Inform

Issue 2

New Zealand Institute of Health Management Auckland Branch Newsletter

August 2002

HEALTH AND SAFETY IN EMPLOYMENT AMENDMENT BILL

Keeping up with new legislation and understanding the implications for our "business" is a Herculean task we must all grapple with. Many members find the Minter Ellison presentations at our monthly branch seminars an excellent tool for keeping up to date. At our July meeting we enjoyed presentations from both Erin Davies and Wendy Brandon. Erin covered the Health and Safety in Employment Amendment Bill and Wendy spoke on the Health and Disability Services (Safety) Act 2001 and the Health Practitioners Competence Assurance Bill.

For those who were unable to attend, **Inform** presents a synopsis of those presentations.

The Health and Safety in Employment Amendment Bill ("the Bill") was introduced on 31 October 2001 but was still with the select committee before Parliament rose for the General Election. Parliament agreed to carry forward the Bill for consideration by the next Parliament. As the Government has been returned and the Bill states that it is to come into force on 2 September 2002, one might expect early attention by the new Parliament.

Erin Davies

The Bill will "amend and add important new elements to" the Health and Safety in Employment Act 1992 ("the Act"). It will:

- Require more employee participation in the management of a Health and Safety "system";
- Recognise stress and fatigue by defining the terms "harms" and "hazard" to cover mental harm;
- Remove the OSH monopoly on prosecutions; and
- Increase the enforcement provisions of the Act.

<u>Increased coverage and cost</u>

The Bill increases the coverage of the Act to ensure that all employers and other people who are in work places are covered by Health and Safety laws. The Bill proposes amendments that:

- Cover "on loan" workers, volunteers in the work place, persons on work experience and recreational users;
- Cover mobile workers;
- Creates duties on those who sell or supply plant or equipment for use in work places to take all practicable steps to ensure that it is arranged, designed, and made and has been maintained so that it is safe for its intended use.

The explanatory note to the Bill anticipates increased cost to employers in establishing and maintaining systems for employee participation.

<u>Employee participation</u>

There is a requirement for all parties to cooperate in good faith to develop and maintain an employee participation system. There is also a general duty on employers to ensure that employees have "reasonable opportunities" to participate effectively in the ongoing management and improvement of OSH in the work place and provide for time off for training of Health and Safety representatives (two days per annum on pay). Health and Safety representatives will be able to issue hazard notices in circumstances where an employer has refused to take steps or the parties do not agree, or the employer has not taken the requisite steps in time.

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Stress and fatigue

The Bill recognises stress and fatigue by defining the terms "harms" and "hazard" to confirm that they cover, respectively, mental harm and physical hazards through physical or mental fatigue.

Mental illness, such as stress, is an identifiable hazard from which employees must be protected under section 6 of the Act. It will be difficult to assess the degree of mental injury an employee has suffered. Careful consultation with the affected employee will help to determine the extent to which they feel impaired, however, a medical assessment may be required.

Under section 25 of the Act, an employer is required to inform OSH of serious harm which occurs to an employee. The Act's definition of serious harm does not explicitly cover mental injuries. OSH has advised that they would expect to be informed if an employee is not capable of performing their tasks due to a mental injury, and as a result that employee has to take time off, or perform light duties, for more than a week.

Infringement notices and Private prosecutions

The Bill removes the Crown monopoly on prosecutions so that private prosecutions will be possible, but only once the Occupational Health and Safety service (OSH) has decided not to take prosecution action itself.

As prosecution is a severe and expensive means of ensuring compliance, the Bill introduces the option of infringement notices for inspectors to use in the case of minor offences ($100 to $800 for individuals, and $500 to $4000 for body corporates).

The Bill also makes it unlawful to enter into an insurance policy or contract of insurance that indemnifies or purports to indemnify a person for the cost of fines under the principal Act. Insurance to cover costs will be allowed to continue. Currently the law renders insurance contracts against liability unenforceable for criminal matters, which require proof of intent or criminal recklessness – the new clause seeks to extend this to strict liability offences, where intent is not needed for actions or omissions to be classed as a criminal offence. It is possible for an employee and/or director to be fined personally and/or imprisoned under various sections of the Act.

This means that employers should talk to their insurer as soon as possible. Any part of the insurance policy that gives protection from fines imposed under the Act will be of no effect from the date that the Act is passed into law.

Offences likely to cause serious harm increase from $100,000 to $500,000, and the maximum term of imprisonment increases from one year to two years. For other offences, the Bill seeks to increase the maximum fine from $50,000 to $250,000. It is also proposed that the limitation period for bringing an action under the Act will increase to six months from the time when the breach became known or should have become known to an Inspector.

Other changes

The Bill also proposes to codify the common law right for an employee to refuse work (ie. to refuse to perform work that theybelieve on reasonable grounds is likely to cause them serious harm.)

In addition, the Bill clarifies that an employer is required to actually provide protective clothing and equipment and to ensure that is made accessible to, and used by, the employees.

The definition of "employment relationship problem" is not restricted to personal grievances (dismissals and disadvantages) and disputes. It now includes "any other problem relating to or arising out of an employment relationship". Accordingly, a pro-active employee discontented with the health and safety of the work place could bring a claim under the ERA as an alternative to a complaint under the Act. Employees have six years in which to bring proceedings (other than personal grievances) and can get penalties/compliance etc if the obligations of the Act are part of the employment agreement and are breached.

HEALTH AND DISABILITY SERVICES (SAFETY) ACT 2001

The Health and Disability Services (Safety) Act ("the Act") is a new licensing arrangement for health service providers. The Act replaces the previous licensing arrangements for hospitals, rest homes and homes for people with disabilities because previous licensing arrangements were considered inadequate to ensure patient safety; and due to some overlap there was duplication and confusion about who was responsible for ensuring residents' safety in relation to the various services provided.

The Act purports to address these problems by requiring healthcare service providers to be certified to provide those healthcare services, and for the provision of those services to be audited.

The Act applies to all healthcare services. This includes:

- Hospital care services;
- Residential disability care services;
- Rest home care services;

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- Specified health or disability services.

The Act also provides that further categories of healthcare services may be added at a later date. Most of the Act's provisions come into force on 1 July 2002. However, some provisions will not come into force until 1 October 2002 and others 1 October 2004.

Key Provision

Section 9 is perhaps the key provision of the Act. It sets out what is required by healthcare services in order to be licensed. Section 9 states that a person providing healthcare services of any kind must do so:

- while certified by the Director-General to provide healthcare services of that kind; and
- while meeting all relevant service standards; and
- in compliance with any condition subject to which the person was certified by the Director-General to provide healthcare services of that kind; and
- in compliance with the Act; and
- if the services are rest home care, or geriatric services that are hospital care, in compliance with any applicable regulations under section 53(1)(a).

Wendy Brandon

It is an offence to provide healthcare services otherwise than in compliance with section 9. Penalties for non compliance are fines up to $50,000.

Getting Certified

The Director-General of Health may certify any person to provide healthcare services while imposing certain conditions that must be complied with by the service provider. Providers who are currently licensed have until 1 October 2004 to become certified. However, all providers established after 1 October 2002 must be certified under the Act.

In order to be certified providers must meet service sector standards approved by the Minister of Health. The standards created under the Act aim to improve the safety levels of healthcare service providers. They are seen as setting minimum expectations for providers to achieve and to encourage quality improvement.

To date, the Minister of Health has approved three service standards for providing hospital care, residential disability care, and rest home care that will be mandatory under the Act:

- The Health & Disability Sector Standards (NZS 8134:2001).
- Infection Control (NZS 8142:2000).
- Restraint Minimisation and Safe Practice (NZS 8141:2001).

In addition, the Minister of Health has approved the National Mental Health Sector Standard (NZS 8143:2001) for the provision of mental health services.

Auditing

Compliance with the standards will be mandatory for currently licensed providers from 1 October 2004. The only exception to this is where a standard is cited in a service provider's funder contract. In those circumstances the standard must be complied with in accordance with the contract. The Act provides that providers may be audited in order to assess compliance.

Where providers do not meet the standards the Director-General has the discretion to serve a written order prohibiting provision of healthcare services if satisfied that the services are being provided outside the compliance requirements or in an unsafe or unsanitary manner. However, the Ministry of Health has indicated that closure or cessation orders are a "clause of last resort" and that the Ministry will provide assistance to ensure that providers meet the requirements of the standards.

HEALTH PRACTITIONERS COMPETENCE ASSURANCE BILL

This Bill was drafted in response to the Cull Report, which criticised the fragmented nature of the current arrangements for the registration and discipline of health practitioners in New Zealand. It was introduced to Parliament on 11 June 2002 but was put to one side for the election. As it has not been sent to a Select Committee no date has been set for the close of submissions, although we expect that it will be announced soon.

The stated purpose of the Bill is "to protect the health and safety of members of the public by providing mechanisms to ensure that health practitioners are competent and fit to practise their professions". To achieve this aim, the Bill proposes a consistent "accountability regime" and systems to ensure that health practitioners are competent in their scopes of practice. It enables a wide range of "health professions" to be encompassed by a single Act, thereby seeking to address concerns that the existing legislation is unable to response adequately to change.

The Bill regulates 18 professions:

Chiropractors, dental hygienists, dental technologists, dental therapists, dentists, dieticians, medical laboratory scientists, medical practitioners, medical radiation technologists, nurses (including midwives), occupational therapists, opticians, optometrists, osteopaths, pharmacists, physiotherapists, podiatrists, and psychologists.

Significant changes made by the Bill

There are several significant changes made by the Bill.

Currently, individual registration bodies regulate the occupations covered by the Bill. Most of these will remain, with 3 new bodies created: the Midwifery Council; Osteopathic Council; and Pharmacy Council. The Dental Council's scope is also expanded under the Bill to incorporate the occupations of dental therapy, dental hygiene and dental technology as well as dentistry. The authorities are bodies corporate responsible for the registration and oversight of practitioners of a particular health profession. The Minister of Health will appoint the members of each authority and must include 2 to 3 lay persons, depending on the total number of authority members.

Although originally the Bill was to require mandatory reporting of adverse events, this has not survived the drafting process. Reporting is now voluntary. Health practitioners may notify the relevant authority where they believe another practitioner may pose a risk of harm to the public by practising below the required standard of competency. Reporting to the relevant Authority is mandatory for the Health and Disability Commissioner and for employers who dismiss employees, or whose employees have resigned, for competence reasons. It is also mandatory for authorities to report to ACC, the Director-General of Health, the Health and Disability Commissioner and any employer of a health practitioner where the Authority believes that a practitioner's practice may pose a risk of harm to the public.

All authorities regulated by the Act will be able to review the competence of their practitioners. Authorities will be required to implement processes that ensure practitioners maintain their competence throughout their careers. Quality assurance activities may be created to facilitate practitioners' learning from patient outcomes, improving their competence and reducing adverse outcomes. An authority must inquire as to the competence of a practitioner in certain circumstances. An authority may also suspend a practitioner's practising certificate in certain circumstances.

Several changes to the complaints system have been made. The aim is to provide a consistent process across the professions for handling complaints against health practitioners and be fair to both the complainant and the health practitioner.

Single Disciplinary Tribunal

The major change introduced by the Bill is the proposal for a single disciplinary tribunal to receive charges against any practitioner covered by the legislation. The tribunal will be called the Health Practitioners Disciplinary Tribunal ("HPDT") and is modelled on the existing Medical Practitioners Disciplinary Tribunal.

The Bill proposes the establishment of complaints investigation committees, ("CICs") modelled on the Medical Council's complaints assessment committees. The new CICs will determine whether a charge should be laid with the HPDT. At any stage of its investigation the CIC will be able to recommend that a practitioner be suspended if a risk to public health and safety is identified. For hearings, the HPDT will comprise 5 members. There will be 2 public members, a legally qualified chair, and 2 practitioners who are to be "professional peers" of the practitioner concerned. In contrast to the current Medical Practitioners Disciplinary Tribunal, this is likely to mean a majority of lay members on the HPDT.

There will be only one professional disciplinary offence under the Act – professional misconduct. Professional misconduct will encompass conduct that constitutes malpractice or negligence in relation to the health practitioner's scope of practice and conduct that is likely to bring discredit to the profession of which the health practitioner was a member at the time of the conduct.

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New Zealand Institute of Health Management
A Branch of the Australian College of Health Service Executives

For all inquiries re Branch activities or membership contact nzihm@xtra.co.nz or (09) 577 5477 Phone/Fax

Up coming Seminars

August 15th
At Minter Ellison Offices, Level 24, BNZ Tower Building, 125 Queen St 5.30 for 6 p.m.

Risk Management in the Health Sector
Presented by Karen Price
Head of Minter Ellison Rudd Watts Risk Sector Group

September 17th
At Marion Davis Library
Auckland Hospital Building 43
5.30 for 6 p.m.

Recommendations of the Bristol Inquiry
Presented by Hugh Ross, Chief Executive, United Bristol Healthcare Trust

Light refreshments supplied

Non Members Welcome
Cost:
Members $20
Non Members $30

Chairpersons' Report

The National Council of NZIHM has moved from Wellington to Auckland. As a result of the move Michelle Duane has joined us part time to manage the National Council activities. Michelle will also support the Auckland Branch and she will be our contact point – welcome Michelle.

I want to thank Richard Penny for managing the Auckland branch of NZIHM over the last 2 years. It was a challenging time when there were a number of changes in Chairperson and committee members. Despite these changes, Richard continued to organise our successful seminar programme. He also organised the annual NZIHM conferences for many years. Richard is available to organise your event/ organisation and can be contacted at r.a.penny@xtra.co.nz or phone 09 817 2271.

The Auckland Committee of NZIHM have chosen to distribute this newsletter to both members and non members to inform Health Managers of our events and activities. If you are not a member and receive this newsletter we encourage you to join. To become a member you join the Australian College of Health Service Executives, of which NZIHM is a branch. Here are a few examples of what only members receive:

- Special member rate to attend the Auckland seminar programme and the annual NZIHM conference
- Australian Health Review journal
- Access to the journal and back issues on line at www.aushealthcare.com.au
- Access to other health publications via the ACSHE website
- Regular issue of the Health Manager, including articles and news on the ACSHE branches, including NZIHM.

Denise Tyrrell

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The potential penalties remain as per the Medical Practitioners Act but the maximum fine increases to $30,000. Orders or decisions made by the HPDT may be appealed to the High Court instead of the District Court at present.

Although it was initially proposed that pharmacies would be deregulated, the Bill does not go that far. The Bill however does make provision for the licensing of pharmacies. Applicants for a licensed operator pharmacy must apply to the Director-General of Health and a Licensing Authority will assess their application. Applicants must be pharmacists and have a 51% interest in the pharmacy business. The maximum number of licences that can be granted to one owner is five

To contact Wendy or Erin, or to read Minter Ellison Health Law publications, go to www.minterellison.co.nz

Reported by Bruce Parkes