out of the hole, electrical cables attached to it had become snagged at ground level. Tension in the lifting chain and the snagged wires increased, and when continued lifting didn't free it, Lyall signalled to Serge to stop the crane. He was moving to disentangle the cables when the pump swung towards him and a lifting chain attachment point snapped, causing the 500kg pump to drop onto him. At this point Serge left the cab and ran to his assistance. Lyall was unconscious with a weak pulse. Serge saw he had a head injury, and left him in the recovery position before driving to the site office to phone for help. By the time he returned, Lyall had died of abdominal injuries.

Serge had contacted emergency services. The project manager notified OSH of the accident within an hour of its occurrence. Lyall's body was removed, but other than this the scene of the accident was left undisturbed until OSH inspectors arrived four hours after the accident.

Investigation

The investigation began that morning. The accident scene and surrounding site were photographed, and the pump lifting eyes, chain and bolts, and Lyall's helmet were removed from the site. (Their removal was recorded in a notice given to the site manager.)

To determine what happened and the company practices and systems in place, inspectors formally interviewed:

- Serge;
- Four other employees who worked on site, two of which were on the other shift;
- The project manager; and

- *The contracts manager.*

The cause of death was determined by an autopsy.

The purpose of an investigation is to:

- *Identify and analyse contributing factors which led to, or resulted in, the injury or illness or the complaint;*
- *Develop preventative measures to eliminate, where possible, the contributing factors;*
- *Determine the extent to which the contributing factors were the result of non-compliance with legal requirements and standards; and*
- *Take whatever actions are required to correct the non-compliance and prevent a recurrence, including enforcement action where necessary.*

Investigation soon focused on the failed equipment. A consultant engineer was engaged to examine and test the failed lifting equipment, and the results were supplied in a formal report. The impact of the company's hazard management systems on the accident was also evaluated.

Report and outcome

OSH's policy is to operate on the principle of "no surprises" to all parties in the investigation. Every effort was made to ensure that the parties were aware of the status of the investigation, reasons why any actions were or were not taken, and any future actions to be taken.

A draft report was produced within 6 weeks and copies were supplied to the company and to Lyall's family for comment. Comments were incorporated in the report.

OSH's policy is to produce a final report and recommendations, wherever possible, within 90 days of the accident, incident or cause of harm becoming known.

The final report must set out:

- *The sequence of events;*
- *The facts that can be proven; and*
- *Conclusions and recommendations.*

In this case, charges were laid against the company for breach of the section 6 duty to provide a safe place of work, and the section 7(1) (a) duty to identify hazards.

In court, the section 7 charge was withdrawn, and the company pleaded guilty to and was convicted on the section 6 charge.

The company produced its own detailed investigation of the accident, which contained recommendations for changes to work practices and equipment.

Judicial inquiries into accidents

The Minister responsible for the Health and Safety in Employment Act may direct an inquiry to be held before a District Court judge into any accident or any occurrence of serious harm that happens at a place of work (section 27).

The decision to hold an inquiry is a matter of ministerial discretion, and will usually be based on public interest grounds. Any decision is made after consultation with the Minister of Justice.

A judge appointed to lead an inquiry has all the powers of a commission of inquiry under the Commissions of Inquiry Act 1908 — meaning they may appoint expert assistance and holding hearings as and where required. Their report is provided to the Minister responsible for the Act.

In the first ten year's of the legislation being in force, no ministerial inquiries were held under section 27.

Reports to a coroner

A coroner may request and be provided with written reports on fatal accidents (section 28).

Having requested such a report, the coroner may decide whether or not to hold an inquest. The inquest may be held in addition to any investigation, prosecution or other enforcement action taken under the Health and Safety in Employment Act.

Health and safety inspectors may, among others, give evidence at a coroner's inquest, and in addition to providing a written report.

A summary of what to do following an accident or other incidence of harm

Make sure anyone injured or suspected of injury or illness has received medical attention if necessary.

A. Recording accidents and incidents that don't result in serious harm

1. When events do not result in serious harm, complete your own investigation.
2. Where a significant hazard is identified, take whatever steps are needed to eliminate, isolate or minimise it. Record the details of the incident and the outcome of the investigation in a register.

B. When events result in serious harm

1. Don't interfere with the accident scene without the permission of a health and safety inspector
2. Advise your local OSH branch office as soon as possible by phone or fax.
3. Complete your own investigation and take steps to eliminate, isolate or minimise any identified significant hazard.
4. Mail or fax written notice in the prescribed form to the nearest OSH office within 7 days.
5. Keep a copy of the written notice in your register. If you keep an accident register in a different form, you must record the prescribed details.

Examples:

*Peter was employed as a storeperson in the depot of the trucking and freight forwarding company, **VroomFreight Ltd**. One day he was unloading cartons from a trailer unit which had been parked at a loading platform. He was stacking the cartons on a pallet when one became jammed. While trying to free the carton, he fell from the platform on to concrete below, suffering severe head injuries and a broken shoulder.*

VroomFreight had not notified OSH by the time a health and safety inspector read of the incident in the newspaper the next morning.

The inspector visited the depot, and on arrival it was clear that the accident site had been completely altered. The trailer unit into which the employee had been loading cartons had been driven away, the pallet had been thrown out, and the platform on which Peter had been standing had been moved. It was therefore difficult to determine what had caused the accident. The company manager claimed that the nature of the business meant that even if OSH had been notified, the company would have been reluctant to hold up the passage of freight by leaving the accident scene undisturbed.

Vroomfreight Ltd was convicted and fined under section 26 for interfering with the scene of an accident.

***Colin** was employed as a machine operator and assembly worker by timber products manufacturer, **Sandalwood Products Ltd**.*

*He had worked for the company for about three months when he arrived at work one morning and was waiting to be assigned work for the day by the foreman **Todd**. In the meantime another experienced employee, **Sue**, was setting up a blade on a spindle moulding machine about 4 metres away.*

Having fitted the blade, Sue turned on the machine, and immediately afterwards there was a loud noise and Colin looked down in pain, to see that his hand was bleeding.

Todd took him to hospital, where surgery removed a part of the blade, and repaired tendon damage. Colin was off work for three months.

*Colin had been assured that the accident would be reported to the authorities, but neither Todd or the company director, **Mr Sandal**, reported the accident to OSH — although it was lodged as an accident compensation claim.*

Colin became concerned about the absence of reporting and the level of safety precautions in the workplace generally. He contacted an OSH inspector at the time of his return to work, when it became clear that the company had not recorded or investigated the accident, and no remedial action had been taken. The company was unaware of the need to report, record and investigate serious harm accidents.

Sandalwood Products Ltd was convicted and fined for breaching sections 25 and 26 of the Act. It was also charged under section 6.

Part 6: How the Act is administered and enforced

This part describes the role of health and safety inspectors, departmental medical practitioners and others who enforce the Act, and the conduct of their dealings with employers and others in places of work.

The Act also provides for the setting of industry standards, the issuing of notices and other enforcement provisions available to inspectors and departmental medical practitioners.

6.1 Health and safety inspectors (sections 29-33)

Appointment of health and safety inspectors

The terms of appointment, powers and functions of inspectors are set out in sections 29-31 of the Act.

Health and safety inspectors operating in most workplaces — except ships or aeroplanes — are employees of the Occupational Safety and Health Service of the Department of Labour (OSH). The Maritime Safety Authority and the Civil Aviation Authority have been designated as responsible for enforcing the legislation with respect to the operation of ships (except naval) and aircraft respectively.

When an inspector has completed the necessary training and experience, they are issued with a certificate of appointment by authority of the Secretary of Labour (or chief executive of the MSA or CAA). The certificate of appointment must be produced when entering a place of work under the authority of the Act, and at any later time if requested by a person apparently in charge of a place of work.

Functions of health and safety inspectors

The broad functions of inspectors and the inspectorate are set out in section 30 of the Act as:

- To provide information and education to employers, employees, and other persons to improve safety at places of work and the safety of people at work;
- To ascertain whether or not the Act has been, is being, or is likely to be complied with;
- To take all reasonable steps to ensure that the Act is being complied with; and
- Other functions as set out in the HSE Act or any other legislation.

Section 30 is important because it describes the role of the inspectorate in relation to individuals, businesses and those in the community that have duties under the legislation. As such, and read in conjunction with the objects of the law and the duties themselves, it describes the nature of the relationship between the inspectorate and the community, and the measures taken to achieve compliance with the Act.

Recruitment

Most inspectors are recruited with specific health and safety qualifications and/or experience in industry. They may also have specialist knowledge and experience of a particular industry, especially the maritime or aviation industries, or the high-risk sectors of:

- Forestry;
- Construction; and
- Mining.

In addition, some OSH personnel who have been recruited as occupational health nurses and accident prevention consultants are warranted as health and safety inspectors. They tend to work within their particular area of expertise, but may carry out the functions of an inspector when required.

Inspection programmes and strategies consistent with the HSE Act are formulated at a national level under the direction of the Minister of Labour, and in consultation with employer, employee and industry groups, and other government agencies. They are aligned with the New Zealand Injury Prevention Strategy.

There is emphasis on industries with greater than average health and safety risks, and programmes may focus on particular hazards, types of industry, or categories of employment relationship.

OSH regional offices also organise inspection, information, and other programmes to meet local requirements, and the CAA and MSA maintain their own programmes.

Powers of entry

Inspectors may enter places of work to carry out prescribed functions

Health and safety inspectors may enter a place of work for the purpose of carrying out any of the functions described above (and listed in section 30 of the Act). For a description of "place of work", refer to the definitions at the back of this guide.

An inspector cannot gain access to a place of work through, or within, a home without the consent of the occupier.

In cases where consent is not given, and an inspector has reasonable grounds for believing that there is a place of work within a home or the home offers the only means of access, an inspector may seek a warrant from a District Court judge.

Entry may be "at any reasonable time"

A visiting inspector is not required to give notice, except where the visiting time or circumstances may be other than what is "reasonable" in the circumstances.

Access is therefore available to any place of work during its regular working hours, and where there are not other circumstances which would make the timing of the visit unreasonable — i.e., there is no hazard to employees or others, and the circumstances are not irregular or disruptive to the employer, employees or others in the place of work.

The timing of an inspector's visit is therefore not a case of being at the most convenient time for the person in charge of the place of work or others. Instead, the balance of convenience lies with the inspector's statutory duty to carry out their role. Section 31's right of entry should be read with regard to the duties of assistance and non-obstruction (see below).

Inspectors must produce their certificate of appointment to the person in charge

Where an inspector visiting a place of work to carry out duties under the Act, section 32 requires them to show their certificate of appointment to the person "apparently in charge" of the place of work. This is not the same as the "person in control of the place of work" under section 16. The use of the word "apparently" is to avoid any technical defence arising out of deception or confusion as to who is in charge of the place of work when an inspector visits.

Some OSH staff members visit places of work in capacities other than as health and safety inspectors — for example as occupational health nurses or technical advisors or engineers. Where the person also holds a certificate of appointment as a health and safety inspector, and they are visiting a place of work in their role as an inspector, they are required to show their certificate of appointment.

In addition, some OSH health and safety inspectors are also accredited as inspectors under the Hazardous Substances and New Organisms Act 1996 — and are under the same obligation to disclose the nature and purpose of their visit to a place of work.

In practice, inspector's certificates of appointment are in the form of an identity card with photograph.

Once an inspector has entered a place of work, the person apparently in charge may request to see their certificate of appointment at any time or times during the visit.

Powers of inspection and investigation

Section 31 (1) describes the activities that an inspector is authorised to carry out in relation to any place of work, while carrying out their functions as an inspector (under section 30).. These should be read in conjunction with the inspector's power to take samples and other objects and things (set out in section 33).

The *inspector* may:

- Conduct examinations, tests, inquiries and inspections or direct others to conduct them (s 31(1)(a)); and/or
- Take photographs or measurements, or make sketches or recordings (s 31(1)(c)).

The inspector may also *require* the employer or other person who controls the place of work:

- Not to disturb the place of work for a reasonable period while any examination, test, inquiry or inspection is carried out (s 31(1)(d)); and/or
- To produce documents or information relating to the place of work or the employees who work there, and permit the inspector to make copies of or extracts from them (s 31(1)(e)); and/or
- To make or provide statements in a specified form or manner about conditions, material, or equipment that affects the safety or health of employees who work there (s 31(1)(f)).

To carry out these functions, the inspector may be accompanied and assisted by other people, or bring any necessary equipment into the place of work (s 31 (1) (b)).

The inspector's functions all relate to events in a place of work. However, the inspector may perform them, *whether or not*:

- The inspector or person they are dealing with is in the place of work;
- The place of work is still a place of work;
- The employer's employees work in the place of work;
- The employer's employees are still employed by the employer;
- The person who was in control of the place of work is still in control of it; or
- In respect of a document or information, it is in the place of work, in the place where the inspector is, or in another place.

(section 31(1A))

Privacy of information concerning identifiable individuals

Where a health and safety inspector is acting on a complaint from an employee or a member of the public, there is no authority to disclose the name of an individual complainant without their permission. There is however, an obligation to disclose the nature of the complaint to the employer or other person in control.

Where documents or information relate to the health status of an identifiable person, that person's consent is required before an inspector may have access (section 31(5)).

Statements made to a health and safety inspector

As noted above, a health and safety inspector is authorised by section 31(1)(f) to require an employer or any other person that controls a place of work to make or provide statements about:

- conditions;
- material; or
- equipment

that affects the health or safety of employees who work there.

Such statements may be made in the course of routine inspections, or while the inspector is investigating an accident or incident.

The statements may be written, oral, or in any other form or manner specified by the inspector. The inspector's requirement of statements is in addition to the powers to require documents or other information as set out above.

A statement provided to an inspector under section 31(1)(f), or documents or other information provided to the inspector, may form the basis of notices issued by the inspector, or may be used in evidence in any subsequent court proceedings.

Evidence-gathering requirements under the Act should be considered in the light of section 47 (see below). That section requires people with duties under the Act, or their employees or agents, to assist inspectors with their investigation, inspection, inquiry, or the exercise of any other power under the Act.

A person required by an inspector to make a statement is not arrested or detained by the inspector. This means there is not the same requirement to caution under the New Zealand Bill of Rights Act 1990 that is found under other criminal law statutes. Nor do the "Judges' Rules" concerning the procurement of evidence apply. There is, however, a common law requirement of fairness on the part of health and safety inspectors conducting interviews or inquiries.

When making a statement to an inspector during an examination or inquiry, no person is required to give any answer or information tending to incriminate themselves (s 31(6)).

The courts have indicated that if a health and safety inspector is exercising their statutory right to "require" a statement from an employer (or their authorised representative), or a person who controls a place of work, then the inspector should caution the person that they do not need to give any information tending to incriminate themselves or the "person" (i.e. company etc.) they represent. In such cases the inspector will use the statement:

"You need to understand that you are not required to give me any answer or information that tends to incriminate [name of employer or controller]."

There may be occasions — particularly during the investigation of a serious accident — when a person making a statement wishes to have a lawyer present while providing a statement to an inspector. The inspector must respect any such request if it is reasonably made, but, as noted above, there is no requirement to advise a person giving a statement of their right to have a lawyer present.

See also part 5, Accidents, for a discussion of the role of health and safety inspectors in investigating accidents.

Duties to assist and not obstruct inspectors

Assistance

Section 47 creates a positive duty for people to assist inspectors (or departmental medical practitioners) in their role.

The duty applies to every person with duties under the Act, or their employees or agents. It requires that at all reasonable times the inspector is furnished with the means required for:

- entry;
- inspection;
- examination;
- inquiry; or
- the exercise of any other power under the Act.

The duty is limited to "at all reasonable times", and for a description of the meaning of this term, see "Powers of entry", above. Failure to meet the duty is an offence under section 50, see 6.5 Offences and penalties, below.

Obstruction

Section 48 makes it an offence for any person to:

- obstruct;
- delay;
- hinder; or
- deceive

any health and safety inspector (or departmental medical practitioner) while they are lawfully exercising or performing any power, function, or duty under the Act.

It is also an offence to cause any other person to do any of these by, for example, delaying the completion of work or wilful blindness.

There is an exemption to the duty where there is "reasonable cause".

"Delaying, hindering or deceiving" may occur through either an action or a failure to act. There is no requirement of intention, meaning acts of "reckless", "wilful blindness" or "negligence" are sufficient to create an offence.

The case law suggests that "obstruction" requires a positive act on the part of the person against whom the complaint is made. It includes such actions as not allowing an inspector to speak to an employee or another person in the place of work, or physical obstruction of an inspector or departmental medical practitioner.

Failure to provide answers to questions that will incriminate the person is not a breach of section 48 (section 31(6)).

Example:

A visit to **The Shamrock Press Ltd.** provides an example of a workplace inspection by a health and safety inspector, **Kim**.

Shamrock is a smaller print works, employing 12 people. The business occupies city-fringe industrial premises with office space attached, and totalling about 800m² in area.

Staff on site are:

- In the office: The managing director (**Seamus**), sales person and accounts officer;
- In the factory: A production manager (**Rick**), three printing machinists, two bindery staff, and a driver/assistant; and
- In a studio adjacent to the factory: three pre-press staff (including the platemaker);

Timing

In this case, Kim visited without giving notice, as part of a routine inspection programme. Alternatively, an inspection may result from a complaint by an employee or other person, an accident or incident reported, or special inspection programme.

If the company regularly works shifts, then it is accepted practice to arrive unannounced during any work shift. The company had last been visited two years before, and three years before that.

Process of inspection

Kim introduced herself to the person apparently in charge of the workplace — the managing director in this case. She produced her warrant in the course of explaining the purpose and nature of the visit — i.e. for OSH to determine whether or not there is compliance with the Health and Safety in Employment Act.

Systems and documentation

By agreement, the inspection began with Seamus describing the company's health and safety policy and hazard management practices. This involved a review of systems in place, in terms of those required by sections 7-10, the provision of information for employees, training and supervision, and accident records required under section 25 of the Act.

Where appropriate, systems to safeguard contractors and principals, visitors, or people in the vicinity would also be reviewed.

Specific hazards and amenities

Next, Kim inspected the basic amenities required by the regulations, such as separate space to take meals, wash, store clothes, toilets, etc.

She then inspected the workplace on a hazard-by-hazard basis as follows:

Office

- Workstations and general office safety (ACOP).

Press room

- Trapping hazards in connection with plant;
- Electrical hazards;
- Safe use and storage of solvents and other chemicals;

- Safe materials handling and storage;
- Safe access to plant and materials;
- Noise;
- Fatigue issues relating to shiftwork.

Bindery

- Mechanical hazards associated with chain stitcher, folder, guillotine and other bindery equipment;
- Interlocked guard on guillotine and other equipment as appropriate;
- Use of solvent-based glues;
- Manual handling /OOS risks;
- Safe stacking and storage of materials, and work flows;
- Noise.

Pre-press (including platemaker)

- Personal computers, monitors, keyboards and furniture;
- Chemicals used for the developing of films and plates.

Driver

- Manual handling/lifting hazards;
- Mechanical risks associated with loading equipment and hoists.

Where appropriate, health records or information supplied by manufacturers, designers, or others, may be requested. Improvement or prohibition notices may be issued to deal with specific hazards revealed in the course of the inspection. Because Kim was focusing on solvent use at the Shamrock, she required information on the availability of material safety data sheets to staff, and discussed levels of exposure in the industry and methods of monitoring for the particular workplace and employees.

In this case, Kim's inspection of the Shamrock premises led to an improvement notice being issued in respect of an unsafe switch for a materials hoist.

Kim's visit to the premises took less than two hours and occupied Seamus for 20 minutes and Rick for intermittent periods totalling 30 minutes.

Powers to take samples and other objects and things

An inspector (or departmental medical practitioner) may take samples, objects and other things from a place of work, or former place of work, for the purposes of:

- Monitoring conditions in the place;
- Determining the nature of any material or substance in the place;
- Determining whether or not the Act has been, is being, or is likely to be complied with; or
- Gathering evidence to support the taking of enforcement action.

(section 33)

The inspector or (departmental medical practitioner) must have lawfully entered the place of work or former place of work (under section 31).

The power includes being able to *take or remove a sample* of any substance or thing for analysis, or being able to *seize or retain* any material, substance or thing. Any sample taken from a person's body must be taken with their informed consent (section 33(3)).

Notice requirements and rights in relation to samples, etc.

There are notice requirements where any sample, material, substance or thing is removed from a place of work by an inspector (section 33(2)).

The notice must be given in writing as soon as it is reasonable to do so, and includes details of:

- What has been (or is being) removed or retained;
- Why it has been (or is being) removed or retained; and
- Where it will be kept in the meantime.

Return of samples, etc.

When the sample, material, substance or thing is longer required, and it is practicable to do so, samples, etc. must be returned to their owner. Alternatively, a District Court may order their return.

Within seven days of removing or retaining the sample, material, substance or thing, the inspector is required to give the employer or other person apparently in charge of the place of work written notice of whether he or she intend to return or destroy it.

There is no right of appeal to an inspector's requirement to take a sample, material, substance or thing for the prescribed purposes. This is to allow health and safety inspectors and departmental medical practitioners to act decisively in response to potentially hazardous situations or gain evidence without procedural interference.

Other matters concerning inspectors

Health and safety inspectors may take three kinds of enforcement action under the Act. They may:

- Prosecute through the courts (under sections 49 or 50);
- Issue infringement notices (section 56B); or
- Seek a compliance order under the Employment Relations Act (sections 137 and 138 of that Act).

See 6.5, Offences and penalties, and 2.6, Employee participation.

Only inspectors may serve **prohibition**, **improvement** or **infringement** notices (sections 39, 41, 56B).

See 6.3, Improvement and prohibition notices.

Matters may be begun by one inspector and completed by another (section 45)

This provision is intended to stop procedural failings with changes in OSH, CAA or MSA personnel. It also means that in some cases procedures begun by a departmental medical practitioner may be enforced or proceeded with by a health and safety inspector.

The exception is in the case of infringement notices, where only the issuing inspector may subsequently revoke or amend the notice or take further steps regarding its enforcement.

Inspectors required to notify local authorities

When, in the course of their duties, a health and safety inspector discovers anything they believe to be a failure to comply with a health and safety enactment administered by a territorial authority, he or she is required to give written notice of the breach to the territorial authority (section 61).

Impersonation of an inspector or DMP

The Act makes it a specific offence to impersonate an inspector or departmental medical practitioner (section 58).

6.2 Departmental Medical Practitioners (sections 34-38)

Appointment and functions of departmental medical practitioners

Medical staff with qualifications in occupational medicine are employed by the Occupational Safety and Health Service of the Department of Labour (OSH) to carry out a range of occupational health functions. In this role they are known as "departmental medical practitioners" or "DMPs".

Departmental medical practitioners are appointed under section 34 of the Act. It provides that currently registered medical practitioners may be issued by the Secretary of Labour with a certificate of appointment as DMPs.

Unlike with health and safety inspectors, the Act does not describe a broad role or range of functions for departmental medical practitioners. Instead, they have a closely defined set of powers surrounding the assessment and management of occupational health.

In practice, departmental medical practitioners are usually called in by health and safety inspectors or other OSH staff in response to an occupational health issue affecting a particular employee or place of work. Where there is a known history of occupational health hazards in an industry or amongst an identified group of employees, DMPs may follow their own inspection or monitoring programmes.

Powers of entry of DMPs

DMPs may enter places of work to carry out prescribed functions

Departmental medical practitioners may enter places of work for the purpose of carrying out any of the functions described below. For a description of "place of work", refer to the definitions given at the back of this guide.

A DMP cannot gain access to a place of work through, or within, a home without the consent of the occupier.

The difference between DMPs' and inspectors' powers of entry

While a DMP has many of the same powers given to a health and safety inspector under section 31, it is important to note that DMPs *do not have* the inspectors' powers to:

- Require an employer or person in charge to not disturb a place of work while any examination, test, inquiry or inspection is pending; or
- Require statements to be made or provided.

Entry may be "at any reasonable time"

As is the case with a visiting inspector, a departmental medical practitioner is not required to give notice, except where the visiting time or circumstances may be other than "reasonable".

For further discussion of what constitutes "any reasonable time", see 6.1, Health and safety inspectors, above.

DMPs must produce their certificate of appointment to the person in charge

Sections 32 and 35 require a departmental medical practitioner visiting a place of work to show their certificate of appointment to the person "apparently in charge" of the place work. As is the case with health and safety inspectors, DMP's certificates of appointment are in the form of an identity card with photograph.

Once a departmental medical practitioner has entered a place of work, the person apparently in charge may request to see their certificate of appointment at any time or times during the visit.

DMPs' powers of inspection and investigation

Departmental medical practitioners' powers of inspection and investigation are set out in sections 35 and 31(1)(a),(b),(c), and (e) and 31(2),(3),(4) and (6) of the Act.

A departmental medical practitioner may:

- Conduct examinations, tests, inquiries and inspections or direct others to conduct them (s 31(1)(a)); and/or
- Take photographs or measurements, or make sketches or recordings (s 31(1)(c)).

To carry out these functions, the DMP may be accompanied and assisted by other people, or bring any necessary equipment into the place of work (s 31(1)(b)).

The departmental medical practitioner may also *require* the employer or other person in control to produce documents or information relating to the place of work or the employees who work there, and permit the DMP to make copies of or extracts from them (s 31(1)(e)).

These powers relate only to the health and safety of employees and others in the place of work, and the duties of employers or others arising out of the Act.

Documents or information provided to a departmental medical practitioner (under section 31(1)(e)), may form the basis of notices issued by the inspector, and may be used in evidence in any subsequent court proceedings. DMPs' power to require documents or information should be considered with the duty for employers and others in control of places of work to assist and not obstruct them, (see sections 47 and 48 of the Act and 6.1, Health and safety inspectors, above).

DMPs do not lead accident investigations, but may be consulted by an investigating inspector for their medical knowledge.

Unlike inspectors, DMPs do not have the power to take samples and other objects and things from places of work.

Privacy of information concerning identifiable individuals

Where documents or information held by an employer relates to the health status of an identifiable person, that person's consent is not required before a departmental medical practitioner may have access (s 31 (5)).

This is because the consent requirement for inspectors is removed for DMPs by section 35. The right of access complements the powers of DMPs to require the medical examination of employees, or suspend employees, as described below.

The provisions of the Privacy Act 1993 and the Official Information Act 1982 apply to information made available to DMPs.

As discussed in 6.1, above, this means that where a departmental medical practitioner is acting on the concerns of an employee or a member of the public, there is no authority to disclose the name of an individual complainant without their permission. There is, however, an obligation to disclose the nature of the complaint to the employer or other person in control if requested.

Example:

*Alex was a 26-year-old male, in good health, who began a job as an auto-spraypainter with **Flash Paint and Stripes**. Within two weeks, he felt "on a high" throughout the week. He felt thick in the head and sleepy, with sore eyes. Away from the workplace, he improved slightly at the weekend.*

During the following weeks, the symptoms worsened. Alex suffered extreme fatigue, loss of concentration and motivation in his work. At home he felt irritable.

On one occasion, he spraypainted for six continuous hours and felt nauseated and dizzy, with a severe headache. This was still present the next morning, when he visited his GP and was put off work for a week.

He recovered gradually and returned to work, but not to spraypaint. The GP notified OSH, and a DMP investigated Alex's workplace. The investigation revealed inadequate ventilation and high solvent contamination in the work area. The DMP and a health and safety inspector together advised the company on improvements to the ventilation system and the setting up of a workplace monitoring programme.

Alex had suffered an acute solvent exposure. Other people in the workplace may have persisted in the poor working conditions and developed a low tolerance to the solvents. After some years in the industry, they are at risk of developing a chronic condition known as solvent-induced neurotoxicity, which cannot be completely cured.

DMPs may require medical examination of employees

Where there are occupational health hazards present in a place of work, departmental medical practitioners may require an employee to be examined by a specified medical practitioner (usually a medical specialist), or to provide a sample for testing or analysis to determine whether the employee is fit for work (section 36).

The health monitoring role of DMPs is restricted to dealing with employees. There has been a long history of legislation requiring the monitoring of employees in industries where there are hazardous substances such as lead and other heavy metals, solvents, or isocyanates in regular use. Section 37 contains the requirements previously contained in regulations concerning particular hazards.

Grounds for requiring examination or test

To require medical examination or testing, a DMP must be satisfied that an employee has been, or may have been, exposed to a significant hazard while at work.

The DMP must also be satisfied, on reasonable grounds, that by examining the employee or having a sample taken from the employee to be tested or analysed, it is likely to be possible to determine:

- Whether or not the employee is or has been exposed to the hazard;

- The extent to which the employee is or has been exposed to the hazard; or
- The extent to which the employee's health has been, or may have been, affected by exposure to the hazard.

Notice requiring examination or test

If a DMP is satisfied that the above grounds are met, they may give written notice to the employee, requiring them to:

- Be examined by a [specified] registered medical practitioner; and/or
- Allow a [specified] person to take a sample from the person and have another [specified] person test or analyse it in a [specified] manner.

In the case of the medical examination of an employee, a written report will be supplied to the DMP concerning their fitness or otherwise for work.

Where a sample is provided and tested or analysed, the DMP will be supplied with a written report of the results.

Compliance with the notice

Usual practice is that the costs of compliance with a notice requiring examination or testing are met by the employer.

It is not an offence for an employee to fail to comply with a notice, but the failure may form the grounds for a suspension notice, see below.

If an employer or other person who controls a place of work were to fail to assist, or exert pressure or undue influence on an employee not to comply with a notice, there is a likely breach of sections 47 or 48, see 6.1, above.

An employee may, potentially, appeal a notice requiring examination or testing. This is, however, an unlikely course of action, because it is not an offence to fail to comply. Instead, any resulting suspension notice may be appealed, where the reasonableness or otherwise of the DMP's request may be considered as a matter of evidence (see below).

DMPs may suspend employees

A departmental medical practitioner may suspend an employee from any work that is causing them to be harmed by exposure to a *significant hazard* (section 37). For a description of "significant hazard" see 2.3, Hazard management responsibilities.

The means of suspension is the suspension notice.

Grounds for suspending an employee

In order to suspend an employee, the departmental medical practitioner must be satisfied on reasonable grounds that the employee:

- Is, has, or may have been exposed to a significant hazard at work; and
- Has been so harmed by exposure to a significant hazard that they should not continue to be exposed to the hazard; or
- Has failed to comply with a notice requiring medical examination or the testing or analysis of a sample (under section 36).

Suspension notices

Where a DMP is satisfied on reasonable grounds, they will issue a written suspension notice to the employee, and supply a copy to the employer. Frequently, the result of a suspension notice will be a change of duties for the employee concerned. There may be instances where the effect of hazard on a person's health renders the person incapable of employment — temporarily or permanently.

The written notice will require:

- The employee to cease doing anything specified in the notice which, in the opinion of the DMP "constitutes, causes or enhances" the employee's exposure to the hazard; and
- The employer to ensure the employee ceases doing the thing(s) specified in the notice.

The notice may be addressed to the employee or employer under their legal name or, in the case of the employer, their usual business name. It will be given in person.

Once the notice has been issued by a departmental medical practitioner, any subsequent correspondence concerning or enforcement of the notice may be undertaken by a health and safety inspector or another departmental medical practitioner.

It is an offence for either the employer or the employee to fail to comply with a suspension notice (sections 37(2) and 50).

There is a right of appeal against a suspension notice, and the administrative provisions of sections 44-48, 57 and 58 apply to the issuing of suspension notices generally. See 6.3, Improvement and prohibition notices, following.

Example:

*Justin, a 39-year-old foreman with **AntiRust Engineering Ltd**, reported to his doctor with increasing lethargy, shortness of breath on exercise, night cough and wheeze associated with particularly "dirty" welding jobs.*

When his GP enquired what he meant by "dirty", Justin reported having to weld in small compartments inside ships. This generated large amounts of fumes, which because of the size of the compartments, could become quite choking. Justin had been working every day for up to two weeks at a stretch.

The doctor asked Justin to record his peak flow levels at regular intervals over a period. The record showed a steady and progressive decline in lung function throughout the day, with little improvement at night, and a further deterioration day-to-day when working. The only improvement was when Justin was absent from work for a weekend.

The GP contacted a departmental medical practitioner who investigated Justin's work environment. The DMP concluded that the asthma may have been due to a number of agents, with welding fumes (containing ozone, oxides of nitrogen and other irritants) being implicated. He noted also that welders often cut through isocyanate foams and plastics while repairing material and these may release isocyanates and other toxic products of combustion which can cause asthma or asthma-like symptoms.

On this basis, the DMP suspended Justin from welding work. He also advised the management of AntiRust on ways of providing a better work environment for Justin and other workers. This included ventilation to the welding area (piped air if necessary) and respiratory protection.

The DMP also helped AntiRust begin a health monitoring programme for employees, which was eventually contracted to a local GP and practice nurse.

6.3 Improvement and prohibition notices (sections 39-46)

Improvement notices

When inspectors may issue improvement notices

When a health and safety inspector believes that any person is failing to comply with any provision of the Act or regulations, they may issue an improvement notice to the person. The notice requires the recipient to take the action necessary to comply with any provision of the Act or regulation specified (section 39).

Improvement notices may be issued when an inspector has a *reasonable belief* that the person receiving the notice:

- Is failing to comply with a provision of the Act; or
- Has failed to comply with a provision and is likely to fail again.

What types of breaches are dealt with by improvement notices?

The breach may concern any section of the Act or regulation made under it, and need not concern hazard management practices. Where there is a likelihood of serious harm, section 41 requires an inspector to issue a *prohibition notice* instead (see below). However, depending on the nature of the hazard and the likelihood and severity of the harm it could lead to, there may be some instances where an improvement notice is issued in response to a significant hazard.

Because an improvement notice does not prohibit the activity leading to the likely breach, the recipient is given the option of continuing with the activity within the period allowed for remedying the breach. But, after the expiry of the notice period, if the breach continues, and the notice has not been appealed, OSH's policy is to prosecute.

Content of an improvement notice

An improvement notice must set out the following information:

- The **provision breached**, i.e. the section of the Act or the regulation concerned;
- The inspector's **reasons for believing** that the person is failing or has failed and is likely to again fail to comply;
- The **nature of the failure** or likely failure; and
- A **day by which compliance** is to be achieved (usually within a specified number of days, but depending on the extent of the steps required to remedy the breach and the significance of the hazard, it may be longer).

In addition, but not as a mandatory requirement, an improvement notice may specify steps that *could* be taken to achieve compliance with the provision concerned.

The suggested means of compliance is not mandatory, because the purpose of the notice is to outline an observed or believed breach, and that it should be remedied — not necessarily how. This is consistent with the non-prescriptive nature of the legislation.

The inspector's belief must be based on reasonable grounds

This means that the test is an objective one and based on clear information, with any inferences being reasonable. Mere suspicion on the part of the inspector is not enough, and the notice requires that the grounds for belief are outlined.

Where a breach has occurred, and the inspector has grounds for believing that there is likely to be a recurrence — "likely" is an important word. In other branches of the criminal law it has been described as "a real or significant risk, or something that might well happen", and not simply an estimate of the chance based on an inspector's broad experience or instinct.

How an improvement notice is served

An improvement notice may be served on an employer, employee, self-employed person, principal, or person in charge of a place of work.

It may be served to:

- The person to whom it relates; or
- A person apparently in charge of any activity, building, place of work, plant, process, situation, structure, or substance to which the provisions of the Act to which the notice applies.

The notice may be handed to the person named in it by an inspector, or it may be posted to them by registered letter (when it is deemed to have been received seven days after it was posted).

The place of improvement notices in OSH's enforcement policy

The availability of improvement notices to health and safety inspectors means that inspectors have a discretion not to prosecute when they initially become aware of a breach in a workplace they visit, or when a complaint is investigated.

However, the improvement notice is an important and often-used approach for inspectors to formally put employers "on notice" that they are in breach of the Act or regulations, and at risk of penalties. More particularly, an improvement notice is "prior warning" of a breach of the Act that can lead to the issue of an infringement notice by a health and safety inspector.

See the summary of OSH's enforcement policy at [6.5, Offences and penalties](#).

Example:

Showstoppers Ltd were a firm of shopfitters with a small warehouse and workshop where shop fit-outs were fabricated by **John**, the managing director, and two employees, **Nancy and Sid**.

There was a range of woodworking and metalworking machinery in the workshop. One frequently-used machine was an overhand planer or "buzzer" used to dress pieces of timber used to make the shopfittings.

One day a health and safety inspector visited on a routine inspection. In the course of the inspection he assessed the hazards arising from Showstoppers' machinery, and their compliance with the legislation.

The inspector's attention was drawn to a broken bridge-guard, which was intended to be in place to protect an operator from coming into contact with a revolving cutter blade. The guard remained in place but, because it was broken at an attachment point and had been "temporarily" wired in place, it was not sufficiently adjustable to provide the protection it was designed for.

- The inspector issued an improvement notice. It stated, in relation to the hazard, that:
- The faulty guard was in breach of section 6 of the Act and Regulation 18 of the HSE Regulations 1995;
- The fact that the failure had been observed by the inspector on the day;
- The repair or replacement necessary to fix the guard; and

- *The repair should be made within 7 days of the issue of the notice.*

The notice was handed to Nancy, who was operating the machine, and apparently in charge of it at the time. Alternatively, it could have been sent by registered mail to John as managing director of the company.

Prohibition notices

When an inspector may issue a prohibition notice

An inspector may issue a prohibition notice when they believe there is a likelihood that *serious harm* will occur to any person by virtue of a failure to comply with a provision of the Act.

A prohibition notice has immediate effect. It remains in force until the inspector is satisfied that measures have been taken that are sufficient to eliminate the hazard or minimise the likelihood that the hazard will be a source of harm (section 41).

What type of situation will result in a prohibition notice?

Any situation where the inspector believes there is a likelihood of serious harm by virtue of a failure to comply with a provision of the Act may be the subject of a prohibition notice.

The range of activities or situations able to be prohibited is very broad, and the notice may require any person to stop the:

- carrying on;
- continuing;
- operating,
- storing;
- transporting, or
- use

of the:

- activity;
- building;
- place of work;
- plant;
- process;
- situation;
- structure; or
- substance

that the inspector believes to constitute the hazard (section 41).

The provision is, therefore, not limited in its application to a "place of work", and may affect the safety of the public at large.

A prohibition notice is intended as an immediate solution to an imminent danger. It may be issued in situations where, for example, an inspector may act on an alarm raised by a member of the public, or on their unchecked memory of a particular chemical reaction or the properties of a particular metal where they feel that there is imminent danger.

However, in practice, prohibition notices tend to be used in less urgent situations where inspectors are basing the prohibition on a strong "likelihood" of harm and on "reasonable grounds" — as is the case with an improvement notice.

Contents of a prohibition notice

A prohibition notice *must specify*:

- The hazard to which it relates; and
- The inspector's reasons for believing that it is likely to cause the harm concerned.

In addition, a prohibition notice *may* require the withdrawal of all employees of a specified kind or description, except as are necessary to deal with the hazard.

The notice *may* also specify the steps that could be taken to eliminate the hazard concerned or minimise the likelihood that the hazard will be a source of harm.

How a prohibition notice is served

When an inspector issues a prohibition notice they are required to fix it to or near the part of the place of work or the item of plant, or other hazard to which it relates. Once the notice is attached, it is an offence for any person to remove it.

The inspector must also give a copy of the notice to any person apparently in charge of the activity, building, place of work, plant, process, situation, structure or substance that the inspector believes is the source of harm.

Compliance with a prohibition notice

When a prohibition notice is issued, it is the responsibility of the person to whom it is given — or any person who controls a place of work or any plant to which it relates — to ensure that no action is taken in contravention of it.

Failure to ensure that no action is taken is an offence. In situations where it can be established that there was knowledge that serious harm could result from the contravention, prosecution could be taken under the more serious section 49 offence provisions. A prohibition notice is "prior warning" of a breach of the Act that may lead to the issue of an infringement notice.

See 6.5, Offences and penalties.

Example:

*A forestry health and safety inspector was making a follow-up visit to the "skids" site of a logging operation being carried out at a remote hilly location by **JP Knightly Logging and Cartage Ltd**. The visit was nearly complete, and he was about to leave when a semi-trailer owned by the company arrived with a large excavator on the back.*

The inspector recognised the digger as one used on various logging operations in the district. He also recognised it as not having a cabin operator protective structure in place that would conform with the Approved Code of Practice for Operator Protective Structures on Self-propelled Mobile Mechanical Plant.

The inspector formed a belief that if the digger was used in the steep terrain without adequate operator protection, then there was a likelihood of serious harm to the operator. On the basis of this assessment, he issued a prohibition notice, which set out:

- *The nature of the rollover hazard presented;*
- *That the uneven terrain led to the inspector's belief that there was a likelihood of harm;*
- *The prohibition against use of the excavator on the logging operation; and*

- *The requirement to fit an appropriate structure under the supervision of a registered engineer.*

*The inspector fixed a copy of the notice to the cab of the digger. He also gave a copy of the notice to **Jack**, who was in charge of the company's operations on the site.*

He explained that it was an offence on the part of the company and/or Jack to allow the digger to be used on the site without the required modifications.

Appeals against notices

Any person affected by a prohibition, improvement or suspension notice may appeal against it to a District Court within 14 days of the notice being issued, or its terms being varied by a health and safety inspector (section 46). There is also a right of appeal against any notices, exemptions, or suspensions provided for by regulations made under the Act.

The only ground of appeal under section 46 is that one or more of the terms of the notice are "unreasonable". The appeal may relate to either the original notice, or a subsequent variation of its requirements.

The person appealing need not be the person served the notice — they need only be "affected" by it.

In hearing an appeal, a District Court must inquire into the circumstances of the notice and may:

- Vary its terms;
- Rescind it; or
- Confirm it.

A notice remains in force while it is being appealed. This is a strong encouragement for employers and others affected by notices to remedy the breaches they describe, rather than seek an appeal. Another factor that discourages appeals is that improvement and prohibition notices do not strictly describe the measure that is to be taken to remedy any breach, only that it is to be remedied.

There may be questions of timing when a notice is being appealed — whether a person receiving a notice should continue to take action towards compliance, although it is under appeal. Strictly speaking the Act requires the compliance action to continue, but in reality this is always going to be a matter of fact and degree, or in hazard management terms — of considering the likelihood and the severity of the potential harm (see 1.5, All practicable steps). However, there are unlikely to be situations where it would be reasonable for an employer or other person who controls a place of work to disregard a prohibition notice.

6.4 Regulations and approved codes of practice

Regulations

Making of regulations

Regulations are made under section 21 of the Act. They may be made to control particular hazards, by industry, or with application to a range of hazards across all industries.

Current government policy is that regulations are made subject to three criteria:

- To reduce compliance costs by giving people a clear understanding of the general provisions of the Act;

- To set minimum standards for the management of particular hazards where alternative control measures are not always effective; and
- To provide matters contemplated by, but not specifically addressed in the Act.

Consultation with industry (persons and organisations at the discretion of the Minister of Labour, and with regard to the regulations' content) is required before, and during the preparation of regulations (s 21(2)). There is also a specific requirement for the Minister of Labour to consult with the Environmental Risk Management Authority established under the Hazardous Substances and New Organisms Act 1996 before the making of regulations on hazardous substances or new organisms (s 21 (3)).

In addition, section 24 provides that regulations made under earlier legislation revoked by the HSE Act may be amended or revoked by regulations made under the Act. They also remain in force until such amendment or revocation. This means that regulations such as those concerning spraycoating, first-aid facilities, etc. made under earlier legislation have remained in force in certain cases.

For a list of regulations made under the Act, see 1.6, How the Act sets more detailed standards.

Who regulations may apply to

Regulations impose duties relating to the safety and health of employees or other people. The duties may apply to:

- Employers and other persons who or that control places of work;
- Employees;
- Principals or self-employed persons; or
- Designers, manufacturers, sellers and suppliers of plant, substances, protective clothing, or protective equipment.

Regulations may also be made for any other matters contemplated by, or necessary for, giving full effect to the Act.

Content and application of regulations

Failure to comply with regulations made under the Act is an offence under section 50 (see 6.5, Offences and penalties).

Unlike the sections of the Act itself, the validity of the provisions of regulations made under the Act is subject to judicial review. This means that a breach of a regulation cited as an offence, or in an improvement or prohibition notice, may be appealed to a District Court on the grounds, among others, that the regulation is *ultra vires* or "beyond the authority of the Act".

For this reason, the Act is required to spell out in some detail the situations where regulations may be made, who they may impose duties on, and the purpose and contents of them.

Sections 22 and 23 describe the categories of people, places, activities and other matters on which regulations can be made.

Section 23(1) describes in further detail the administrative mechanisms that may be made by regulation for the enforcement of the Act.

Section 23(2) says that regulatory requirements for the registration, licensing, or certification of places of work (under s23 (1) (a)) may incorporate by reference to all or any part of any:

- NZ Standard;

- Standard, requirement, recommended practice, rule, statute, or regulation of any other country; or
- Other document published by the New Zealand Government.

When such a document is referred to in a regulation, it is considered part of the regulation — in the form at which the reference is made. If the content of the standard or other document subsequently changes, then the change in content will not be incorporated without the making of a new regulation (section 23 (3)).

Approved codes of practice

Approval and publishing of approved codes of practice

Section 20 allows for the approval by the Minister of Labour of statements of preferred work practices or arrangements on the recommendation of the Secretary of Labour.

The process of approval is carefully prescribed by the Act, which sets out a process of issuing *Gazette* notices, followed by consultation and subsequent approval by the Minister, after consultation with all interested parties is complete (section 20(1)–(5)).

The Act requires that copies of all approved codes of practice are available for members of the public to see and copy at each OSH branch. A reasonable fee may be charged for copies or copying of approved codes.

For a list of approved codes of practice, see 1.6, How the Act sets more detailed standards.

Subject matter of approved codes of practice

Section 20 (1) sets out the matters that may be covered by approved codes of practice. They may be:

- Statements of preferred work practices or arrangements; or
- Regarding plant, protective clothing, or equipment:
 - Aims, arrangements, practices, or principles for their design;
 - Arrangements, characteristics, components, configurations, elements or states for their manufacture; or
- Statements of preferred characteristics for manufactured or processed substances used:
 - In connection with protective clothing or equipment; or
 - Otherwise used in connection with protecting people from hazards.

Compliance with approved codes of practice

Approved codes of practice are not legislation, but statements of preferred practice, which may be produced in courts as evidence of suitable means of compliance with the Act. They do not necessarily provide the only way of complying with the Act, but they do offer an accepted way.

Failure to follow an approved code of practice is therefore not an offence in itself.

Instead, in considering any prosecution for a breach of a section of the Act or regulation, a court may have regard to any approved code of practice that was in force at the time of the alleged failure, and that is relevant to the charge (section 20(9)).

Approved codes are, therefore, admissible in court by either the prosecution or defence as evidence of good practice — but the reliance placed on them is a matter of discretion for the judge.

6.5 Offences and penalties

How the Act creates offences

As described throughout this guide, the Act prescribes a range of duties for employers and others. Where there is a failure to observe such a duty, sections 49 or 50 may make the breach an offence under the Act. Where such breaches occur, a health and safety inspector or, in certain circumstances, another person may prosecute through the courts. There are two main categories of offence that may be prosecuted — depending on the degree of seriousness of the breach and the culpability of the offender — and these are discussed below.

In addition, health and safety inspectors may issue **infringement notices**, which require the defendant to pay a fee, for infringement offences. These are also described below.

Offences where there was knowledge of the potential for serious harm by the offender

The first category, under section 49, is where a person takes an action, or fails to take an action, as the case may be, knowing that it is reasonably likely to cause someone serious harm. These are offences determined by Parliament and the courts to involve the highest culpability on the part of the defendant, and they attract the highest level of fines under the Act, and there is the potential for imprisonment. See, Section 49 offences — involving "knowledge", below.

Section 50 offences

Section 50 offences apply to breaches of most of the duties prescribed by the Act. Unlike section 49 offences, there is not a "knowledge" or *mens rea* requirement on the part of the offender. Instead, in any prosecution the Crown has only to prove that the breach of a duty has occurred and that, intentionally or otherwise, the person charged caused it by their action or inaction. See, Section 50 offences, below.

Section 49 offences — involving "knowledge"

The most serious offence under the Act is where a person:

- Takes an action knowing that it is reasonably likely to cause death or serious harm, and the action is contrary to a provision of the Act; or
- Does not take action, knowing that inaction is reasonably likely to cause death or serious harm, and the person concerned is required by the Act to take action.

If convicted, the person may be fined up to \$500,000 or face up to two years in prison, or both.

Where a prosecution against a person under section 49 is unsuccessful, the defendant may still face charges under section 50.

A defendant facing a section 49 charge may elect trial by jury. The exception is where a company or body corporate is being prosecuted.

In any Health and Safety in Employment Act prosecution, the Crown must prove all the elements of the offence to the criminal law standard of "beyond reasonable doubt". This means proof of the breach of a particular duty, for example, failure to train or supervise an employee, and, in the case of a section 49 prosecution, the following requirements.

Establishing "knowledge" on the part of the defendant

Knowledge of the potential for harm is the *mens rea*, or "state of mind" necessary for establishing a section 49 offence. In a prosecution the Crown is required to prove beyond reasonable doubt that the defendant had knowledge that the action or inaction would or could cause serious harm.

A court will find "knowledge" where there has been "wilful blindness" or forgetfulness on the part of the defendant, but will require evidence that they have been clearly informed of, or considered in their own mind, that there was a significant risk or danger of serious harm at some point prior to the accident or incident which formed the breach.

Evidence to establish the existence of knowledge may take the form of statements from employees, or an inspector or other person who had discussed the risk with them or recalled other statements. "Knowledge" may also be established where there has been a previous accident or conviction in relation to the hazard, or where a defendant has been served a prohibition, suspension or improvement notice by a health and safety inspector prior to the action or incident in question. (See discussion below.)

Establishing what was "reasonably likely to cause serious harm"

An important and often missed point in relation to section 49 offences is that it is often not at issue that the defendant knew of the existence of the hazard concerned, but rather that they knew that there was a reasonable likelihood of serious harm being caused by the breach.

The prosecution in a section 49 offence therefore needs to provide clear evidence of there having been a "reasonable likelihood of serious harm".

This element of the offence may be established by verbal statements, or documentary or other evidence.

One situation that is likely to provide conclusive evidence is where a prohibition notice has been issued to the defendant and they have failed to observe it. Because of the specific terms of *prohibition notices* and *suspension notices*, they offer strong evidence of the requisite elements for a section 49 conviction if they are breached. For this reason, employers and others should be on notice when they receive such a notice, not only of the risks they describe, but also the significantly greater penalties imposed for non-observance. Where there is a direct connection, an infringement notice for a similar or continuing matter may provide evidence of prior knowledge of the likelihood of harm occurring.

Improvement notices, and *verbal directions* by an inspector, on the other hand, are less conclusive evidence of knowledge. Because an improvement notice usually allows a breach to continue for a period before it must be rectified, it will not always offer evidence of "reasonable likelihood" to the required standard. This is, however, a matter for the courts in each case, and there will be circumstances where the issue, or failure to observe, an improvement notice will provide clear evidence in support of a section 49 charge.

Ultimately, "reasonably likely" is an objective term that should be considered in the light of the factors used to consider what is "all practicable steps" — particularly with regard to the nature and severity of any injury or harm that may occur, and the degree of risk or probability of injury or harm occurring. See 1.5, "All practicable steps".

Section 50 offences

What makes an offence

The vast majority of prosecutions are taken under section 50 of the Act.

Under that section it is an offence for any person to fail to comply with any of the duties imposed by the following:

- The duties set out in part II of the Act (and set out in parts 2, 3 and 4 of this guide) (except the requirement to involve employees in hazard management processes, or the warning requirements for visitors to a place of work set out in s 16 (3));

- The general duty to involve employees in health and safety matters (s 19B), or an employer failing to hold an election for a health and safety representative (clause 6 schedule 1A);
- Regulations made under or continued in force by the Act (ss 21-24);
- The requirements relating to accident recording and reporting (ss 25-26);
- Suspension notices (s 37 (2))
- Improvement notices (s 39(5));
- Prohibition notices (s 42 (1), or s 43);
- The duties to assist and not obstruct health and safety inspectors to carry out their role in places of work (ss 47 and 48);
- Entering into a contract of indemnity against fines or infringement fees under the Act (s56I (2)); or
- The restriction against impersonating an inspector (s 58).

Fines for section 50 offences

The defendant may be fined up to \$250,000 for each charge. The exception is for breaches of section 16(3), where a fine of up to \$10,000 may be imposed for failure to warn a visitor to a place of work of a significant hazard.

What must be proven

Unlike section 49 offences, those under section 50 need not have led to serious harm or the potential for serious harm. Also, the Crown does not have to prove the mental element of "knowledge" or intention on the part of the defendant (section 53).

Depending on the charge under section 50, the prosecution must establish "beyond reasonable doubt" that there has been a breach of a duty, and that there has been a failure to meet each element of the section creating the duty.

Where duties are qualified by the "all practicable steps" requirement

Where the duty requires a person to take "all practicable steps", the prosecution must prove beyond reasonable doubt that one available practicable step that should have been taken wasn't in the particular case. The defendant may cross examine and challenge the prosecution's evidence, or introduce alternative evidence to establish an element of doubt in the Crown's contention that all practicable steps had not been taken. If the challenge to the Crown's evidence is strong enough to introduce a reasonable doubt in the eyes of the judge, then there is an acquittal on the charge.

Offences that are not qualified by the taking of "all practicable steps"

Where a duty is not qualified by the "all practicable steps" requirement, the prosecution need only establish that the defendant has not fulfilled the duty, regardless of their intention or otherwise. For example, in the case of an employer failing to report details of an accident involving serious harm to an employee, it would only need to be established that the accident had not in fact happened, and that the report had not been received by the nearest OSH branch office.

However — the Crown having established these facts to the satisfaction of the court — the person charged may then raise a defence of "total absence of fault". This means that where the prosecution has shown that a defendant has failed to comply with a provision of the Act, then that defendant may still have a defence. For such a defence to operate, the defendant must show that there was a total absence of fault on his or her part, or that "all due diligence" was exercised. To do this, the defendant must prove that they took the required degree of care to the civil standard of "on the balance of probabilities", which is lower than that required of the Crown prosecution.

To return to the example of the failure to notify an accident discussed above — the employer charged would have a defence if they could establish that there had been an earlier notification, and establish "on the balance of probabilities" that the appropriate form had been completed, sent, and, say, lost in the post.

In another example, a regulation may require machine guarding of a particular type. An accident is caused by the guard being removed from a machine, and the employer is prosecuted. The employer may have a defence under strict liability if they can show that there was a mechanism for guarding the machine which was not easily dismantled, and yet an employee did dismantle it despite instructions to the contrary.

It should be remembered though, that strict liability is a high test and "total absence of fault" means what the words suggest.

Summary of OSH's enforcement policy

Purpose

The purpose of OSH's enforcement policy is to achieve compliance with the Health and Safety in Employment Act 1992.

OSH achieves this by:

- Providing information and/or advice to those who have obligations under the legislation;
- Determining whether or not the legislation is being complied with; and
- Enforcing the legislation where a breach is observed or reported.

OSH's response to any observed breach of the Act is to choose the enforcement intervention that will best:

- See hazards eliminated, isolated, or minimised quickly and effectively; and
- Influence future compliance with the legislation.

Enforcement interventions

Enforcement interventions to prevent non-compliance include:

- Written warnings by an inspector;
- Improvement notices;
- Suspension notices;
- Prohibition notices;
- Revocation of registration, certificates, exemptions and approvals;
- Application for a compliance order from the Employment Relations Authority;
- Infringement notices; or

- Prosecutions.

The chosen enforcement intervention depends on:

- The seriousness of the non-compliance;
- Continued or repeated non-compliance;
- Refusal to take remedial action; and
- The harm or potential harm to those affected by the non-compliance.

Refer to 6.3, Improvement and prohibition notices for a description of the issuing and enforcement of these notices. Suspension notices are described in 6.2, Departmental medical practitioners.

Compliance orders

Where there is adamant and continuing refusal to comply with the employee participation requirements of part 2A of the Act, an inspector will seek a compliance order from the Employment Relations Authority.

Infringement notices

The issuing of an infringement notice will be considered for any offence under section 50(1) when:

- no injury has occurred, but there is a likelihood of serious harm occurring as a result of the breach; or
- there is no likelihood of serious harm from the breach, but it is recurring

and where the prior warning and other requirements for infringement notices are met.

Prosecution

Court proceedings are considered where a breach has been identified, there is evidence to sustain a prosecution, and where:

- Compliance cannot be gained otherwise; or
- There has been deliberate or careless disregard for the safety and health of others;
- There has been deliberate attempt to obtain economic advantage through failure to comply; or
- The public interest requires a prosecution.

A prosecution may be in the public interest if it:

- Ensures public accountability; and/or
- Publicises a problem of more general interest; and/or
- Ensures the offender recognises (and pays for) the seriousness of the matter.

To sustain a prosecution, sufficient evidence must be available to support every element of the proposed charge.

Choice of defendants

Only those who had the ability to change the situation in question are charged.

Where there is the possibility of charges against an employee under section 19, these will be made only where the employee has acted recklessly or with gross negligence, and the employer had provided them with the opportunity to perform at the required safe level.

Number of charges

Only sufficient charges are laid to call the defendant publicly to account.

It is unlikely that any situation will warrant more than three charges at a maximum against any one defendant. Where more than one employee is affected or involved, separate charges are laid in respect of the impact on each employee only if there was clearly a separate default in respect of each employee.

The general rule is that where, prima facie there is a clear breach of a particular section under the Act then an individual charge for that breach will be laid.

Where there is police involvement

For six months after a breach comes to notice, charges may be laid under the HSE Act, although the police are considering charges under the Crimes Act. If the police charges proceed, they take precedence over HSE Act charges.

Exemption for people injuring others in the course of preventing harm

Where an employee harms someone in an effort to protect that person from harm, the employee and the employer have not caused an offence under the Act (section 51).

The exemption is intended to provide for emergencies and to avoid potential injustices where emergency services personnel or others in dangerous situations could be in breach of the Act.

Offences by officers of bodies corporate or Crown organisations

If a corporate body or Crown organisation fails to comply with the Act, its officers, directors or agents are liable for conviction (section 56). This may be in addition to any prosecution and/or conviction of the body corporate.

Who may lay charges

Health and safety inspectors

Section 54A empowers an inspector to begin proceedings for an offence against the Act that has not been subject to an infringement notice.

[Refer to the summary of OSH's enforcement policy, above.]

Health and Safety in Employment Act prosecutions are taken in District Courts and subject to the Summary Proceedings Act 1957. Proceedings may be begun by one inspector and continued by another.

Private prosecutions

When an inspector, or another enforcement agency, does not take enforcement action in response to a particular matter, there is provision for a person other than an inspector to begin court proceedings for an alleged offence under the Act. Prior to this, a person — not necessarily the person who will prosecute — must have notified the Secretary of Labour (or chief executive of another designated agency responsible for enforcement) of their interest in any enforcement action, and been advised that the agency will not be proceeding with enforcement against any person.

Court action may then be begun by any other person in relation to the matter, by “laying an information”.

Where another enforcement authority, i.e. the police or LTSA, has taken enforcement action with respect to the particular matter, it is possible to seek leave of the court to prosecute regardless, providing OSH or another designated agency has formally indicate that it will not be prosecuting.

Notification of interest regarding enforcement action

A person may notify the Secretary of Labour (or chief executive of the CAA or MSA as appropriate) of their interest in knowing whether a particular matter has been, is, or is to be, subject to the taking of an enforcement action by an inspector (section 54).

The notification of interest must be in a manner prescribed by regulation.

When the Secretary (or chief executive of the CAA or MSA) has been notified in this way, they must ensure that the person with an interest is informed of:

- Any decision already, or subsequently made by an inspector regarding the taking of enforcement action; and
- Any information that the Secretary is aware of relating to prosecution action by another enforcement authority (i.e. police, LTSA, MSA or CAA) under other legislation.

There is no requirement to advise the person notifying of reasons for any decision taken.

Time limits for laying of charges

The Health and Safety in Employment Act sets a time limit for the laying of an information — i.e. beginning prosecution — for an offence. In relation to the “incident, situation, or set of circumstances” to which the particular offence relates, the information must be laid within six months of the earlier of when it:

- **first became known** to an inspector; *or*
- **should reasonably** have become known to an inspector.

(section 54B)

The effect of legislative change

Previously the Act conformed with the “six-month rule” contained in the Summary Proceedings Act 1957, which meant prosecution had to occur within six-months of when any breach of the Act occurred, *not* when it became known, or should have become known to an inspector.

The timing requirement changed with the passing of the Health and Safety in Employment Amendment Act 2002, with effect from 5 May 2003. However, the amendment does not apply retrospectively — meaning proceedings cannot be begun with respect to any “incident, situation, or set of circumstances” that occurred more than six months before that date. An effect of this is that prosecutions will continue not to be able to be taken with respect to long latency occupational diseases or other matters where the breach occurred before 5 May 2003.

The new extended time limit will apply with respect to any offence against the Act that occurs after 5 May 2003, not necessarily all that “become known or should reasonably have become known” to an inspector after that date (section 31 Health and Safety in Employment Amendment Act 2002).

Extension of the time limit for laying an information

Where a **health and safety inspector** considers that they will not be able to investigate a matter and lay an information within six months of the matter coming to notice, they may apply to a District Court for an extension. Application must be made before the six months has passed (section 54C).

The court may only grant an extension where it is satisfied that:

- The inspector reasonably requires longer to decide;
- The reason for the extension is that the events and issues surrounding the alleged offence are complex or time consuming;
- It is in the public interest to grant the extension; and
- It will not unfairly prejudice the proposed defendant in their defence of the charge.

Before making its decision, the court must give an opportunity to be heard to each of:

- The person seeking the extension;
- The proposed defendant; and
- Any person who has notified an interest in knowing whether an information will be laid (under section 54(1)).

A person other than an inspector may also apply to a District Court for an extension of time before laying an information (section 54C).

The application can only occur where a health and safety inspector has not taken enforcement action in relation to the matter and has notified any persons who have advised of their interest in enforcement action. It may be made within a month of receiving such advice from the inspector.

The court may only grant an extension where it is satisfied that:

- Another person wishes to decide whether to lay an information in respect of the matter;
- It is unreasonable, with regard to the time taken by an inspector to respond, to expect, or have expected, the person to make that decision within the six-month period; and
- The inspector concerned has not applied for an extension.

Before making its decision, the court must give an opportunity to be heard to each of:

- The person seeking the extension;
- The proposed defendant; and
- Any person who has notified an interest in knowing whether an information will be laid (under section 54(1)).

Decisions to prosecute

An inspector's decision whether or not to prosecute is subject to judicial review.

Insurance and indemnities against fines or infringement fees

It is unlawful to insure against a fine or an infringement fee that is imposed for an offence under the Act (section 56I).

It is, however, legal to insure against:

- Legal costs in defending a prosecution; or

- A sentence of reparation.

It is an offence to offer, agree, or enter into any contract to indemnify, or indemnity to pay any person's liability for a fine or an infringement fee under the Act. This means, among other things, that it is illegal for an employer to pay an employee's fine on their behalf.

[Refer to the fact sheet, Insurance]

Sentencing for HSE Act convictions

Sentencing criteria for Health and Safety in Employment Act prosecutions are set out in section 51A of the Act, which must be read in conjunction with the Sentencing Act 2002 (and do not limit the application of that legislation).

Sentencing involves the court's consideration of the following:

The purposes of sentencing

The Sentencing Act (s 7) describes the broad purposes of sentencing. It requires the balancing each of the factors of:

- Reparation;
- Accountability to, and protection of the community;
- The need to denounce the conduct; and
- Deterrence,

with regard to the needs of the community, the victim, and the offender.

Sentences of reparation, and any additional fine, may be made after consideration of the financial circumstances of the person convicted (s 35 Sentencing Act).

The principles of sentencing

The Sentencing Act (s 8) lists a series of principles that encourage the setting of a level of fine that is consistent with the nature and seriousness of the offence and other similar types of offending.

In addition, section 51A of the HSE Act requires consideration of the degree of harm that has occurred as a result of the offence.

Aggravating or mitigating factors

The Sentencing Act (s 9) lists a series of factors relating to the motivation and/or conduct of the offender (and the victim) in the circumstances of the particular offence. In addition to any other factors may be raised by the circumstances.

Section 51A of the HSE Act specifically requires consideration of the safety record of the person convicted, to the extent that it shows whether any aggravating factor is absent.

Any offer, agreement, response or measure to make amends (s 10 Sentencing Act)

The fine payable must also take into account any reparation ordered, and the financial circumstances of the offender.

Section 51A of the HSE Act particularly requires the sentencing court to consider whether the person has:

- Pleaded guilty;
- Shown remorse for the offence and any harm caused;

- Co-operated with the authorities with regard to the investigation and prosecution of the offence; or
- Taken remedial action to prevent a recurrence.

Case law regarding sentencing for Health and Safety in Employment Act convictions has suggested that there should be no "starting point" of a sentencing level for any given offence and that each case is different in its circumstances. Maximum penalties are reserved for the worst possible cases. Submissions on penalty are encouraged from Crown prosecution, because it is their task to help the judge reach a fair and appropriate result from the point of view of the community.

Sentencing is not a mathematical exercise, and the circumstances of the individual case are all important.

There is limited case law on sentencing arising out of **section 49** prosecutions. However, the general principle is that in such cases, the deterrent effect of the offence is the dominant consideration of the sentencing judge. But consideration must also be made to the circumstances and effects of the breach, and also to the convicted company or person.

**Table 4: Health and Safety in Employment Act 1992
Prosecution Statistics: Period 1 April 1993 - 18 January 2001**

For all Branches

For Breach of Section	Prosecutions	Highest Fine (\$)	Lowest Fine (\$)	Number of Convicted and Fined	Total Fines (\$)	Average Fines (\$)
6	860	\$35,000	\$200	647	\$3,692,625	\$5,707
7	159	\$20,000	\$100	73	\$247,650	\$3,392
8	4	\$6,500	\$6,500	1	\$6,500	\$6,500
9	3			0		
10	32	\$5,000	\$250	12	\$33,250	\$2,771
12	52	\$12,500	\$500	22	\$53,350	\$2,425
13	241	\$20,000	\$130	106	\$452,730	\$4,271
15	75	\$20,000	\$500	45	\$167,050	\$3,712
16	153	\$30,000	\$200	87	\$465,750	\$5,353
17	32	\$8,000	\$100	22	\$34,550	\$1,570
18	138	\$12,000	\$300	77	\$237,500	\$3,084
19	120	\$5,000	\$150	65	\$62,200	\$957
25	124	\$5,000	\$100	60	\$68,050	\$1,134
26	60	\$6,500	\$200	28	\$40,400	\$1,443
39	34	\$3,000	\$150	22	\$23,050	\$1,048
42	2			0		
43	14	\$10,000	\$250	8	\$27,500	\$3,438
48	12	\$5,000	\$500	6	\$7,850	\$1,308
56	1			0		
Totals:	2,116	\$35,000	\$100	1,281	\$5,620,005	\$4,387

**Table 5: Health and Safety in Employment Regulations 1995
Prosecution Statistics: Period 1 April 1993 - 18 January 2001**

For all Branches

For Breach of Section	Prosecutions	Highest Fine (\$)	Lowest Fine (\$)	Number of Convicted and Fined	Total Fines (\$)	Average Fines (\$)
4	1			0		
16	1			0		
17	2	\$8,000	\$8,000	1	\$8,000	\$8,000
18	1			0		
20	1	\$3,000	\$3,000	1	\$3,000	\$3,000
21	20	\$22,000	\$150	16	\$66,950	\$4,184
22	2	\$4,500	\$750	2	\$5,250	\$2,625
24	1			0		
26	17	\$2,000	\$250	7	\$7,750	\$1,107
53	3	\$2,500	\$2,500	2	\$5,000	\$2,500
67	4	\$7,500	\$400	3	\$8,300	\$2,767
Totals:	53	\$22,000	\$150	32	\$104,250	\$3,258

Infringement notices

Health and safety inspectors are able to issue infringement notices for breaches of the Act (section 56B). Every infringement notice will impose a fee on the person receiving it (the defendant).

At the time of publication the Occupational Safety and Health Service were developing a process for the introduction of infringement notices which would commence during 2004. Notices will only be issued in relation to matters that occur after 5 May 2003. Similarly, prior warning in relation to any such matter (see below) must also have been issued after 5 May 2003 for it to be an infringement offence.

Who can be issued with an infringement notice

Infringement notices can be issued to any person, whether a natural person or a body corporate, with duties under the Act.

The person may be:

- An employer;
- An employee;
- Self-employed person;
- A principal;
- A contractor;
- A subcontractor; or
- A person who controls a place of work.

Infringement offences

An infringement offence is any offence described in section 50(1) of the Act (see, Section 50 offences, above).

Requirements for notices

Before issuing an infringement notice, a health and safety inspector must **believe on reasonable grounds** that the defendant has committed an infringement offence.

Also, the defendant must have had prior warning of the offence (arising out of or relating to the same or a similar matter) in the form of:

- A written warning from an inspector;
- An improvement notice;
- A prohibition notice;
- An infringement notice;
- A conviction for an offence under the Act;
- A hazard notice; or
- A compliance order.

An infringement notice must be issued within 14 days of the inspector becoming aware of the alleged offence.

A person cannot be issued with an infringement notice **and** later prosecuted for the same matter (unless the offence is continuing or repeated). An infringement notice does not result in a criminal record, but may be considered by a court if the person who received it is prosecuted for another breach of the Act.

The inspector may require further information

When considering issuing an infringement notice to a person, an inspector may require the person to provide certain information.

In the case of an **individual**, the inspector may require:

- The person's full name;
- Whether, in relation to a place of work, the person is 1 or more of the following:
 - an employer
 - an employee
 - a self-employed person
 - a principal
 - a contractor
 - a subcontractor
 - a person who controls a place of work;
- The person's date of birth
- The person's residential address and if different, postal address.

In the case of a **body corporate**, the inspector may require:

- The body corporate's legal name

- Whether the body corporate is one or more of the following:
 - an employer
 - a principal
 - a contractor
 - a subcontractor
 - a person who controls the place of work
- The postal address of the body corporate.

The person is required to provide this information (section 56D).

Setting the infringement fee

There are two categories of infringement fee:

- Failure to systematically identify hazards in terms of section 7(1) of the Act (fee between \$800-\$4,000, in multiples of \$100).
- All other infringement offences (fee between \$100-\$3,000, in multiples of \$100).

The issuing inspector must use his or her discretion to determine the fee. In doing so, the inspector will take into account:

- Whether or not harm resulted from the offence;
- If harm resulted, the extent of the harm;
- What potential harm could have resulted from the offence;
- The size of the business if an employer, principal or contractor;
- The financial circumstances of the person; and
- The safety record of the person.

For a breach of section 7(1) of the Act, the issuing inspector need only consider the last three points.

After a person has been issued with an infringement notice

If the infringement fee is paid within 28 days of being served with an infringement notice, no further action will be taken for that offence.

Alternatively, the person receiving the notice may:

- Raise with the issuing inspector any matter relating to the circumstances of the alleged offence for consideration; *or*
- Deny liability for the offence and request a court hearing; *or*
- Admit liability for the offence, but wish to have a court consider written submissions as to the penalty or otherwise.

If the defendant does not pay the fee within 28 days, and does not request a court hearing or make submissions to the court, they will be served with a reminder notice.

After a further 28 days, reminder notices unpaid or unappealed may be filed in court and an order made for payment (with costs).

A summary of rights is printed on the back of infringement notices or reminder notices.

[For more information, refer to fact sheet, Infringement notices.]

6.6 Relationship with accident insurance and compensation agencies

Funding the administration of the Act

Section 59 provides for a levy to be collected from employers, or other earners who are not employees, to fund the administration and enforcement of the Act.

The levy is collected with other levies or premiums payable collected by the Inland Revenue Department for accident insurance and/or compensation. The rate is fixed by regulation, and is currently set at 5c per \$100 of payroll.

When Inland Revenue collect the levy, there is no requirement for separate accounting to payers — it is included in accident compensation premiums without separate reference.

Information sharing provisions

Accident compensation legislation requires OSH — as the agency that administers the HSE Act — to be provided with information that relates to claims for work-related personal injury.

OSH may, in turn, use the information only for the following purposes:

- Developing a body of statistical data relating to work-related personal injury;
- Determining trends in the incidence of such injury;
- Developing and implementing programmes relating to the prevention of such injury; and
- Reviewing the effectiveness of the Health and Safety in Employment Act and its administration.

Information on injuries is also passed to the Department of Statistics' Injury Information Manager for the maintenance of a national database on workplace injury and illness.

Definitions

The following key terms are defined in section 2 of the Act, or, where indicated, in the Health and Safety in Employment Regulations 1995. The definitions are reproduced here, with commentary in *italics* where applicable.

Accident means an event that —

- a) Causes any person to be harmed; or
- b) In different circumstances, might have caused any person to be harmed.

The Act prescribes investigation, hazard management and reporting duties after an accident. It should be noted that the definition in terms of the Act is broader than in common usage, and includes "near misses" as well as events that cause injury or illness.

All practicable steps, in relation to achieving any result in any circumstances, means all steps to achieve the result that it is reasonably practicable to take in the circumstances, having regard to —

- a) The nature and severity of the harm that may be suffered if the result is not achieved; and
- b) The current state of knowledge about the likelihood that harm of that nature and severity will be suffered if the result is not achieved; and
- c) The current state of knowledge about the harm of that nature; and
- d) The current state of knowledge about the means available to achieve the result, and about the likely efficacy of each; and
- e) The availability and cost of each of those means.

To avoid doubt, a person required by the Act to take all practicable steps is required to take those steps only in respect of circumstances that the person knows or ought reasonably to know about.

This important term is discussed at 1.5, "All practicable steps" and 6.5, Offences and penalties.

Armed Forces, has the same meaning as in section 2(1) of the Defence Act 1990.

At work, in relation to any person, means present, for gain or reward, in the person's place of work.

The definition depends on that for "place of work". It also raises the question of timing, as to when a person is in their place of work, but not necessarily for gain or reward. Is for example, an employee "at work" during their unpaid lunch break? The courts are likely to say, "yes", if the purpose of their coming to work was for gain or reward, and their shift is continuing after the break. On the other hand, a visit to a place of work for private purposes, and after the hours of work is less likely to be construed as "at work".

Compliance order, means an order made under section 137 of the Employment Relations Act 2000.

Refer to 2.6, Employee participation, and 6.1, Health and safety inspectors.

Construction work is defined by Regulation 2 as —

- a) Any work in connection with the alteration, cleaning, construction, demolition, dismantling, erection, installation, maintenance, painting, removal, renewal, or repair, of —

- i) Any building, chimney, edifice, erection, fence, structure, or wall, whether constructed wholly above or below, or partly above and partly below, ground level;
 - ii) Any aerodrome, cableway, canal, harbour works, motorway, railway, road, or tramway;
 - iii) Any thing having the purpose of drainage, flood control, irrigation, or river control;
 - iv) Any distribution system or network having the purpose of carrying electricity, gas, telecommunications, or water;
 - v) Any aqueduct, bridge, culvert, dam, earthwork, pipeline, reclamation, reservoir, or viaduct;
 - vi) Any scaffolding; and
- b) Includes any work in connection with any excavation, preparatory work, or site preparation carried out for the purposes of any work referred to in paragraph (a) of this definition; and
 - c) Includes any work referred to in paragraph (a) or paragraph (b) of this definition carried out underwater, including work on buoys, obstructions to navigation, rafts, ships, and wrecks; and
 - d) Includes the use of any materials or plant for the purposes of any work referred to in any of paragraphs (a) to (c) of this definition, and
 - e) Includes any inspection or other work carried out for the purposes of ascertaining whether any work referred to in any of paragraphs (a) to (c) of this definition should be carried out; but
 - f) Does not include any work in any mine, quarry, or tunnel.

Contractor means a person engaged by any person (otherwise than as an employee) to do any work for gain or reward.

Refer to 4.3, Duties of principals and contractors. The words "any work" suggests a contract for services, and not, for example, a contract for the sale of goods. There may be situations where a contract at face value is for the supply of goods, but contains an element of the provision of services — through warranties, service agreements, etc.

Employee, subject to sections 3C to 3F, means any person of any age employed by an employer to do any work (other than residential work) for hire or reward under a contract of service and, in relation to any employer, means an employee of the employer.

For further discussion see 1.4, Coverage is broad, and 3.1, The meaning of "employee".

Employer, subject to sections 3C to 3F,

- (a) means a person who or that employs any other person to do any work for hire or reward; and, in relation to any employee, means an employer of the employee; and
- (b) includes, in relation to any person employed by the chief executive or other employee of a Crown organisation to do any work for the Crown organisation for hire or reward, that Crown organisation.

For further discussion see 1.4, Coverage is broad, and 2.1, The meaning of "employer". See also the definition of "notification", below.

Enforcement action, means

- (a) in relation to an inspector —

- (i) the laying of an information under the Act; or
 - (ii) the issuing of an infringement notice under the Act; or
 - (iii) the making of an application for a compliance order; and
- (b) in relation to a person other than an inspector, —
- (i) the laying of an information under this Act; or
 - (ii) the making of an application for a compliance order.

Facility, includes amenity and equipment.

This definition is particularly relevant to the application of regulations made under the Act concerning the provision of facilities.

Fail includes refuse; and "failure" includes refusal.

Harm

- (a) means illness, injury, or both; and
- (b) includes physical or mental harm caused by work-related stress.

See also, "serious harm", below.

Hazard

- (a) means an activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation, or substance (whether arising or caused within or outside a place of work) that is an actual or potential cause or source of harm; and
- (b) includes—
 - (i) a situation where a person's behaviour may be an actual or potential cause or source of harm to the person or another person; and
 - (ii) without limitation, a situation described in subparagraph (i) resulting from physical or mental fatigue, drugs, alcohol, traumatic shock, or another temporary condition that affects a person's behaviour.

See also "phenomenon", below.

Hazard notice, has the meaning set out in section 46A(1), and is a notice that:

- (a) describes a hazard identified in a place of work; and
- (b) is in the prescribed form; and
- (c) may set out suggested steps to deal with the hazard.

Health and safety committee, means a committee established to support the ongoing improvement of health and safety in a place of work.

Health and safety representative, means an employee elected, as an individual or as a member of a health and safety committee or both, to represent the views of employees in relation to health and safety at work.

See also the definition of "trained health and safety representative, below.

Healthy means unharmed, and "health" has a corresponding meaning.

The definition is intrinsic to the purpose of the legislation and the duties it imposes. It is important to note that "unharmed" is a narrower definition than in common use (or as defined by the World Health Organisation).

Home means a place occupied as a dwelling house; and includes any garden, yard, garage, outhouse, or other appurtenance, of a home.

This definition is used in conjunction with that for "residential work". See also 1.4, Coverage is broad.

Infringement notice, means a notice given under section 56B.

Machinery means an engine, motor, or other appliance that provides mechanical energy derived from compressed air, the combustion of fuel, electricity, gas, gaseous products, steam, water, wind, or any other source; and includes —

- a) Any plant by or to which the motion of any machinery is transmitted; and
- b) A lifting machine, a lifting vehicle, a machine whose motive power is wholly or partly generated by the human body, and a tractor.

This definition is particularly relevant to the application of regulations made under the Act and concerning machinery.

Matter, in sections 54, 54A, 54C, 54E, 56B and 56C, means —

- (a) a failure to comply with this Act or regulations made under this Act; or
- (b) a series of such associated failures arising out of, or relating to, the same incident, situation or set of circumstances.

Notifiable work is defined by Regulation 2 as—

- (a) Any restricted work, as that term is defined in regulation 2 of the Health and Safety in Employment (Asbestos) Regulations 1998;
- (b) Any logging operation or tree-felling operation, being an operation that is undertaken for commercial purposes;
- (c) Any construction work of one or more of the following kinds;
 - i) Work in which a risk arises that any person may fall 5 metres or more, other than—
 - Work in connection with a residential building up to and including 2 full storeys;
 - Work on overhead telecommunications lines and overhead electric power lines;
 - Work carried out from a ladder only;
 - Maintenance and repair work of a minor or routine nature;
 - ii) The erection or dismantling of scaffolding from which any person may fall 5 metres or more;
 - iii) Work using a lifting appliance where the appliance has to lift a mass of 500 kilograms or more a vertical distance of 5 metres or more, other than work using an excavator, a fork-lift, or a self-propelled mobile crane;
 - iv) Work in any pit, shaft, trench, or other excavation in which any person is required to work in a space more than 1.5 metres deep and having a depth greater than the horizontal width at the top;
 - v) Work in any drive, excavation, or heading in which any person is required to work with a ground cover overhead
 - vi) Work in any excavation in which any face has a vertical height of more than 5 metres and an average slope steeper than a ratio of 1 horizontal to 2 vertical;

- vii) Work in which any explosive is used or in which any explosive is kept on the site for the purpose of being used;
- viii) Work in which any person breathes air that is or has been compressed or a respiratory medium other than air.

Notification is defined in Regulation 26 as:

1. In the regulation, the term "employer" includes a person who controls a place of work.
2. Subject to subclause (4) of this regulation, every employer who intends to commence any notifiable work or any work that will at any time include any notifiable work shall take all practicable steps to lodge notice of that intention in accordance with this regulation.
3. A notice required to be lodged under subclause (2) of this regulation shall—
 - a) Be lodged at an office that deals with occupational safety and health matters, being the nearest such office of the Department to the place where the work is to be carried out; and
 - b) Be in writing; and
 - c) Be given at least 24 hours before the time at which the employer intends to commence the work; and
 - d) Contain the following particulars—
 - i) The nature and location of the work; and
 - ii) The name, address, and contact details of the employer; and
 - iii) The intended date of commencement of the work; and
 - iv) The estimated duration of the work.
4. It shall not be necessary for any employer to comply with subclause (2) of this regulation before commencing any construction work or tree felling operation necessary to deal with an emergency arising from—
 - a) Damage caused by any earthquake, explosion, fire, flood, lightning, ram, slip, storm, or washout; or
 - b) The blockage or breakdown of any drain or sewer; or
 - c) The blockage or breakdown of any distribution system or network for electricity, gas, telecommunications, or water.

Person includes the Crown.

Person who controls a place of work, in relation to a place of work, means a person who is —

- a) The owner, lessee, sublessee, occupier, or person in possession, of the place or any part of it; or
- b) The owner, lessee, sublessee, or bailee, of any plant in the place.

See 1.4, Coverage is broad, or 4.1, Duties of persons who control a place of work.

Phenomenon includes radiation.

"Phenomenon" is used in the definition of "hazard", above.

Place of work means a place (whether or not within or forming part of a building, structure, or vehicle) where any person is to work, is working, for the time being works, or customarily works, for gain or reward; and

In relation to an employee, includes a place, or part of a place, under the control of the employer (not being domestic accommodation provided for the employee), —

- a) Where the employee comes or may come to eat, rest, or get first-aid or pay; or
- b) Where the employee comes or may come as part of the employee's duties to report in or out, get instructions, or deliver goods or vehicles; or
- c) Through which the employee may or must pass to reach a place of work.

To date the courts have interpreted the definition provided by section 2 of the Act as meaning that in effect there are two definitions of places of work. The first, more general definition applies in situations where any person is working, whether employee, self-employed, contractor or other person.

The second definition is extended in relation to employees, by the inclusion of the subcategories a)-c).

The case law has found that where there is no employee involved, the narrower definition applies, i.e. the categories a)-c) do not apply. The place of work is therefore said to be the immediate area where work has taken, is taking, or will take place.

This was the finding in a hearing which determined whether or not a landowner was in control of a "place of work", under section 16 (1) of the Act. However, in a situation where an employee of a contractor or any other person is working, a landowner, or other person could be found to be in control of the place of work — with the broader definition applying.

Plant includes —

- a) Appliance, equipment, fitting, furniture, implement, machine, machinery, tool, and vehicle; and
- b) Part of any plant, the controls of any plant, and any thing connected to any plant.

Because it begins with the word "includes", this definition supplements the everyday meaning of the word "plant", and does not limit its terms.

Principal means a person who or that engages any person (otherwise than as an employee) to do any work for gain or reward.

This describes a contract for services.

Residential work, in relation to the occupier of a home, means —

- a) Domestic work done or to be done in the home; or
- b) Work done or to be done in respect of the home, —

by a person employed or engaged by the occupier solely to do work of one or both of those kinds in relation to the home.

For further discussion see 1.4, Coverage is broad, and 3.1, The meaning of "employee".

Safe, —

- a) In relation to a person, means not exposed to any hazards; and
- b) In every other case, means free from hazards; — and "unsafe" and "safety" have corresponding meanings.

Serious harm, means death, or harm of a kind or description set out in the first schedule to the Act, or declared by regulation to be "serious" for the purposes of this Act; and "seriously harmed" has a corresponding meaning.

No regulations for this purpose have been passed to date. Instead, the first schedule of the Act describes serious harm as:

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; or
 - Crushing.
2. **Amputation** of body part.
3. **Burns** requiring referral to a specialist registered 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 registered 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.

Ship, has the same meaning as in section 2(1) of the Ship Registration Act 1992

Significant hazard means a hazard that is an actual or potential cause or source of —

- a) Serious harm; or
- b) Harm (being harm that is more than trivial) the severity of whose effects on any person depend (entirely or among other things) on the extent or frequency of the person's exposure to the hazard; or
- c) Harm that does not usually occur, or usually is not easily detectable, until a significant time after exposure to the hazard.

"Significant hazard" is an important definition for determining the responses required by employers managing hazards under the duties of sections 7-10. It is important to note that the definition is considerably wider than just a cause of "serious harm". This has the effect of placing employers on notice that they need to identify and manage hazards with the potential for any harm that is not trivial. The harm may only occur after a long time. Likewise, the potential harm may vary in degree according to the intensity or duration of exposure to the hazard.

See 2.3, Hazard management.

Subcontractor means a person engaged (otherwise than as an employee) by any contractor or subcontractor to do for gain or reward any work the contractor or subcontractor has been engaged (as contractor or subcontractor) to do.

The Act imposes the same duties on a subcontractor as a "contractor". See 4.3, Duties of principals and contractors.

Substance includes a thing that is an organic material, whether living or not.

Suspension notice means a notice under section 37 (1) of the Act.

Trained health and safety representative, has the meaning set out in section 46A(1) and means — a health and safety representative who has achieved a level of competency in health and safety practice specified by the Minister by notice in the *Gazette* or who has completed an appropriate course approved under section 19G.

Union, has the same meaning as in section 5 of the Employment Relations Act 2000.

Volunteer —

- (a) means a person who —
 - (i) does not expect to be rewarded for work to be performed as a volunteer; and
 - (ii) receives no reward for work performed as a volunteer; and
- (b) does not include a person who is in a place of work for the purpose of receiving on the job training or gaining work experience.