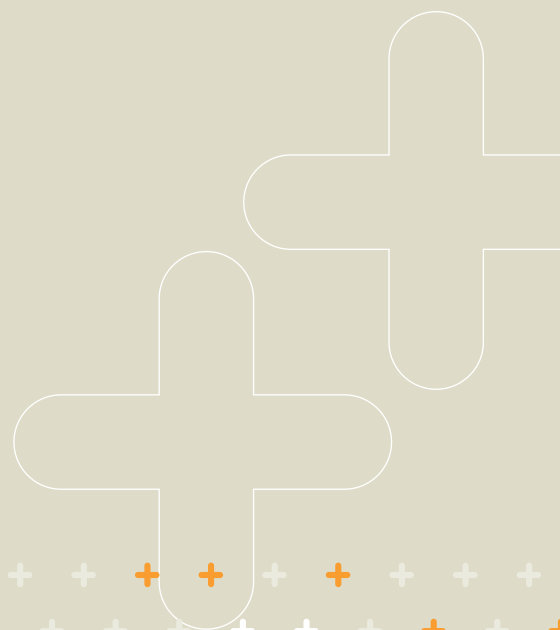


Defining Serious Harm

➤ DEPARTMENT OF LABOUR RESPONSE TO SUBMISSIONS RECEIVED ON THE DISCUSSION DOCUMENT ON THE REVISION OF THE DEFINITION OF "SERIOUS HARM" UNDER THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992





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Acknowledgement

Prepared for the Department of Labour
Department of Labour

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October 2008

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Contents

LIST OF TABLES AND CHARTS	5
1. SUMMARY	6
Method of consultation	7
Method of analysis.....	8
Broad themes emerging from consultation.....	8
Recommended changes to the draft.....	11
Recommended changes to the draft definition after consultation	12
2. BASIS FOR CONSULTATION.....	14
Draft definition for consultation	14
Questions for consultation	15
3. OVERVIEW OF SUBMITTERS	17
Who submitted	17
Support for the review	19
Support for the draft definition.....	19
Support by type of submitter	19
4. ANALYSIS OF RESPONSES TO INDIVIDUAL QUESTIONS	21
Q1. Should the review focus primarily on the use of the definition to describe notification requirements?.....	21
Q2. Is the avoidance of lists in the definition appropriate and effective?	24
Q3. Is there sufficient inclusion of gradual process injuries?.....	27
Q4. Should clause 1 be limited to "bodily function"?.....	31
Q5. Should the phrase "temporary severe loss" be retained, while supplemented with a time-activated definition?	34
Q6. Will there be sufficient inclusion of "temporary severe loss of bodily function" for non-employees?	37
Q7. Should the definition of "temporary severe loss" be based on absence from the workplace or, alternatively, being unable to carry out normal duties?	40
Q8. Is seven days an appropriate period of incapacity, and if not, what is, and why?	44
Q9. Has "mental harm" been adequately caught by the draft definition?.....	49
Q10. Should all cases of amputation or surgical removal of body part be included in the definition?.....	53
Q11. Is there sufficient coverage of dangerous incidents or events to highlight "significant hazards" in workplaces?.....	55
Q12. In clause 4, is there a need to include a time limit between the occurrence of the injury itself and the treatment provided?.....	58
Q13. What explanatory material should be made available for employers and others?	60
Q14. What information should be included in the prescribed manner of written notice for occurrences of serious harm?.....	62
Q15. What information should be included in the prescribed form of accident register, and should it contain the same information as the manner of written notice?	63

Q16. What are the resource and compliance implications of the new definition, and are these reasonable for your business or organisation?	64
Q17. Will the revised definition help employees to exercise the right to refuse work likely to cause serious harm?.....	66
5. RECOMMENDED REVISED DRAFT DEFINITION FOR CABINET APPROVAL.....	68
APPENDIX: SUBMISSIONS RECEIVED.....	69

LIST OF TABLES AND CHARTS

Table 1: Submitters by type.....	17
Chart 1: Submitters by type.....	17
Table 2: Submitters by industry.....	18
Chart 2: Submitters by industry.....	18
Chart 3: Approval or disapproval of the draft definition	19
Table 3: Support or opposition of draft definition by sector.....	19
Table 4: Support or opposition of draft definition by sector.....	20
Table 5: Response to Q1 by type of submitter	21
Table 6: Response to Q1 by industry	21
Table 7: Response to Q2 by type of submitter	24
Table 8: Response to Q2 by industry	24
Table 9: Response to Q3 by type of submitter	27
Table 10: Response to Q3 by industry.....	27
Table 11: Response to Q4 by type of submitter	31
Table 12: Response to Q4 by industry.....	31
Table 13: Response to Q5 by type of submitter	34
Table 14: Response to Q5 by industry.....	34
Table 15: Response to Q6 by type of submitter	37
Table 16: Response to Q6 by industry.....	37
Table 17: Responses to Q7 by type of submitter.....	40
Table 18: Responses to Q7 by industry	40
Table 19: Response to Q8 by type of submitter	44
Table 20: Response to Q8 by industry.....	44
Table 21: Response to Q9 by type of submitter	49
Table 22: Response to Q9 by industry.....	49
Table 23: Response to Q10 by type of submitter.....	53
Table 24: Response to Q10 by industry	53
Table 25: Response to Q11 by type of submitter.....	55
Table 26: Response to Q11 by industry	55
Table 27: Response to Q12 by type of submitter.....	58
Table 28: Response to Q12 by industry	58
Table 29: Response to Q17 by type of submitter.....	66
Table 30: Response to Q17 by industry	66

1. SUMMARY

“Serious harm” is a key concept for hazard management and notification of harm under the Health and Safety in Employment Act 1992 (HSE Act). It has four main uses under the Act, by defining:

- what is a “significant hazard” and so must be managed by an employer (under the hierarchy of actions set out in sections 7-10)
- the occurrences of harm or accidents that must be notified, and when an accident scene must be protected until investigated (sections 25 and 26)
- the degree of harm that creates the most serious offences, with the highest fines, or imprisonment, under the Act (section 49)
- the work that employees may refuse because it is likely to cause them serious harm (section 28A).

The term is defined by section 2 of the HSE Act as “death or harm of a kind or description declared by the Governor-General by Order in Council to be serious” for the purposes of the Act. Section 2(4) then provides that until the commencement of the first Order in Council, serious harm is as defined in Schedule 1 of the HSE Act. Schedule 1 is reproduced as appendix 2.

When the HSE Act was passed in 1992, the intention was that the “temporary” definition in Schedule 1 of the Act was to be replaced with a more comprehensive definition developed after consultation.

The “temporary” definition contained in Schedule 1 has always presented difficulties for users and had gaps in terms of certain types of harm and hazard covered by the law. Employers, departmental staff and others have had particular difficulty interpreting the phrase “temporary severe loss of bodily function” in clause 1. Court cases have not clarified interpretation.

Schedule 1 is also now ambiguous regarding the amendment made to the Act in 2002 to recognise harm caused by stress and fatigue.

On 11 April 2007 Minister of Labour, Hon Ruth Dyson, released for public consultation the paper titled Defining Serious Harm: a discussion paper on the revision of the definition of serious harm.

The discussion paper was based on a draft amended definition. There were 17 questions on aspects of the draft, to structure discussion and encourage comments and suggestions. Submissions closed on 15 June 2007.

This report summarises submissions and provides analysis and statistical tables by question, with the department’s recommendations in response.

The basis for analysis has been to ensure that the policy intent of the HSE Act is implemented and administered in a manner that:

- eliminates unnecessary compliance costs and minimises necessary compliance costs for employers and others

- provides maximum clarity and consistency
- gives comprehensive coverage of workplaces and hazards
- maintains the interests of employees and others affected by work activities.

Consultation very clearly confirmed the need to revise the definition, but submissions contained a wide range of responses and suggestions for changes to the draft contained in the discussion document.

From our analysis we recommended a total of 19 changes to the wording of the draft contained in the discussion document. We summarised these as giving effect to five key changes to the definition, each of which responded to a significant theme arising from submissions:

- reducing the coverage of soft tissue injuries from what was proposed in the draft
- making the definition clearer by grouping it into the three main types of harm considered "serious"
- requiring diagnosis for all types of serious harm not resulting from a single exposure to a workplace hazard
- revising upwards the threshold of harm to non-employees
- better defining "contact with any energy source" and "fall or physical impact".

Method of consultation

Reducing all forms of serious harm in all types of workplaces to a few short paragraphs — while achieving several legislative objectives — was always going to be an intricate and challenging project.

The Department's approach has been to develop a specific proposal and then test it through consultation. The proposal, or draft definition itself, was drafted to use the existing terminology and approach while extending coverage to give the widest effect to the legislation – and, as such was an "ideal" in terms of the policy intent of the legislation.

The intention was that consultation focused on the draft definition would test it and allow refinement to make it more practical from the point of view of the regulated and regulators.

Considering it is a technical amendment, there was relatively high response rate and quality of submissions on the discussion document. Over a thousand pages of submissions and questionnaire responses were received.

The bulk of submissions responded directly to the questions in the discussion document — although in the course of doing this, many offered comments and suggestions. Some submitters also provided extensive analysis and discussion of their own, and often in addition to responding to the questions.

Method of analysis

In analysing submissions, the Department has reviewed the responses to individual questions, which were reasonably closely aligned to the draft definition. From this analysis it has recommended changes to the draft.

Where the consultation questions encouraged a “yes” or “no” answer, or asked respondents to choose from options, the responses are summarised tables. The tables show responses according to industry or submitter type. It should be noted that they are illustrative only and suggest only generally where submissions came from, rather than indicating any objective “weight” or value to responses.

We analysed submitters’ responses to each of the 17 individual questions in the discussion document. The basis for analysis was to ensure that the policy intent of the HSE Act is implemented and administered in a manner that:

- eliminates unnecessary compliance costs and minimises necessary compliance costs for employers and others
- provides maximum clarity and consistency
- gives comprehensive coverage of workplaces and hazards
- maintains the interests of employees and others affected by work activities

Broad themes emerging from consultation

Below is a summary of seven significant themes emerging from consultation as a whole.

1. The definition shouldn’t be used to collect injury and illness data that can be obtained from ACC data

Although there was general acceptance of the need for the review, the objects of the revision was challenged by some submitters — particularly with respect to the definition being broadened in scope to include less serious injuries for data collection purposes.

Submitters questioned why there was additional reporting of minor injuries when they were unlikely to be investigated further by the Department and while more comprehensive injury and illness data is available from ACC records.

Related to this, numerous submitters felt the broader coverage of the draft for data collection purposes would cloud its other uses: particularly to determine “significant hazards”, and to define the work an employee can refuse as unsafe.

The Department notes these comments, also that the injury data available to the inspectorate has improved considerably since parties were originally consulted on the revision. It recommends raising the threshold for serious harm to a level of harm that suggests there is a need for the involvement of the health and safety inspectorate to ascertain whether or not there has been compliance with the Health and Safety in Employment Act.

2. The draft's coverage of soft tissue injuries is too broad

A majority of employers, industry groups and professional groups described a greatly increased compliance burden if the draft were implemented. They submitted that a major cause of this is that the draft sets too low a threshold for soft tissue and other minor injuries, including gradual process injuries that need to be actively managed in a range of work settings, but should not be deemed "serious harm".

Employers and others also submitted that lowering the draft's threshold would trivialise the harm and not encourage employers and others to pay more attention to "serious" harm.

The discussion document asked submitters to choose between "absence from the workplace" or "unable to perform normal duties" as a threshold for physical incapacity.

The Department notes that, although absence from the workplace provides a sharper distinction that would be more easily understood and applied by employers and others, it could result in some quite serious conditions, such as broken limbs or serious musculoskeletal conditions not being reported. For that reason it proposes "inability to complete normal duties" as the trigger. This option, in addition to restricting the first clause to physical harm arising from a single incident, and in combination with other changes, will provide adequate coverage of soft tissue injuries.

3. The definition will be made clearer by grouping it into the three main types of harm that are considered "serious"

Submitters said that the definition could be grouped and worded much more clearly and that this would aid the majority of users.

The draft definition had followed the format of the current definition and was presented as a series of legal clauses alone, rather than using headings to indicate the types of harm being caught by each of the different clauses.

The discussion document mentioned the possibility of alternatives, and categories of injury and illness used by legislation overseas. Various submitters, including professional bodies and practitioners in businesses showing best practice, indicated a preference for types of harm being grouped into three main categories: trauma injury, acute illness in specified circumstances, and chronic illness or injury requiring diagnosis or treatment.

Other submitters suggested a degree of confusion around the meaning of the draft definition. This added support to submissions that the definition could have a more coherent structure to improve clarity for users.

The Department recommends that the definition is grouped in three distinct clauses, each describing a category of harm:

1. trauma injury;
2. acute illness or injury (in specified circumstances); and

3. chronic or serious occupational illness or injury.

4. *Diagnosis should be required for all types of serious harm not resulting from a single exposure to a workplace hazard*

Submitters said the reference to gradual process injuries in clause 1 of the draft, in combination with using the phrase “unable to perform their normal duties” set the threshold too low. They submitted this was inconsistent with ACC injury management practices.

Submitters asked that the definition set a threshold of diagnosis by the appropriate medical specialist for gradual process injuries, as is proposed for mental harm, and for better alignment to ACC definitions and approaches.

Numerous submitters referred to the variability of the medical profession in determining incapacity, and varying access to diagnosis and treatment. There were references to “the socialisation of medicine”, where GPs apply social — rather than strictly clinical — values to the presenting patient. The Department notes this is an issue where medical diagnosis and treatment is used to set the threshold for reporting.

The Department’s recommendation is that all chronic illness and injury resulting from exposure to a workplace hazard should, where possible, be confirmed by diagnosis by the appropriate specialist medical practitioner. This is consistent with other recommendations to improve and clarify the definition in response to point 3 above.

5. *The draft’s references to “contact with any energy source” and “fall or physical impact” are too broad and need to be better defined*

There was general agreement with the content of clause 3 of the draft, which sets a lower threshold for reporting acute illness in certain circumstances.

One such circumstance is “contact with any energy source”, and another is “a fall or other physical impact”. Submitters suggested that both of these are too broad in the draft, and that more serious cases would be caught by clauses 1 or 4 in any event.

The Department agrees and proposes that clause 3(c) of the draft is amended to refer to “any electrical, combustible or mechanical energy source”.

The Department also proposes that clause 3(d) is amended to refer only to “a fall from one height to another”, rather than all slips, trips and falls resulting in a visit to the doctor.

6. *The draft’s coverage of injuries to non-employees is too broad in some circumstances*

Departments or Crown agencies responsible for public areas, such as the Department of Conservation and district health boards, and supermarket operators submitted that the coverage of members of the public visiting

workplaces was too wide. They submitted it would be difficult, if not impossible for them to meet their obligations to report in many cases.

The Department notes that in many such cases information about injuries is as likely to be received by complaints, either to the dutyholder, or the Department. It proposes minor changes to the draft to set the threshold at a level where reporting is more achievable for businesses and other agencies responsible for public access areas, while keeping the definition consistent with the policy intent of the 2002 amendments.

7. Explanatory materials and implementation of the revision were seen as important for it to be successful

Consistent with the relatively high interest in the discussion paper, and the number of submissions received, there were many good suggestions on the provision of guidance and support for employers and others after the Order in Council is passed.

Recommended changes to the draft

The following recommendations for change are discussed in the responses to specific questions in part 4 of this report, following.

1. That further consideration is given to the inclusion of interpretations of key phrases in the definition itself.
2. That the HSE (Prescribed Matters) Regulations 1993 are amended concurrently with the proposed definition and that further consideration is given to aligning classifications with ACC descriptors.
3. That the reference to gradual process injuries is removed from clause 1 of the draft definition.
4. That clause 4 of the draft definition is amended to make specific reference to "diagnosis" to require reporting of occupational illness and disease where a diagnosis is provided by the appropriate registered medical specialist.
5. That clause 1 of the draft definition is amended to refer to "physical incapacity" instead of "injury or disease".
6. That the definition is grouped into three clearly distinguishable categories of harm: trauma injury, acute illness or injury (including loss of consciousness), and chronic or serious occupational illness or injury.
7. That clause 1 of the draft definition is amended to refer to harm arising from a single accident or incident only.
8. That the phrase "temporary severe loss of bodily function" be removed from the draft.

9. That the reference to "including" in clause 1(b) of the draft is removed.
10. That clause 1 of the draft is amended to refer to "physical incapacity", and that clause 1(b) refers to physical incapacity leading to a person being unable to complete their normal duties.
11. That the degree of incapacity in clause 1(b) of the draft is amended to refer to "physical incapacity" leading to a person being unable to complete their normal duties for a period of 7 or more calendar days".
12. That clause 4 of the draft definition is amended so that the reference to "registered specialist operating within their scope of practice" becomes "registered specialist operating within the appropriate scope of practice".
13. That clause 4 of the draft definition is amended so that the reference to "treatment" becomes "diagnosed and confirmed as caused by exposure to a workplace hazard".
14. That clause 2 of the draft be deleted and clause 1(a) is amended to refer to "permanent loss of bodily function (including from any amputation of body part)".
15. That the reference to physical impact be removed from clause 3(d) of the draft.
16. That the reference to "a fall" in clause 3(d) of the draft be narrowed to only include falls from one height to another.
17. That the reference to "contact with any energy source" in clause 3(c) be further defined to refer more specifically to types of energy.
18. That the Department consult with Parliamentary Counsel Office regarding whether it is better to promulgate a revised definition with the prescribed manner of written notice and accident register.
19. That the Department consult with the Accident Compensation Corporation and Department of Statistics to align the prescribed manner of written notice and accident register and forms used under the Injury Prevention, Rehabilitation and Compensation Act 2001 as appropriate.

Recommended changes to the draft definition after consultation

Changes to the draft definition in the discussion document are marked as "track changes" below

Text ~~struck through~~ has been deleted from the draft.

Text underlined has been added to the draft.

Serious harm, for the purposes of the Health and Safety in Employment Act 1992 means death, or:

1. Trauma injury

~~1. Injury (including that caused by gradual process) or disease which causes Physical incapacity caused by an accident or event and leading to:~~
a) permanent loss of bodily function (including from any amputation of body part); or
b) ~~temporary severe loss of bodily function (including any harm causing the person to be~~ a person being unable to perform their normal duties for a period of 7 or more calendar days).

~~2. Amputation or surgical removal of body part; or~~

2. Acute illness or injury

~~3. Loss of consciousness, or~~ Acute illness or injury requiring treatment by a medical practitioner, or any loss of consciousness, from caused by:
(a) lack of oxygen; or
(b) absorption, inhalation, or ingestion of any hazardous substance; or
(c) contact with any electrical, combustible, or mechanical energy source; or
(d) a fall from one height to another ~~or other physical impact.~~

3. Chronic or serious occupational illness or injury

~~4. Any~~ Physical or mental harm that requires:
(a) resulting in hospital admission for more than 24 hours;; or
(b) requiring in-patient surgery;; or
(c) diagnosed treatment and confirmed as caused by exposure to a workplace hazard, by a medical practitioner who is a registered specialist operating within ~~their~~ the appropriate scope of practice.

2. BASIS FOR CONSULTATION

The purposes and process of the revision are described in the document *Defining Serious Harm: a discussion paper on the revision of the definition of serious harm*.

The Minister of Labour, Hon Ruth Dyson, released the discussion paper for public consultation on 11 April 2007, with a closing date for submissions of 15 June 2007.

As a basis for the consultation, the discussion paper contained a draft definition and 17 questions for submitters to respond to.

Interested parties were encouraged to respond to the questions either on-line or by sending the Department of Labour a Word document. The majority of submissions followed this suggested format for submitting. In addition, some organisations provided more extensive submissions, and numerous of these showed a high level of understanding of the legislation and the uses of the definition.

The Department of Labour acknowledges the overall quality of submissions, and records its appreciation of the efforts of, and the insights offered by, stakeholder groups and individual employers who submitted.

Draft definition for consultation

The discussion paper proposed the following draft revised definition:

“death, or harm of a kind or description declared by Order in Council to be serious for the purposes of this Act” — with the Order in Council containing the following:

1. Injury (including that caused by gradual process) or disease which causes:
 - a) permanent loss of bodily function; or
 - b) temporary severe loss of bodily function (including any harm causing the person to be unable to perform their normal duties for more than 7 calendar days); or
2. Amputation or surgical removal of body part; or
3. Loss of consciousness, or acute illness requiring treatment by a medical practitioner from:
 - (a) lack of oxygen; or
 - (b) absorption, inhalation, or ingestion of any substance; or
 - (c) contact with any energy source; or
 - (d) a fall or other physical impact; or

4. Any physical or mental harm that requires hospital admission, surgery, or treatment by a medical practitioner who is a registered specialist operating within their scope of practice.

Questions for consultation

The discussion document posed the following questions about the draft definition:

1. Should the review focus primarily on the use of the definition to describe notification requirements?
2. Is the avoidance of lists in the definition appropriate and effective?
3. Is there sufficient inclusion of gradual process injuries?
4. Should clause 1 be limited to "bodily function"?
5. Should the phrase "temporary severe loss" be retained, while supplemented with a time-activated definition?
6. Will there be sufficient inclusion of "temporary severe loss of bodily function" for non-employees?
7. Should the definition of "temporary severe loss" be based on absence from the workplace or, alternatively, being unable to carry out normal duties?
8. Is seven days an appropriate period of incapacity, and if not, what is, and why?
9. Has "mental harm" been adequately caught by the draft definition?
10. Should all cases of amputation or surgical removal of body part be included in the definition?
11. Is there sufficient coverage of dangerous incidents or events to highlight "significant hazards" in workplaces?
12. In clause 4, is there a need to include a time limit between the occurrence of the injury itself and the treatment provided?
13. What explanatory material should be made available for employers and others?
14. What information should be included in the prescribed manner of written notice for occurrences of serious harm?
15. What information should be included in the prescribed form of accident register, and should it contain the same information as the manner of written notice?

16. What are the resource and compliance implications of the new definition, and are these reasonable for your business or organisation?
17. Will the revised definition help employees to exercise the right to refuse work likely to cause serious harm?

3. OVERVIEW OF SUBMITTERS

Who submitted

A total of 116 submissions were received. These are listed as an Appendix.

Table 1: Submitters by type

Type	Number	Percent
Employer	60	52%
Employee/individual	11	9%
Central govt organisation	5	4%
Education provider	3	3%
Industry or employer association	15	13%
Professional organisation	6	5%
Union/employee representative	6	5%
Volunteer/not for profit organisation	2	2%
Other (see comment)	8	7%

Chart 1: Submitters by type

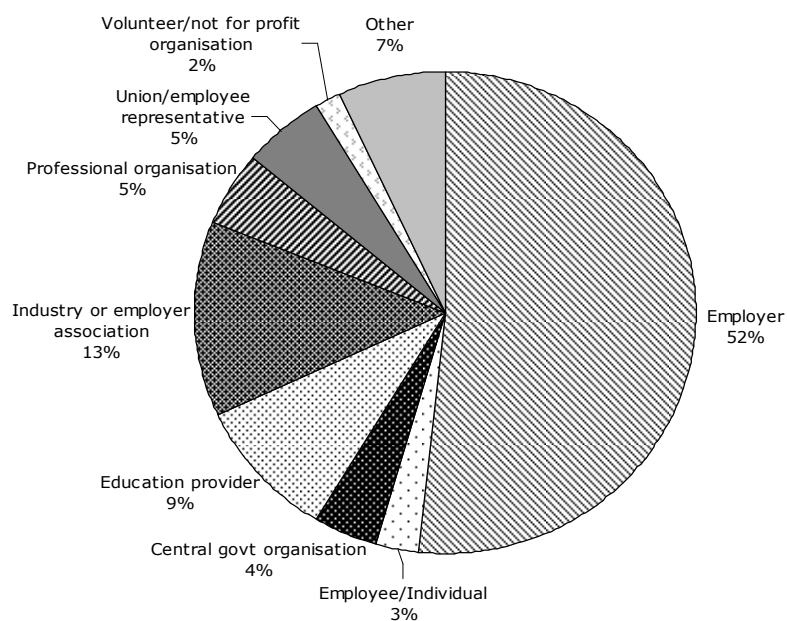
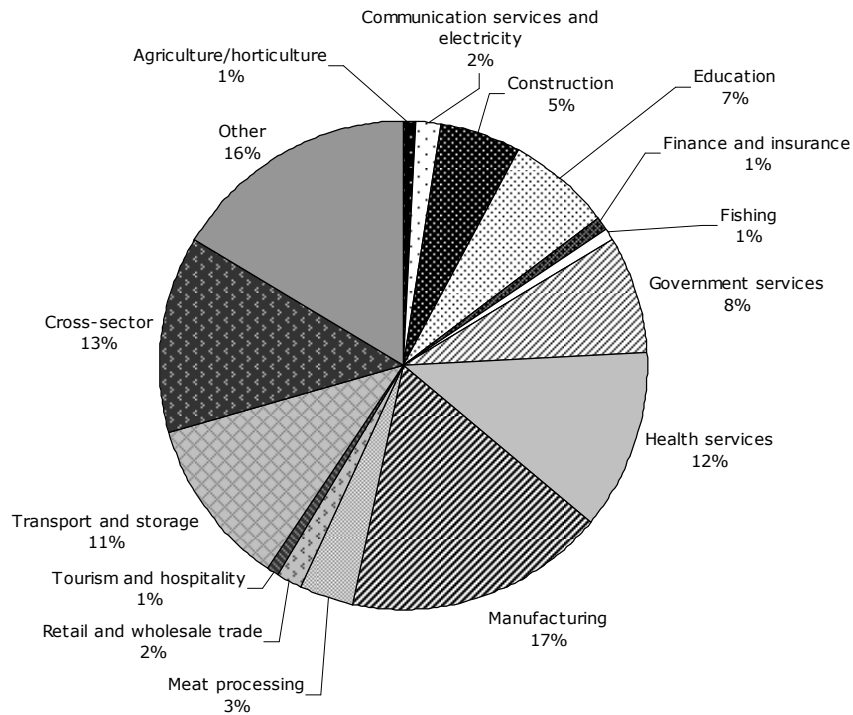


Table 2: Submitters by industry

Industry	Number	Percent
Agriculture/horticulture	1	1%
Communication services and electricity	2	2%
Construction	6	5%
Education	8	7%
Finance and insurance	1	1%
Fishing	1	1%
Forestry	0	0%
Government services	9	8%
Health services	14	12%
Manufacturing	20	17%
Meat processing	4	3%
Retail and Wholesale Trade	2	2%
Tourism and hospitality	1	1%
Transport and storage	13	11%
Other (see comment)	15	13%
Cross-sector	19	16%

Chart 2: Submitters by industry

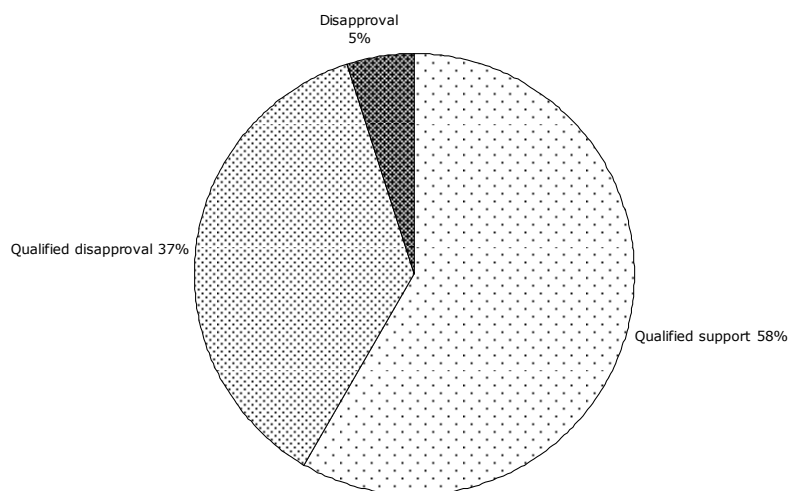


Support for the review

There was almost unanimous support for the review (109/116 submissions).

Support for the draft definition

Chart 3: Approval or disapproval of the draft definition



Support by type of submitter

Table 3: Support or opposition of draft definition by sector

	Support	Qualified support	Neutral	Qualified opposition	Opposition
Employer	0	35	0	22	3
Employee/individual	0	8	0	3	0
Central govt organisation	0	5	0	0	0
Education provider	0	3	0	0	0
Industry or employer association	0	10	0	3	2
Professional organisation	0	5	0	1	0
Union/employee representative	0	5	0	1	0
Volunteer/not for profit organisation	0	2	0	0	0
Other (see comment)	0	5	0	2	1
	0 0%	78 67%	0 0%	32 28%	6 5%

Table 4: Support or opposition of draft definition by sector

	Support	Qualified support	Neutral	Qualified opposition	Opposition
Agriculture/horticulture	0	0	0	1	0
Communication services	0	1	0	1	0
Construction	0	4	0	2	0
Education	0	5	0	3	0
Finance and insurance	0	1	0	0	0
Fishing	0	0	0	0	0
Forestry	0	0	0	0	0
Government services	0	7	0	1	1
Health services	0	9	0	5	0
Manufacturing	0	8	0	9	5
Meat processing	0	4	0	0	0
Retail and wholesale trade	0	1	0	1	0
Tourism and hospitality	0	0	0	1	0
Transport and storage	0	12	0	1	0
Other (see comment)	0	14	0	4	0
Cross-sector	0	12	0	3	0
	0	78	0	32	6
	0%	67%	0%	28%	5%

4. ANALYSIS OF RESPONSES TO INDIVIDUAL QUESTIONS

Q1. Should the review focus primarily on the use of the definition to describe notification requirements?

A total of 71 submitters (62% of the total) responded to this question.

Of those that addressed the question, 72% answered "yes" and 28% answered "no".

Table 5: Response to Q1 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	3	0	3
Employer	25	11	36
Education provider	3	0	3
Employee/Individual	3	0	3
Industry or employer association	5	7	12
Professional organisation	6	0	6
Union/employee representative	2	0	2
Volunteer/not for profit organisation	1	0	1
Other (see comment)	3	2	5
Total	51	20	71

Table 6: Response to Q1 by industry

Type of submitter	Yes	No	Total answering
Agriculture/horticulture	0	1	1
Construction	3	1	4
Communication services	2	0	2
Education	3	1	4
Fishing	0	1	1
Finance and insurance	1	0	1
Forestry	0	0	0
Government services	4	0	4
Health services	7	3	10
Manufacturing	6	3	9
Meat processing	1	3	4
Retail and Wholesale Trade	1	0	1
Tourism and hospitality	0	1	1
Transport and storage	6	1	7
Other (see comment)	5	1	6
Cross-sector	12	4	16
Total	51	20	71

The majority of respondents, of all types except employer or industry groups, answered “yes” to this question. This confirmed the importance of the s 25(3) reporting duty for employers and others, and that it creates an obligation and potential liability which should not be greater than is necessary for the purposes of the Act.

Numerous submitters, whether answering “yes” or “no” to the question, pointed out that, while the duty to notify and report serious harm had the greatest impact on employers and others, the other uses had to be considered concurrently.

Some pointed out that the use of the definition to determine those hazards that are “significant” is important.

Others suggested that the HSE Act be amended and different definitions be developed for the various duties and uses that the current definition defines.

Several employers and industry groups said that the definition needed to be framed with regard to the duty to report itself — i.e. what it is that employers and others are reporting, and why.

They noted that the duty was to report “serious”, not “trivial” harm for the purpose of the inspectorate to fulfil their role in determining whether or not the law was being observed — not to collect comprehensive injury statistics as such. The latter would involve setting a lower threshold.

Numerous employers, industry groups and health and safety professionals said that lowering the threshold for reporting would create an additional compliance burden that would undermine the working of the legislation, trivialise reporting, and cloud its purposes.

The Department agrees that these arguments have merit, as does the suggestion that it is important that significant hazards are identified in workplaces, and reported to the inspectorate and others where appropriate.

While there is a balance to be struck between these two competing uses, consultation has confirmed that the working of the HSE Act will be best improved by using the definition to set a threshold for reporting that provides for an appropriate intervention by the inspectorate. This is preferable to the definition attempting to provide definitive injury and illness statistics, or being tailored towards the identification of “significant hazards”. This is also consistent with other legislations’ use of the definition to determine the level of reporting only.

One submitter [43] suggested serious harm should be limited to incidents the Department of Labour (or other agencies) would realistically consider investigating. The Department notes the comment, but the high number of workplace injuries and illness mean there will always be a degree of discretion in determining which occurrences of serious harm are investigated. The match will never be exact, and to ensure effective enforcement, there will inevitably be a higher number of reports than of actual investigations.

This higher threshold of reporting is consistent with section 30, which describes the role of health and safety inspectors, and with the purposes of the Act. It is also consistent with the definition for serious harm being set by Order in Council, to allow adjustment for new hazards and priorities for the inspectorate.

Q2. Is the avoidance of lists in the definition appropriate and effective?

A total of 80 submitters (70% of the total) responded to this question. Of those that addressed the question, 60% answered "yes" and 40% answered "no".

Table 7: Response to Q2 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	2	1	3
Employer	21	20	41
Education provider	1	0	1
Employee/individual	3	3	6
Industry or employer association	8	5	13
Professional organisation	6	0	6
Union/employee representative	3	1	4
Volunteer/not for profit organisation	1	0	1
Other	3	2	5
Total	48	32	80

Table 8: Response to Q2 by industry

Industry	Yes	No	Total answering
Agriculture/horticulture	1	0	1
Construction	3	1	4
Communication services and electricity	1	2	3
Education	1	0	1
Fishing	0	1	1
Finance and insurance	0	0	0
Forestry	4	2	6
Government services	8	4	12
Health services	3	7	10
Manufacturing	2	2	4
Meat processing	1	1	2
Retail and wholesale trade	0	1	1
Tourism and hospitality	6	4	10
Transport and storage	5	2	7
Other	11	5	16
Cross-sector	2	0	2
Total	46	32	78

Not using a list of conditions in clause 1(b) of draft is a significant departure from the existing definition. This may explain why Question 2 received the highest number of responses.

There was overall support for the change away from lists, and general acceptance that even if lists were retained there would inevitably be some degree of gaps and inconsistencies.

Employers divided evenly between those who prefer lists and those who don't. Both types of submission focused on the issue of clarity and ease of compliance for employers and others. Several submitters pointed out that removing lists as a source of ambiguity would only mean the ambiguity shifts to key phrases, such as "absence" or "normal duties", or "bodily function". Some consultants who interacted with smaller employers said that smaller businesses prefer lists for ease of compliance.

The Department notes these comments and agrees that they are valid. In response, it notes that the current definition contains both sources of ambiguity and that the intention is to remove at least half the problem by avoiding lists.

Having removed the list of conditions in clause 1(b), the need will then be to choose the most suitable terminology, and then explaining and clarifying it for dutyholders. Some suggested that the revised definition contain its own definitions of key terms, to avoid potential ambiguity while keeping the definition itself brief. Others suggested that the definition should be as concise as possible and so would not need further definitions or guidance for employers and others to be able to use it.

Various submitters said that, regardless of whether or not the definition itself uses lists of conditions — lists could be used in support of the definition. This is consistent with the current prescribed accident recording and reporting form. The discussion document confirmed that this approach will continue, and gave some detail on the content of a revised prescribed form.

Submissions said that if a broad definition is used, in clause 1 in particular, there is a need for a glossary either in the definition itself or in supporting materials.

Several employers and professional groups, and two government agencies, submitted that by not limiting the types of reportable conditions by a list, the definition will include many soft tissue and other minor injuries. They pointed out that lists of discrete injuries or conditions are a convenient way of eliminating unwanted or irrelevant reporting. While not necessarily suggesting avoiding the use of lists, several submitters suggested more attention be given to the exclusion of minor injuries in particular, especially to members of the public.

The Department notes these comments and the need not to trivialise the degree of harm that is considered "serious". It also notes that as a first principle, the legislation requires consideration of all types of harm, not specific kinds – the seriousness of the harm can then be determined by the degree of treatment or

incapacity resulting. This is consistent with the approach taken in the draft of avoiding lists, although the potential for ambiguity or over-inclusion raised by submitters is noted.

There was concern that avoiding lists, with a time-activated standard, would mean some important injuries would be missed, e.g. fractures [11], or lacerations, which are currently caught. The Department acknowledges that is a possibility in situations where, for example, a fracture or laceration does not meet any of the requirements of clause 1, 3 or 4 of the draft.

However, the Department notes such injuries are likely to have occurred in similar circumstances and result in similar incapacitation to soft tissue injuries. There can also be difficulties in diagnosing fractures, such as "greenstick" or cartilage damage, under the existing definition, and it remains questionable whether they are a priority for investigation.

There was a suggestion that any list used should align with ACC lists for injury type [20]. The potential for this will be addressed when the Department develops a proposal for a new prescribed form of accident register and reporting form consistent with the revised definition.

Recommended changes to the draft

1. That further consideration is given to the inclusion of interpretations of key phrases in the definition itself.
2. That the HSE (Prescribed Matters) Regulations 1993 are amended concurrently with the proposed definition and that further consideration is given to aligning classifications with ACC descriptors.

Q3. Is there sufficient inclusion of gradual process injuries?

A total of 76 submitters (66% of the total) responded to this question. Of those that addressed the question, 62% answered "yes" and 38% answered "no".

It should also be noted that among employers, numerous positive responses were qualified by the comment that they thought that coverage of gradual process injuries in clause 1 would be better achieved by other means.

Table 9: Response to Q3 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	1	0	1
Employer	26	17	43
Education provider	2	1	3
Employee/individual	3	2	5
Industry or employer association	6	6	12
Professional organisation	6	0	6
Union/employee representative	1	0	1
Volunteer/not for profit organisation	0	1	1
Other	2	2	4
Total	47	29	76

Table 10: Response to Q3 by industry

Industry	Yes	No	Total answering
Agriculture/horticulture	1	0	1
Construction	2	2	4
Communication services and electricity	11	2	13
Education	3	1	4
Fishing	0	1	1
Finance and insurance	1	0	1
Forestry	3	0	3
Government services	0	0	0
Health services	5	6	11
Manufacturing	4	7	11
Meat processing	2	2	4
Retail and wholesale trade	2	0	2
Tourism and hospitality	0	1	1
Transport and storage	6	2	8
Other	6	4	10
Cross-sector	1	1	2
Total	47	29	76

This question drew considerable comment from employers, industry groups, and health safety professionals in particular.

There was overall approval of the inclusion of gradual process injuries in the definition. However, numerous submitters were opposed to their inclusion in clause 1. They submitted that inclusion of gradual process injuries on the basis of inability of a person being able to perform their job, and potentially without a definitive diagnosis, was inadequate, and left too much uncertainty for employers and others.

The meat industry in particular made extensive submissions on this aspect of the definition and the need for the definition to recognise debilitating cases as serious, while encouraging treatment and rehabilitation of the majority of cases.

From an alternative perspective, a transport union referred to a high incidence of musculoskeletal disorders in its membership and said that these need greater recognition and priority from employers. It encouraged earlier reporting at a lower threshold.

The draft for consultation included gradual process injury, which includes hearing loss, musculoskeletal and numerous other occupational conditions, as physical injury or illness that would be caught by clause 1. This approach broadly matched the first clause of the current definition, which refers to a range of conditions that may cause permanent or temporary severe loss of bodily function. Because the draft removed this list of conditions, to maintain coverage and avoid doubt, it included a specific reference to gradual process injury as a basis for consultation.

Because clause 1 of the draft replaces a list of conditions with the time-activated reporting requirement, this would apply to gradual process injuries as well — while the current, albeit low, level of reporting tends to be dependent on a medical diagnosis having been made.

Numerous groups reported that gradual process conditions are complex, extremely variable in their causes and effects, and difficult to manage for employers and occupational health and safety professionals. They referred to the need for accurate diagnosis, and often extensive periods of occupational rehabilitation and recovery from conditions.

Several submitters said that the threshold for reporting gradual process injuries set in the draft would only discourage or impede effective treatment and send a message to employers and others that was inconsistent with the injury management processes promoted by the ACC.

Need for a diagnosis

Numerous submitters said that the situation with respect to gradual process injury and illness is similar to that with mental harm, and that diagnosis by an appropriate medical specialist is required [44]. There was concern that diagnosis

by a General Practitioner would not meet an appropriate clinical standard [90, 101].

There were some submissions concerning the inclusion or otherwise of particular conditions resulting from occupational exposure to chemicals or other agents, e.g. scleroderma currently not captured [7, 22, 74]. A union suggested that WBV needed to be included [94] and that there should be reporting at an early stage to instigate injury prevention or enforcement action as appropriate.

Collectively, submissions have been interpreted as acceptance of the need for an appropriate level of diagnosis. Also, that employers are wary of being put in the position of having to attempt diagnosis themselves to meet the reporting requirements under clause 1 of the draft [36].

Submitters suggested there would be difficulty distinguishing conditions caused by prior employment, or outside-of-work factors, or where there has been multi-employer exposure [52, 77, 96]. There was comment that this could lead to proactive employers who take a responsible approach to managing injury or illness incurring additional liability or even penalties by reporting.

There was concern about how multi-employer cases will be recorded and investigated [77].

One submitter suggested that the draft clause may be interpreted to include only symptoms [71].

The discussion document noted that one reason for including gradual process injuries in clause 1 of the draft was to gather better information on incidence and prevalence for the Department to act on. In response, it was submitted that reporting gradual process (and soft tissue injury generally) would impose unwarranted costs with little benefit. It was suggested that the Department should instead access ACC records. It was also submitted that reporting of soft tissue conflicts with s28A [43]. One submitter said delays in diagnosis and having to retrospectively identify serious harm would increase compliance costs [64].

Conversely, some submitters said that the compliance burden was justified by the need for early intervention in these cases, and two submitters referred specifically to this being the case for noise-induced hearing loss [106, 109].

The discussion of gradual process soft tissue injury is related to that concerning responses to Question 8, below (period of incapacity for reporting). Several submitters said that gradual process injury and illness should be categorised separately from trauma injuries and with a different threshold. The Department supports this suggestion.

The use of the definition of serious harm to gather more incidence and prevalence data is discussed in section 4 of this report, and in the discussion of questions 14 and 15. Conclusions from that discussion suggest that the Department does not

need to attempt to collect cases of gradual process injury in the manner suggested by the draft for consultation.

Alignment with ACC and other injury management processes

Several submitters referred to a need to use ACC definitions and diagnosis criteria [35, 41, 42, 55, 91], or those under the (voluntary) Notifiable Occupational Disease System [106, 109].

Another suggested that gradual process should be dealt with under HSE health monitoring requirements [68].

Numerous submitters referred to conflicting messages coming from the lower threshold of the draft and the rehabilitation methods being encouraged by the ACC scheme. This is discussed in the response to Question 7, below.

The Department acknowledges the quality and quantity of submissions on this issue. It also recognises the alternate approaches they represent. In deciding between them, it has focused on the use of the definition to report harm to the inspectorate. The Department's position is that, given the high incidence of gradual process injuries in some industries, and the fact that treatment and rehabilitation strategies are generally available and in place, the inspectorate's resources are best used to deal with the more severe cases of gradual process injuries.

The Department also agrees that the definition should be consistent, or at least not inconsistent, with the diagnostic criteria for gradual process injury applying under the IPRC Act.

The Department also recognises that the definition should not set a "serious" standard for gradual process injuries that ACC or good occupational health and safety practice categorises as "manageable", or means that HSE Act processes are inconsistent with the practice of occupational rehabilitation.

The Department supports using a specialist diagnosis for determining if gradual process injuries and illness are serious harm, thereby moving coverage of gradual process to clause 4 of the draft. This is consistent with the proposal to limit the coverage of clause 1 of the draft to trauma injury caused by a single accident or incident.

Recommended changes to the draft

3. That the reference to gradual process injuries is removed from clause 1 of the draft definition.
4. That clause 4 of the draft definition is amended to make specific reference to "diagnosis" to require reporting of occupational illness and disease where a diagnosis is provided by the appropriate registered medical specialist.

Q4. Should clause 1 be limited to “bodily function”?

A total of 73 submitters (63% of the total) responded to this question. Of those that addressed the question, 73% answered “yes” and 27% answered “no”.

Table 11: Response to Q4 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	3	0	3
Employer	30	10	40
Education provider	1	1	2
Employee/individual	3	3	6
Industry or employer association	8	1	9
Professional organisation	2	4	6
Union/employee representative	1	0	1
Volunteer/not for profit organisation	1	0	1
Other	4	1	5
Total	53	20	73

Table 12: Response to Q4 by industry

Industry	Yes	No	Total answering
Agriculture/horticulture	1	0	1
Construction	3	0	3
Communication and electricity	7	8	15
Education	3	1	4
Fishing	0	0	0
Finance and insurance	1	0	1
Forestry	0	0	0
Government services	4	0	4
Health services	8	2	10
Manufacturing	8	3	11
Meat processing	3	0	3
Retail and wholesale trade	2	0	2
Tourism and hospitality	0	0	0
Transport and storage	6	3	9
Other	5	3	8
Cross-sector	2	0	2
Total	53	20	73

Clause 1 of the draft, as with the current definition, is concerned only with physical harm, i.e. not mental or emotional harm. The question was included to validate, or invalidate, that approach, and responses have validated it.

Some submitters indicated uncertainty about the meaning and significance of the term “bodily function” either directly, or by implication from their responses to the question. This is consistent with the Department’s understanding of the current problems, and suggests the review was justified. One submitter [49] questioned whether the use of “bodily function” in the draft captures mental health and wellbeing. Another [11] suggested that a definition of the term is required. This suggestion is addressed more generally in the discussion of Question 2 responses, above.

Various professional groups suggested that there should be a redrafting to refer to “physical incapacity”, or “physical injury”. The Department considers the suggestion to have merit – physical incapacity is a phrase that does not rely on a medical diagnosis to determine illness or injury. Determining coverage will hinge on the person with the duty understanding that a person injured by an accident or incident to such an extent that they didn’t manage to perform their usual job for a week – that it is all. Some submitters also pointed out that the discussion paper referred to “incapacity”, yet the draft does not, and suggested that it should.

This concept could also be expanded to improve consistency with ACC and as a basis for developing further guidance for medical practitioners and others assessing people’s readiness for work after injury or illness. For example, work has been done in this area by the Victorian WorkCover Authority. Such work in New Zealand could potentially improve consistency for both ACC claims and serious harm reporting, while contributing to ACC’s vocational rehabilitation objectives.

Professional groups submitted that there is scope for the definition to be made clearer by grouping the types of harm being notified into three clearly distinguishable categories: trauma injury, acute illness, and serious or chronic occupational illness and injury. They argue that this is consistent with overseas practice, and will make the definition more coherent and obvious to employers and others using it. It is also likely to help avoid confusion for some employers and others determining when they are required by s26 of the Act to hold the scene of an accident or incident that causes serious harm.

The Department supports this approach and proposes, subject to agreement by Parliamentary Counsel Office, that inserting headings and minor reorganisation of the draft would considerably improve clarity for users. Clause 1 of the draft would then be concerned only with physical incapacity caused by a single accident or incident – trauma injury.

Various submitters offered a range of reworded and reordered versions of the draft for consideration. Two followed variations of the approach described above.

Some submitted that the general approach of clause 4 could provide sufficient coverage so that clause 1 wasn’t necessary. This was not the intention of the Department or the draft. As with the existing definition, clause 1 of the draft was

intended to capture more obvious physical injury only. Another questioned whether it could be interpreted to include tendon tears, and whether there would be unintended coverage [71].

Even though it was limited to “bodily function”, the first clause of the draft was phrased to include a wider range of injuries — most notably soft tissue injuries, which are not currently included.

Whether or not to extend coverage to these conditions is discussed with reference to questions 3 and 8.

Recommended changes to the draft

5. That clause 1 of the draft definition is amended to refer to “physical incapacity” instead of “injury or disease”.
6. That the definition be grouped into three clearly distinguishable categories of harm: trauma injury, acute illness or injury, and chronic or serious occupational illness or injury.
7. That clause 1 of the draft definition is amended to refer only to harm arising from a single accident or event.

Q5. Should the phrase “temporary severe loss” be retained, while supplemented with a time-activated definition?

A total of 79 submitters (69% of the total) responded to this question. Of those that addressed the question, 61% answered “yes” and 39% answered “no”.

Table 13: Response to Q5 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	2	1	3
Employer	22	21	43
Education provider	3	0	3
Employee/individual	4	1	5
Industry or employer association	6	4	10
Professional organisation	4	2	6
Union/employee representative	2	0	2
Volunteer/not for profit organisation	1	0	1
Other	4	2	6
Total	48	31	79

Table 14: Response to Q5 by industry

Industry	Yes	No	Total answering
Agriculture/horticulture	1	0	1
Construction	3	1	4
Communication and electricity	9	7	16
Education	4	1	5
Fishing	1	0	1
Finance and insurance	1	0	1
Forestry	0	0	0
Government services	4	1	5
Health services	6	6	12
Manufacturing	5	6	11
Meat processing	1	2	3
Retail and wholesale trade	0	2	2
Tourism and hospitality	0	0	0
Transport and storage	5	2	7
Other	6	3	9
Cross-sector	2	0	2
Total	48	31	79

Problems for employers and others interpreting the phrase “temporary severe loss of bodily function” was a major reason for the review. The draft retained the phrase but replaced the current list of conditions with a time-activated threshold.

Submissions showed very clear agreement that the existing term is problematic.

Retention of the phrase “temporary severe loss”

Responses to the draft’s retention of “temporary severe loss” divided fairly evenly across all types of submitters and industries.

A majority (61%) of respondents supported retention of the phrase, with the proviso that it is better defined. Some practitioners said that the phrase was well known and that the broad concept of what it “caught” was understood – the issue, they said, was about better defining the concept.

However, employers, industry groups, and professional groups divided almost evenly with regard to retaining it.

Numerous of these groups submitted that the phrase was so problematic and had led to so much confusion, that there was nothing to be gained by retaining it – particularly if the definition is revised more comprehensively.

The Department considers this suggestion to have merit, and if clause 1 of the draft is revised to refer to “physical incapacity” through trauma injury the term will be redundant.

One submitter suggested the phrase be retained with reference to the criteria used in current guidance [41]. The Department is aware of a wide range of guidance and “rules of thumb” circulating amongst health and safety practitioners, none of which is official.

The principle of a time-activated threshold

Numerous submissions discussed the merit or otherwise of a time-activated clause. (Groups that had submitted that they would prefer to see lists in the definition tended to answer “no” to this question.)

In relation to the use of a time-activated threshold, submitters suggested:

- it could lead to inconsistency because of the wide variability of how much time off a particular injury will lead to, as a function dependent on motivation, pain and social issues [21, 55, 60]
- it not being supported due to the number of days off work given for minor injuries by well-meaning GPs [58]
- conditions such as pleural plaques and asthma being serious but might not be caught when they should be [94]
- confusion over when the injury becomes “serious” could discourage immediate reporting [21 etc.]
- the time limit is arbitrary regardless of the amount of time chosen [29]

- It will mean increased reporting of soft tissue injuries, and inconsistencies of varying conditions across industries [32].

Several submitters said that uncertainty could lead to either excessive or minimal reporting, and that there could be confusion and increased compliance costs as employers and others decided whether or not to hold the scene of an accident. The discussion document had described the advantages of a time-activated standard as simplicity for dutyholders, and inability to complete normal duties in the workplace as being the best indicator of physical incapacity (which is the ultimate effect being sought). There was majority support for this principle, and the Department supports the proposal.

It was suggested as an alternative that there be two thresholds, one for death and dangerous occurrences with immediate notification, and the second for serious harm with written report and investigation findings [106, 109].

The Department acknowledges that, while this suggestion might have merit, it would require legislative amendment, and so exceeds the scope of the review. Also, while it might add clarity in some ways, it would add to the complexity of the definition in others. Instead, the Department proposes amending the definition to make trauma injury a clearly defined category of harm, with a more obvious connection to the section 26 duty.

Just what is the most appropriate period of incapacity to determine serious harm is discussed under Question 8, below.

Recommended change to the draft

8. That the phrase “temporary severe loss of bodily function” be removed from the draft.

Q6. Will there be sufficient inclusion of “temporary severe loss of bodily function” for non-employees?

A total of 58 submitters (50% of the total) responded to this question. Of those that addressed the question, 71% answered “yes” and 29% answered “no”.

Table 15: Response to Q6 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	2	1	3
Employer	25	7	32
Education provider	1	1	2
Employee/Individual	3	0	3
Industry or employer association	6	2	8
Professional organisation	2	3	5
Union/employee representative	1	1	2
Volunteer/not for profit organisation	0	0	0
Other (see comment)	1	2	3
Total	41	17	58

Table 16: Response to Q6 by industry

Type of submitter	Yes	No	Total answering
Agriculture/horticulture	1	0	1
Construction	4	0	4
Communication services	1	1	2
Education	3	1	4
Fishing	0	1	1
Finance and insurance	1	0	1
Forestry	0	0	0
Government services	3	1	4
Health services	5	1	6
Manufacturing	8	3	11
Meat processing	1	1	2
Retail and Wholesale Trade	6	2	8
Tourism and hospitality	0	0	0
Transport and storage	4	0	4
Other (see comment)	0	0	0
Cross Sector	4	6	10
Total	41	17	58

The Health and Safety in Employment Amendment Act 2002 extended section 25's recording and reporting requirements to principals and the self-employed, and included harm caused to non-employees. The discussion document refers to this change as an impetus for the revision of the definition of serious harm.

The discussion document also describes how since the HSE Act was first passed in 1992, several other pieces of legislation in the energy and transport sectors now use the definition of serious harm to, among other things, set a threshold for the reporting harm to members of the public to different authorities. These are the Gas Act 1992, the Plumbers, Gasfitters and Drainlayers Act 2006, and the Hazardous Substances and New Organisms (HSNO) Act 1996. There are also shared reporting arrangements with some agencies operating under the Electricity Act 1992, Gas Act 1992, Railways Act 2006 and HSNO Act.

HSNO Act incident reporting

The definition describes reportable events under section 144 of The HSNO Act. ERMA New Zealand, as the agency administering the HSNO Act, submitted that, in addition to the reporting of loss of consciousness or acute illness under clause 3 of the draft, clause 1 should also provide for harm to non-employees.

Proposed amendments to the draft exclude non-employees from clause 1(b). However, all cases of acute injury (including from inhalation, ingestion or absorption of any hazardous substance) under clause 3 of the draft, as amended, will be covered. More serious cases requiring hospital admission for more than 24 hours, in-patient surgery, or a specialist diagnosis will be caught by the last clause.

The Department's position is that this provides sufficient coverage of events under the HSNO Act, while maintaining clarity and a realistic level of reporting for employers and others. In this context, the Department notes that it receives notifications of injuries and events by two means: reporting from employers and others under section 25 and also by complaints from the public, employees and elsewhere. It is confident that incidents notifiable under the HSNO Act will be adequately covered by amendments to the draft.

Large institutions and public amenities

Two universities, several district health boards, and the Department of Conservation submitted on the extent of coverage of non-employees under clause 1(b) of the draft. They said that the draft definition would set the threshold for reporting harm to non-employees too low and the level of reporting would be neither desirable nor achievable.

There was reference to the arrangements currently in place between district health boards, who maintain a highly-developed Sentinel Incident Reporting System, and the Department to limit the number and type of reports of serious harm to non-employees. The view was expressed that this worked well, and that

it should either be confirmed by the revised definition or maintained by another means.

The Department's response is that the revised definition should provide some limitation on the types of events, while the existing administrative arrangements remain.

The Department of Conservation expressed similar concerns with regard to injuries to visitors to the conservation estate. However, in most of these cases, and unlike in hospitals, universities, or a supermarket, it is questionable whether such injuries occur in a "place of work" in terms of the Act. Subject to the above response, and the discussion of responses to Question 11, below, the Department's position is that the issue is better addressed by guidance on the coverage of the legislation with respect to public spaces.

No submissions were received from local authorities.

Employers' responsibility for non-employees

Employers responding to the question generally answered that there was sufficient, or "too much" coverage of harm to non-employees. Supermarket operators and other businesses suggested "temporary severe loss" to members of the public had always been problematic, but the absence of a list in the draft would make it more difficult to comply. They said reporting could not be completed in many cases, because the business operator did not have the information – and this was particularly so for soft tissue injuries where people "hobble home".

The Department notes these comments and agrees that the HSE Act's strict liability requirement to report under s25 makes this particularly problematic for dutyholders. Reporting also raises privacy issues where the reporting is being completed by someone other than the injured person, but not within the confines of an employment or contractual relationship.

The Department proposes limiting the coverage of clause 1(b) to those about whom the employer, contactor or self-employed person can reasonably be expected to know has experienced physical incapacity meaning they have been unable to complete their normal duties. It also proposes that Parliamentary Counsel Office advise on the best way to give effect to including injuries to non-employees in the clause.

Recommended change to the draft

9. That the reference to "including" in clause 1(b) of the draft is removed.

Q7. Should the definition of “temporary severe loss” be based on absence from the workplace or, alternatively, being unable to carry out normal duties?

A total of 80 submitters (69% of the total) responded to this question. Of those that addressed the question, 45% expressed a preference for “absence from the workplace” and 33% for “being unable to carry out normal duties”. 19% of submitters said neither was a suitable measure, and some suggested alternatives.

Table 17: Responses to Q7 by type of submitter

Type of submitter	Normal duties	Absence	Both or combination	Neither	ADL	Incapacity	Total answering
Central govt organisation	1	1	1	0	0	0	3
Employer	7	23	2	6	1	2	41
Education provider	2	1	0	0	0	0	3
Employee/individual	3	2	0	0	0	0	5
Industry or employer association	5	4	0	2	1	0	12
Professional organisation	2	1	0	3	0	0	6
Union/employee representative	3	1	0	0	0	0	4
Volunteer/not for profit organisation	0	1	0	0	0	0	1
Other (see comment)	3	2	0	0	0	0	5
Total	26	36	3	11	2	2	80

Table 18: Responses to Q7 by industry

Type of submitter	Normal duties	Absence	Both or combination	Neither	ADL	Incapacity	Total answering
Agriculture/ horticulture	1	0	0	0	0	0	1
Construction	2	2	0	0	0	0	4
Communication services and electricity	0	1	1	0	0	0	2
Education	3	2	0	1	0	0	6
Fishing	1	0	0	0	0	0	1
Finance and insurance	0	1	0	0	0	0	1
Forestry	0	0	0	0	0	0	0
Government services	2	1	1	1	0	0	5
Health services	3	6	0	0	1	0	10

Type of submitter	Normal duties	Absence	Both or combination	Neither	ADL	Incapacity	Total answering
Manufacturing	1	8	1	1	0	0	11
Meat processing	0	0	0	2	0	0	2
Retail and wholesale trade	0	1	0	0	0	1	2
Tourism and hospitality	1	0	0	0	0	0	1
Transport and storage	2	7	0	0	0	0	9
Other (see comment)	5	2	0	2	0	0	9
Cross-sector	5	5	0	4	1	1	16
Total	26	36	3	11	2	2	80

The discussion document proposed a time-activated standard to clarify the phrase “temporary severe loss of bodily function” in the existing definition. It then looked at options for the two components of such a measure — the type of physical incapacity, and its duration.

Question 7 sought comment on the best descriptor for physical incapacity for clause 1(b) by asking submitters to choose between two alternatives, “absence from the workplace” or “unable to perform normal duties”

“Unable to perform normal duties” was used in the draft. It had been suggested in earlier consultation as providing the greatest coverage, including of non-employees, and therefore would elicit the most comment.

The question did receive a high response rate, and considerable comment — consistent with the degree of uncertainty and dissatisfaction with this part of the current definition.

Overall there was a higher level of support for “absence from the workplace” as a descriptor, with the most support from individual employers. However, in aggregate, other categories of submitters preferred “normal duties”.

Normal duties

There was general agreement that the term “normal duties” would provide the greatest level of coverage, but also some comment that it would set the threshold too low and create uncertainty for employers in interpreting just what constituted “normal” vs “abnormal” duties. Some suggested that a definition of “normal duties” would be required as duties vary too much in industries such as construction for the usual definition of “normal” to suffice [36].

Some submitters said that the “normal duties” threshold would provide the least scope for employers and others to avoid reporting by having injured employees present themselves at work for a short time, or to complete light duties. “Normal

range of duties and activities” was suggested as an alternative to avoid such issues, and give better coverage to non-employees [50]. Several submitters said the “normal duties” would give the best coverage of non-employees, also that it would cause such incidents to be recorded, and encourage better identification of hazardous situations [47].

It was submitted that “normal duties” is a measure of occupational capacity, not functional capacity, and not a measure of the loss of bodily function [29].

Alternatively, some employers and others had commented on a tendency they perceive for general practitioners to give employees unnecessary lengths of absence from the workplace.

Several submissions referred to the use of a “normal duties” threshold as being inconsistent with current practice in vocational rehabilitation — where the emphasis is on early return to work and injury management to return the injured person back to full capacity. It was submitted by the meat and manufacturing industries and banks that setting the threshold of reporting too low would send the wrong message and act and provide a disincentive for employers to rehabilitate employees in this way. (Others [38, 41] said the effect would be the opposite, and that using “normal duties” would encourage rehabilitation.)

The Department notes the points made regarding alignment with the IPRC Act. In setting the lower threshold in the draft it the intent was that it would provide for earlier reporting and injuries coming to the employer’s and others’ attention sooner, leading to better injury management and data collection. Submissions have indicated that such injuries are being managed effectively in most cases, particularly among those organisations that are most likely to report cases.

Several submitters held that, since data on these cases is now available to the health and safety inspectorate through ACC records, the emphasis of the definition should be on the reporting of those cases which are “serious” and where further investigations or intervention may be warranted. The department’s view is that this is appropriate, and consistent with the functions of the inspectorate set out in section 30 of the Act.

Absence from the workplace

A majority (23 of 36) employers who addressed the issue favoured using “absence from the workplace” as the threshold.

Absence was generally seen as the easier term for employers and others to interpret, and as providing more consistency with the IPRC Act requirements and vocational rehabilitation processes, as well as with good health and safety practice.

Submitters pointed out some limitations with the term:

- return to work is often determined by work requirements rather than injury severity [21]

- General Practitioners are patient advocates and often allow too long an absence [24].

There were extensive submissions on the perceived tendency of General Practitioners to allow time away from work without clear evidence of work-relatedness or diagnosis [8,10, 13, 24, 55, 67, 98, 102]. One submitter suggested absence with a certificate that the employee cannot do light duties [62].

The Department notes that, as with “normal duties” there are some limitations with the term, and that “absence” is not necessarily a suitable proxy for “incapacity”. However, the limitations are similar to those of the accident compensation scheme’s use of one week as a proxy for weekly compensation claims. There will inevitably be variation in the amount of time away from the workplace that doctors prescribe for workplace injuries and illness.

Alternatives

Some submitters who did not support the use of a time-activated definition said that they did not support either alternative.

Health and safety practitioners suggested the use of “pre-injury duties”, or “activities of daily living” (ADLs) as a standard [24, 37, 44]. Coverage of non-employees is discussed under the responses to Question 6, above.

Another submitter said the definition should require a medical certificate that is time bound [58].

As noted above, there are good arguments for using “absence” and, alternatively, for using “normal duties” as a proxy to aid clarity and avoid conflicting messages with rehabilitation programmes. Some submissions indicated that use of “normal duties” , while arguably less clear to apply, will have less impact on the emphasis given to vocational rehabilitation in workplaces.

On balance and after subsequent discussion with employer and employee groups, the Department proposes using “inability to complete normal duties” as a proxy for physical incapacity that is not permanent but still sufficiently serious to warrant reporting.

The discussion of responses to Question 8, below, addresses the best period of incapacity for clause 1(b).

Recommended change to the draft

10. That clause 1 of the draft is amended to refer to “physical incapacity”, and that clause 1(b) refer to physical incapacity leading to a person being “unable to complete their normal duties”.

Q8. Is seven days an appropriate period of incapacity, and if not, what is, and why?

A total of 57 submitters (49% of the total) responded directly to this question. Of those that addressed the question, 49% answered “yes” and 51% answered “no”.

However, this analysis does not accurately reflect the fact that many submitters suggested alternatives to the 7 calendar days proposed in the draft, and numerous submitters qualified their “yes” or “no” responses — either in terms of the number of days, or whether calendar or working days, consecutive or non-consecutive.

Table 19: Response to Q8 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	0	1	1
Employer	10	13	23
Education provider	3	0	3
Employee/Individual	3	2	5
Industry or employer association	4	7	11
Professional organisation	2	4	6
Union/employee representative	2	0	2
Volunteer/not for profit organisation	1	0	1
Other (see comment)	3	2	5
Total	28	29	57

Table 20: Response to Q8 by industry

Type of submitter	Yes	No	Total answering
Agriculture/horticulture	1	0	1
Construction	1	2	3
Communication services	1	9	10
Education	5	1	6
Fishing	1	0	1
Finance and insurance	1	0	1
Forestry	0	0	0
Government services	0	1	1
Health services	1	4	5
Manufacturing	4	4	8
Meat processing	0	2	2
Retail and wholesale trade	0	1	1
Tourism and hospitality	1	0	1

Type of submitter	Yes	No	Total answering
Transport and storage	4	1	5
Other (see comment)	1	4	5
Cross-sector	7	0	8
Total	28	29	57

Question 8 addresses the second dimension of the proposed solution to the current uncertainty with the phrase “temporary severe loss of bodily function” to determine physical incapacity.

The summary of responses to Question 7, above discussed which of the phrases “absence from the workplace” or “unable to carry out normal duties” provides the better alternative. If “inability to perform normal duties” is chosen as the preferred option, it then leaves the question of the most suitable period of absence from the workplace.

To improve clarity, the Department also proposes changing clause 1 to refer specifically to trauma injuries, or those arising from a single accident or event. This is in conjunction with including serious or chronic injuries or illness in clause 4 of the draft on the basis of diagnosis or level of treatment only. This is consistent with submissions that said reporting should be based on diagnosis, not absence, particularly for disease [4, 10, 13, 58, 61].

The draft for consultation set a threshold of 7 calendar days, but was silent on whether or not the 7 days need to be consecutive. The discussion document referred to this as being broadly comparable with the threshold for entitlement claims under the IPRC Act.

The drafting was not intended to provide definitive parity between the two pieces of legislation. ACC entitlement is determined for other purposes and using a range of criteria distinct from those for the definition of “serious harm” under the HSE Act. (The IPRC Act refers essentially to the “first week” of compensation.) Several submitters referred to this distinction. Some made the reference only in passing, and others to suggest that broad alignment of the concepts will not improve clarity, but reduce it [60].

One submitter said the definition should refer to the first week of incapacity, as in ACC, or the IPRC Act be amended to refer to 7 calendar days [38]. The Department is of the view that complete alignment is not necessary and because the two pieces of legislation serve different purposes, would not contribute to either’s effectiveness.

Numerous submitters did show a preference for broad consistency with the ACC threshold, and said that, despite the imprecision of the alignment, it would improve clarity for employers and others.

One submitter [56] referred to literature on “the socialisation of medicine” and said that absence from work was often not decided on purely clinical grounds, but

according to a range of other factors, usually from the person's home life, the need for rest, etc. The submitter said that data and agency interventions arising from serious harm reporting should reflect this reality as best they can.

The Department notes this comment and emphasises that serious harm reports will be integrated into the Department's client database and used more for industry surveillance than for the investigation or enforcement of particular occurrences of serious harm.

Number of days

More submitters approved of a 7-day threshold than proposed an alternative, but a good range of alternatives were proposed. These included suggestions for a shorter period, or longer than 7 days, or variations on what constitutes a week.

Individual responses are summarised below. It should be noted that many submissions were qualified or indirectly expressed and have therefore been paraphrased to give a summary of the range of views represented.

2 days (3) - [14, 16, 18]

3 days (2) - [26, 66]

<7 days (2) - [2, 7]

7 days (38) - [3, 9, 11, 20, 21, 27, 38, 41, 42, 49, 50, 51, 57, 61, 62, 63, 68, 70, 71, 75, 76, 80, 82, 83, 84, 86, 88, 92, 93, 94, 96, 97, 99, 100, 104, 105, 106, 109]

>7 or 14 days (22) - [8, 13, 25, 28, 31, 32, 39, 40, 44, 46, 47, 48, 52, 64, 67, 69, 81, 85, 89, 98, 101, 102]

At least 4 weeks (1) [52]

The Department's view from submissions is that a trigger of physical incapacity meaning a person is unable to complete their normal duties for 7 or more calendar days is the preferred option overall — that it provides the most clarity, and an appropriate level of coverage.

This is particularly the case if clause 1 of the draft definition is revised to refer to physical incapacity from a single accident or event which causes absence from the workplace.

Those proposing shorter periods saw it as necessary to capture trauma injuries that pointed to specific hazards. However, in these cases the employer is required to review all accidents, identify and manage hazards in this way under sections 7-10 of the Act, regardless of whether it is serious harm.

Earlier legislation — where the period of incapacity was shorter — did not have this requirement, and concerned a much narrower range of workplaces. The Department's position is that lowering the threshold of what is serious harm for this purpose is not justified. It would not provide useful information to the Department, would be difficult to resource, and could have the effect of undermining dutyholders' obligation to manage hazards within the workplace.

Numerous employers suggested 14 days, and several said this would help avoid the inclusion of too many soft tissue injuries in particular. The Department's view is that the changes to the draft to restrict clause 1 to trauma injury only, and absence from the workplace, will address this concern. Some soft tissue injuries will still require reporting, but the Department considers this appropriate and that multiple reports from a single workplace or those of a more serious nature would warrant investigation.

Calendar days or working days

Some employers saw the reference to "calendar days" as meaning increased liability for employers and others and expressed a preference for "working days" instead. However, other submitters said there were similar implications for using "working days".

Of those who commented directly in support of either option, the numbers divided evenly:

Calendar days (7) - [6, 50, 51, 70, 94, 106,109]

Working days (7) - [41, 42, 54, 68, 83, 92, 99]

Several submitters commented directly on the need to consider roster periods when describing the period of incapacity. One submitter [20] suggested "7 days or one completed roster period, whichever is longer". Another [96] suggested the period of incapacity should be as per roster in the month immediate prior to the incident. Others said that the period of incapacity should include rostered days off [6, 106, 109], and another pointed out that shift rotation causes problems if calendar days are chosen [43].

Consecutive or non-consecutive days

Employers tended to express a preference for limiting the period to consecutive days, and several submitters referred directly to this [7, 15, 35, 38, 54, 62, 106, 109].

A group of health sector employers [11] suggested a time-bound period of incapacity e.g. 7 days off within one month.

Unions, and some health and safety professionals, were not in favour of any time limit within which the calendar days are to be measured. They submitted that injuries and illness do not always come to light immediately after exposure to a hazard, and employees and others may continue to work, only to mean that the

resulting injury or illness is not appropriately recorded or recognised and responded to.

The Department notes this point. In response, it observes that in attempting to be inclusive of such injuries and illness, the definition needs to retain enough precision to ensure that dutyholders can be clear that they have duty to report — and so that other more obvious cases are not missed.

Several employers and others referred to the difficulty they have in managing persistent or chronic injuries or conditions, and the difficulty the draft would present for them reporting such cases. They represented these as being managed under IPRC provisions and, as noted in the discussion of responses to Question 3 above, suggested that reporting would be problematic and of doubtful value.

The Department's position is that these cases are best determined by diagnosis under clause 4, and that the employee and/or employer, and often the accident insurer, will be motivated to seek accurate diagnosis. When the employer receives the diagnosis from the employee or other affected person, they will be on notice to report the occurrence of serious harm under section 25. Reliance on diagnosis offers the best process in such cases.

The Department also notes submissions regarding the potential manipulation of roster information or token appearances in the workplace by injured employees. It notes that alignment of clause 1(b) with the period of incapacity before weekly compensation is payable will provide a form of financial incentive for accurate reporting, as well as an easy means for employers to check their compliance against ACC records. Additionally, the department proposes changing the draft to refer to "inability to complete normal duties for a period of 7 or more calendar days".

The Department proposes that, on balance, the term "inability to complete normal duties" best captures the spirit of the law and so is more likely to be interpreted in a manner consistent with that intention.

Recommended change to the draft

11. That clause 1(b) of the draft is amended to refer to "physical incapacity" leading to a person being unable to complete their normal duties for a period of 7 or more calendar days".

Q9. Has “mental harm” been adequately caught by the draft definition?

A total of 79 submitters (69% of the total) responded to this question. Of those that addressed the question, 66% answered “yes” and 34% answered “no”.

Table 21: Response to Q9 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	2	1	3
Employer	28	15	43
Education provider	3	0	3
Employee/Individual	2	4	6
Industry or employer association	6	3	9
Professional organisation	4	1	5
Union/employee representative	4	1	5
Volunteer/not for profit organisation	0	0	0
Other (see comment)	3	2	5
Total	52	27	79

Table 22: Response to Q9 by industry

Type of submitter	Yes	No	Total answering
Agriculture/horticulture	0	1	1
Construction	1	3	4
Communication and electricity	1	4	5
Education	4	3	7
Fishing	0	0	0
Finance and insurance	1	0	1
Forestry	0	0	0
Government services	5	1	6
Health services	10	2	12
Manufacturing	5	6	11
Meat processing	2	1	3
Retail and Wholesale Trade	1	1	2
Tourism and hospitality	0	0	0
Transport and storage	7	2	9
Other (see comment)	5	3	8
Cross sector	10	0	10
Total	52	27	79

The draft definition in the discussion document set a high diagnostic threshold for mental harm — that of a registered medical specialist operating within their scope of practice.

This proposal was generally well accepted by employers, industry groups and health and safety professional groups. A strong majority of submitters supported the requirement of a confirmed medical diagnosis for cases of mental harm caused by a workplace hazard.

A small number of submitters asked for cases of stress or psychological bullying events in themselves [73] to be included, without a medical diagnosis. Other submitters stressed the importance of recognising mental harm in the definition but did not suggest a particular means of achieving this.

A small number of submitters felt that a diagnostic criteria alone was not appropriate, and that the harm should also involve absence from the workplace [14, 16, 18, 61].

Numerous submitters said that the definition should refer specifically to work-relatedness, when describing the diagnosis required [13, 16, 29, 31, 44, 46, 61, 62, 64, 77, 106].

Some submitters suggested that mental harm should be included in the definition as a separate clause, not included in clause 4 as “physical or mental harm” [55, 65, 106]. Another suggested that only discrete, and not chronic, occurrences should be caught by the definition [4].

Support for diagnosis by medical specialist

Numerous employers agreed that diagnosis should be by a medical practitioner in the appropriate scope of practice i.e. a psychiatrist [11, 13, 29, 31, 32, 41, 42, 43, 44, 46, 47, 53, 58, 61, 64, 69, 71, 77, 83, 84, 85, 94].

Several suggested that the definition should require diagnosis made under DSM IV¹ or another appropriate set of criteria [7, 11, 25, 58, 60].

Several submitters said that there should be treatment as well as diagnosis [25, 31, 37, 44, 46, 55, 60, 64, 69]. Others represented the alternative view, that the word “treatment” in the draft would be problematic [28, 59, 60, 77], or that it should only require diagnosis and not treatment [22].

The question was asked whether an employer could know if a medical practitioner is a registered specialist [12, 96]. The Department feels that this issue could be dealt with by guidance in support of the definition. The categories of medical

¹ *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition. Published by the American Psychiatric Association, Washington DC 1994. This document is the pre-eminent diagnostic reference for mental health professionals in the United States, and is widely used by specialist clinicians in New Zealand.

practitioners used in the draft definition are also consistent with the Health Practitioners Competence Assurance Act 2003, which will help clarity.

The Department's view is that the diagnostic criteria chosen, and whether or not there is an appropriate treatment, is a matter for the medical specialist concerned. Diagnosis is implicit in all clinical cases involving a specialist, but the definition could be made more explicit to avoid uncertainty amongst users.

Numerous submissions said that clause 4 should refer specifically to "work-relatedness". The Department's view is that although this is not strictly necessary, as the sections of the HSE Act which create the duties contain this requirement for causation, it will help avoid confusion and help the definition to be interpreted on its own words.

Diagnosis by other practitioners

Unions accepted a medical diagnosis as a proxy, but suggested a lower level of diagnosis, e.g. by a General Practitioner or clinical psychologist.

Some submitted the diagnosis should be by a clinical psychologist, medical practitioner or specialist in occupational medicine [6, 7, 38, 45, 50, 70].

A submission from the Ministry of Health [27] suggested that treatment by a registered medical practitioner who is not a specialist would be sufficient, as there is difficulty gaining access to medical specialists, including psychiatrists in some regions. Other submissions said that in some regions there is difficulty accessing medical specialists generally.

Other submissions suggested there would be issues with employee privacy, and that it would require consent from the employee. Two government employers [56, 85] suggested diagnosis in consultation with employer, because of the complexity of such cases.

Numerous submissions referred to the complexity of cases and difficulty for employers and medical practitioners in discerning the degree of work-relatedness of a case.

The Department notes these comments. One of the concomitants of requiring a specialist diagnosis for mental harm is that patient confidentiality is maintained where the employee prefers it that way. If, however, an employee does advise an employer that they are suffering work-related mental harm and have a diagnosis from a psychiatrist, then the onus is on the employer to record and report the occurrence under s25 of the HSE Act.

There is an element of privacy in the facts of all occurrences of serious harm, but particularly for cases of mental harm. This is a justification for raising the diagnostic threshold to a level where the employee produces the diagnosis to the employer – at which point it is appropriate that there is a notification to the department.

The Department's view is that this is the most appropriate process for dealing with such complex and sensitive issues.

Employers are also obligated to manage the hazard and employees' exposure under other sections of the HSE Act, and may use a range of approaches to do this. The discussion paper referred to mediation under the Employment Relations Act 2000 as the most appropriate means of dealing with workplace stress and fatigue issues. Consultation has confirmed this.

Recommended changes to the draft

12. That clause 4 of the draft definition is amended so that the reference to "registered specialist operating within their scope of practice" becomes "registered specialist operating within the appropriate scope of practice".
13. That clause 4 of the draft definition is amended so that the reference to "treatment" becomes "diagnosed and confirmed as caused by exposure to a workplace hazard".

Q10. Should all cases of amputation or surgical removal of body part be included in the definition?

A total of 73 submitters (63% of the total) responded to this question. Of those that addressed the question, 64% answered "yes" and 36% answered "no".

Table 23: Response to Q10 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	3	0	3
Employer	25	12	37
Education provider	2	1	3
Employee/individual	4	1	5
Industry or employer association	5	7	12
Professional organisation	2	3	5
Union/employee representative	2	0	2
Volunteer/not for profit organisation	1	0	1
Other (see comment)	3	2	5
Total	47	26	73

Table 24: Response to Q10 by industry

Type of submitter	Yes	No	Total answering
Agriculture/horticulture	0	1	1
Construction	4	0	4
Communication services and electricity	0	1	1
Education	3	2	5
Fishing	0	1	1
Finance and insurance	1	0	1
Forestry	0	0	0
Government services	5	0	5
Health services	9	1	10
Manufacturing	5	3	8
Meat processing	2	2	4
Retail and wholesale trade	0	1	1
Tourism and hospitality	0	1	1
Transport and storage	6	3	9
Other (see comment)	6	2	8
Cross-sector	6	8	14
Total	47	26	73

It was generally accepted by submitters that harm caused by amputation is "serious" and should be included in the definition. Two-thirds of submitters who answered the question gave a "yes", but not all of these agreed with clause 2 of the draft as included in the discussion document.

Several submissions referred to problems for employers and others in interpreting "surgical removal" and "amputation" and said that the clause as drafted would not improve clarity. Some submitters suggested that cases of amputation would be sufficiently covered by the reference to permanent loss of bodily function in clause 1(a).

Submitters described particular difficulty with the phrase "surgical removal" and some pointed out that it was not necessary to refer to it separately if clause 4 referred to surgery.

The Department notes these comments and agrees that a separate clause referring to amputation or surgical removal is unnecessary.

The level of support for the inclusion of a separate clause referring to amputations does, however, indicate that there should be a specific reference to amputation. If this reference were to be included in clause 1(a) of the draft, which refers to "permanent loss of bodily function" it would improve clarity by excluding less extreme cases, such as where the skin at the tip a finger only is damaged and there is full recovery without surgery or other intervention.

The Department also agrees that it would help clarity to remove the reference to "surgical removal" from the draft and rely instead to the reference surgery in clause 4 of the draft for consultation.

Recommended change to the draft

14. That clause 2 of the draft be deleted and clause 1(a) is amended to refer to "permanent loss of bodily function (including from any amputation of body part)".

Q11. Is there sufficient coverage of dangerous incidents or events to highlight “significant hazards” in workplaces?

A total of 69 submitters (60% of the total) responded to this question. Of those that addressed the question, 80% answered “yes” and 20% answered “no”.

Table 25: Response to Q11 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	1	1	2
Employer	30	7	37
Education provider	2	0	2
Employee/individual	3	2	5
Industry or employer association	10	1	11
Professional organisation	3	2	5
Union/employee representative	1	0	1
Volunteer/not for profit organisation	1	0	1
Other (see comment)	4	1	5
Total	55	14	69

Table 26: Response to Q11 by industry

Type of submitter	Yes	No	Total answering
Agriculture/horticulture	1	0	1
Construction	2	1	3
Communication services and electricity	1	5	6
Education	2	0	2
Fishing	1	0	1
Finance and insurance	1	0	1
Forestry	0	0	0
Government services	2	1	3
Health services	8	2	10
Manufacturing	6	2	8
Meat processing	3	1	4
Retail and wholesale trade	1	0	1
Tourism and hospitality	1	0	1
Transport and storage	6	2	8
Other (see comment)	9	0	26
Cross-sector	11	0	11
Total	55	14	86

Question 11 had a relatively low response rate, but a high percentage of affirmative responses.

Some responses suggested the question had been interpreted generally with regard to the adequacy of coverage of clause 3 or the draft — which sets a lower level of harm in recognition of the circumstances in which it occurred. This interpretation of the question generally received a positive response.

However, some comments addressed the idea that the definition could, or should, include the reporting of “near miss” incidents where no harm had occurred.

That interpretation of the question, which was not intended for discussion, generally received a negative response. Submitters pointed out that the identification of significant hazards is already covered under s7 of Act, and that near misses should not be included in serious harm reporting [3, 4, 14, 16, 41, 63, 69, 83, 97, 101, 106, 109]. Some also pointed out that there is reporting of specified “near miss” events under the HSNO and HSE (Pressure Equipment, Cranes and Passenger Ropeways) Regulations 1999 [21, 106, 109].

The Department notes these submissions, and agrees that there is no need for the definition to cover such near miss events.

As described in the discussion document, clause 3 of the draft is intended to fill certain gaps in coverage and better align the definition with other legislation such as the Electricity Act, Gas Act, and HSNO Act — each of which concerns harm to members of the public as well as employees. The intention of the draft clause was to set the threshold of harm slightly lower in respect of certain hazardous situations, not require reporting of near misses. The interface between these pieces of legislation, the HSE Act and the definition is discussed under the commentary on Question 6 above.

Taking into account the above comments regarding near miss events, there was a high level of support for clause 3 of the draft, and for the inclusion of harm from contact with energy sources and from falls. Suggestions for change were mainly concerned with the two types of hazard discussed below.

Contact with any energy source

Some submitters said that the reference to “contact with any energy source” in clause 3 (c) of the draft is too broad [31, 60, 104], and that it would lead to a lack of clarity for dutyholders.

The Department notes this comment. The reference to “energy source” was to improve reporting under energy legislation. The same coverage could be achieved by narrowing the phrase to refer more specifically to energy sources as, for example, “electrical, combustible or mechanical energy source”.

This narrowing of clause 3 (c) would provide coverage for energy legislation and the HSNO Act, as well as the traditional forms of motive power, such as drive shafts, conveyors, belts and pulleys, which continue to be an issue in workplaces.

Fall or other physical impact

Some employers said the threshold for falls and physical impact was too low and that too many soft tissue injuries and minor incidents would be included [notably 3, 60,116]. Others suggested that these would be included by clause 1 [46, 64, 69], albeit with a higher threshold of harm.

Some submissions, from unions and public institutions, were supportive of a lower threshold for assaults.

The Department notes the submissions that the coverage of clause 3(d) of the draft is too broad to be practical. It accepts that employers and others found it difficult to understand and apply the clause as drafted, and that there is merit in using an amended clause 1 of the draft to capture such trauma incidents, at a higher threshold. However, the Department recommends maintaining the lower reporting threshold of clause 3 (d) of the draft for all falls other than trips and slips.

This is because falls from heights remain a major cause of death and serious injury and a priority for injury prevention activities and the health and safety inspectorate.

The Department therefore suggests amending clause 3(d) of the draft to refer to "a fall from one height to another" to capture falls from height, into unguarded holes etc. This is preferred to stipulating "falls from a height of over 1m" or similar, which would, in the Department's view, be too narrow in its coverage.

Recommended changes to the draft

15. That the reference to physical impact be removed from clause 3(d) of the draft.
16. That the reference to "a fall" in clause 3(d) of the draft be narrowed to only include falls from one height to another.
17. That the reference to "contact with any energy source" in clause 3 (c) be further defined to refer more specifically to types of energy.

Q12. In clause 4, is there a need to include a time limit between the occurrence of the injury itself and the treatment provided?

A total of 72 submitters (63% of the total) responded to this question. Of those that addressed the question, 39% answered "yes" and 61% answered "no".

Table 27: Response to Q12 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	1	1	2
Employer	16	20	36
Education provider	1	2	3
Employee/individual	2	4	6
Industry or employer association	4	7	11
Professional organisation	3	3	6
Union/employee representative	0	2	2
Volunteer/not for profit organisation	0	1	1
Other (see comment)	1	4	5
Total	28	44	72

Table 28: Response to Q12 by industry

Type of submitter	Yes	No	Total answering
Agriculture/horticulture	0	1	1
Construction	0	4	4
Communication and electricity	1	9	10
Education	1	4	5
Fishing	0	1	1
Finance and insurance	0	1	1
Forestry	0	0	0
Government services	1	1	2
Health services	3	7	10
Manufacturing	5	4	9
Meat processing	1	2	3
Retail and wholesale trade	0	2	2
Tourism and hospitality	0		0
Transport and storage	5	3	8
Other (see comment)	4	5	9
Cross-sector	7	0	7
Total	28	44	72

The discussion document suggested that it may be appropriate to include a time limit between the incidence of the harm and when treatment occurs in terms of clause 4 of the draft. Some respondents interpreted this more broadly, as referring to a time limit between exposure to the hazard and treatment etc.

Both interpretations of the question are relevant to the revision, and in both cases a clear majority of submitters said that there was no need for a time limit. Some said that any time limit would restrict the definition's coverage of occupational illness and disease. The Department agrees that inclusion of a time limit, particularly if clause 1 of the definition is amended to refer only to harm caused by a single accident or event, would result in a gap in coverage of occupational illness and disease. This is inconsistent with the policy intent and purpose of the primary legislation.

Some employers were concerned at potential liability and argued for a time limit — to avoid liability for occupational exposures their employees had gained in previous employment, or injuries that had been untreated through no fault of the employer. In response, the Department notes that determining causation is inherent to the diagnosis of occupational illness and disease, and that the clinical standard of diagnosis proposed is that of a medical specialist.

The Department also notes that section 25 (1) (b) of the Act only requires an employer to record (and notify under section 25(3)) serious harm to an employee "while at work, or as a result of any hazard to which the employee was exposed while at work, in the employment of the employer". A similar restriction applies to the types of harm to contractors that is reportable by principals.

The Department's position is that consultation has confirmed that a time limit is not required for clause 4.

Q13. What explanatory material should be made available for employers and others?

The discussion document considered the merits of a revised definition that is relatively self-contained or, alternatively is dependent on further guidance or explanatory form, of whatever type. It proposed a relatively concise definition that will stand alone if necessary, but will benefit from further explanatory material. With that in mind, Question 13 asked for suggestions on the explanatory materials that should be developed.

Numerous submitters said that the definition should be drafted so that it stands alone and is not reliant on explanatory materials. Others said that the definition could not be effective without additional guidance — whether regulation, approved code of practice, or guideline.

Others submitted that there was a need for more consistency of training and information across agencies, and also within the Department.

Significantly, several groups said it was important for explanatory or other supporting materials, including forms, to provide a summary of why information is being collected, and what it will be used for. It was suggested that this will ease compliance for businesses and improve accuracy and response rates.

Submissions also suggested, directly, and by inference, that there is a lack of understanding amongst businesses about the need for reportable serious harm to be linked to exposure to a hazard in the workplace. Strictly speaking, this is not a matter for the definition itself to address, but is an important issue to consider when developing supporting materials for the definition.

The Department notes these comments, and acknowledges the importance of this information to businesses.

What submitters said that they would like

Submitters provided a range of suggestions for the sorts of information they would like to receive, including:

- intent of the definition, and how reports will be used
- case studies/illustrative scenarios/practical examples
- lists of known/common occupational disease and injury, and diagnostic criteria
- decision-making flowcharts
- definitions/glossary, e.g. for bodily function, registered specialist/medical practitioner, hospital admission, treatment, injury, disease, acute, severe, loss of consciousness
- guidance on what is needed to establish a causal link between serious harm and a workplace hazard
- processes for dealing with accidents and serious harm occurrences in the workplace, including the involvement of employee representatives
- new notification forms and updated ACC forms as appropriate
- a standardised hazard management template for significant hazards

- guidance on the section 28A right to refuse/ and s26 requirement not to interfere with accident scene.

Who the information should be developed for

Submitters said that information should be developed for:

- employers, self-employed, principals with duties
- employees
- health and safety representatives
- small business
- health and safety practitioners, GPs and medical practitioners
- persons developing procedures and policies.

How submitters would like to receive information

Submitters engaged actively with this aspect of the question, and provided numerous suggestions. This is indicative of the level of response with the review from employers and others generally.

Online:

- Frequently asked questions
- PDF/printable versions
- Reporting online

Over the phone:

- Hotline/ helpdesk/ 0800 number

In person or by audiovisual means:

- Regional education and training workshops/seminars
- Education campaign in health and safety publications
- DVD training media for first-aid courses
- module for health and safety representative training courses

In print and other media:

- Comprehensive booklet
- A4 fact sheets
- Inspector guidelines made public
- Information packs

Because the definition is fundamental to the working of the HSE Act, it influences or defines many of the Act's processes. Many submitters said that the revision provided an opportunity for the Department to publish not only explanatory material on the definition itself, but also on the processes of the legislation – several of which will be clarified and enhanced by an improved definition.

The Department notes these views and agrees that the revision will provide opportunities for improving information on the legislation generally. It will develop these as resources allow.

Q14. What information should be included in the prescribed manner of written notice for occurrences of serious harm?

Because the prescribed form for recording and reporting serious harm is dependent on the definition itself, the Department has not reviewed submissions on this question in detail.

When decisions have been made on the content of the definition, the Department will develop a revised prescribed manner of written notice in the light of submissions.

In passing, the Department notes that submissions indicated general acceptance of the current form for accident and incident recording and notification (and with the data specification set out in appendix 3 of the discussion document) — although a small number of employers objected to the amount of information currently required.

Several submitters referred to the desirability of the manner of reporting conforming with International Labour Organisation (ILO) guidelines.

Some submitters referred to the need to maintain employee confidentiality and questioned whether ethnicity data would be held by employers, and, whether it should be reported.

In the interim, the Department considers it will improve clarity if the regulation containing the prescribed manner of written notice is passed with a revised definition and then published together. This is because the lists contained in the form have the effect of providing guidance for users.

Recommended change to the draft

18. That the Department consult with Parliamentary Counsel Office regarding whether it is better to promulgate a revised definition with the prescribed manner of written notice and accident register.

Q15. What information should be included in the prescribed form of accident register, and should it contain the same information as the manner of written notice?

Refer to the response to Question 14, above.

A majority of submitters said that there should be consistency between the accident register as the manner of written notice.

Other submitters asked that there be alignment between ACC forms, terminology and processes where appropriate.

Several submitters said that they did not support the inclusion of the employer or self-employed person's ACC number in the prescribed manner of written notice. This was because it would be difficult to obtain and could delay reporting for some people completing reports, and because it could be inaccurate or deceptive as many employers have multiple numbers.

Recommended change to the draft

19. That the Department consult with the Accident Compensation Corporation and Department of Statistics to align the prescribed manner of written notice and accident register and forms used under the IPRC Act as appropriate.

Q16. What are the resource and compliance implications of the new definition, and are these reasonable for your business or organisation?

The draft definition substantially lowered the threshold for serious harm. This attracted considerable comment on the increased compliance burden from employers, industry groups and professional groups. A majority of these predicted additional costs and difficulties — mostly arising from increased documentation and reporting of serious harm occurrences.

Two larger employers had reviewed their accident records in light of the draft for consultation and concluded that there would be up to six times as many notifications. Another employer, in the meat processing industry, suggested a 10-fold increase in reports [77]. Others, particularly smaller employers, felt the increase would be lower than this.

However, not all employers described a significantly increased burden of reporting, and numerous smaller businesses, and professionals said that, even with a lowered threshold, there would be little difference in the administrative burden.

Numerous submitters referred to the increased burden for employers who are required not to disturb an accident scene under section 26. The Department has noted these comments but also observes that section 26 applies where “a person is seriously harmed while at work” and refers to a single “incident”. The Department’s view is that clarification of this matter of application will ease employer concerns, and that this will be included in explanatory materials.

Why the compliance burden will increase

Submissions from employers, industry and professional groups said that the compliance burden would increase because of the following changes in the draft definition:

- Increased coverage of soft tissue, mental harm and chronic injuries
- Increased emphasis on medical diagnosis in clause 4
- Increased coverage in soft tissue and gradual process, chronic conditions, and mental harm
- Normal duties and 7 calendar days requirements
- Non-interference with accident scene for more events
- Duplication of reporting/increase in investigations
- Greater ACC scrutiny/increase in levies for those in ACC accreditation programmes because more serious harm notifications.

Additional resources required by the draft definition

Submissions from employers, industry and professional groups indicated that the above changes would require employers and others to implement the following:

- Additional processes for reporting and responding to the Department – particularly in connection with gradual process and soft tissue injuries

- Additional documentation of what constitutes “normal duties”
- Additional monitoring and documentation of attendance
- Retraining of management, employees, and health and safety representatives
- More pre-employment medicals to avoid employer exposure to potential serious harm occurrences caused by earlier employment
- Updating software/systems/forms
- Update safety management systems
- Increased departmental resources for recording and follow up of reports
- Increased practitioner workload.

The Department notes these submissions. In response, it observes, and as noted in the discussion document and by numerous submitters, that most of these systems and processes are already required by the legislation. Amendment of the definition will not create new duties or requirements for reporting or documentation as such. But it agrees that the draft for consultation would increase the number and type of reports of serious harm occurrences.

The Department also observes that the majority of the cost of additional medical diagnosis would be funded by the ACC scheme and that there will not be significant additional costs for employers in this respect.

There will also be some one-off costs in training, changing systems and providing information to employees, but the Department’s view is that these costs will be quickly outweighed if the revised definition improves clarity and ease of compliance for employers and others, and other benefits through the better working of the legislation by improved coverage.

Consultation confirmed that the greatest concern stemmed from the increased inclusion of soft tissue and gradual process injuries and illness. The Department’s position is that suggested changes to the draft to further narrow coverage, and restrict clause 1 to single accidents and events meaning a person is unable to complete their normal duties for a period of 7 or more calendar days” will restrict this coverage, while still bringing the most serious cases to the attention of the Department. ACC data on less serious cases will be sufficient for monitoring purposes.

Q17. Will the revised definition help employees to exercise the right to refuse work likely to cause serious harm?

A total of 62 submitters (53% of the total) responded to this question. Of those that addressed the question, 24% answered "yes" and 76% answered "no".

Table 29: Response to Q17 by type of submitter

Type of submitter	Yes	No	Total answering
Central govt organisation	0	0	0
Employer	6	27	33
Education provider	1	2	3
Employee/individual	3	2	5
Industry or employer association	2	5	7
Professional organisation	1	5	6
Union/employee representative	1	1	2
Volunteer/not for profit organisation	0	1	1
Other (see comment)	1	4	5
Total	15	47	62

Table 30: Response to Q17 by industry

Type of submitter	Yes	No	Total answering
Agriculture/horticulture	0	0	0
Construction	1	2	3
Communication services and electricity	0	0	0
Education	1	4	5
Fishing	0	0	0
Finance and insurance	1	0	1
Forestry	0	0	0
Government services	1	0	1
Health services	3	6	9
Manufacturing	0	10	10
Meat processing	0	3	3
Retail and wholesale trade	1	0	1
Tourism and hospitality	0	0	0
Transport and storage	1	7	8
Other (see comment)	3	4	7
Cross-sector	3	11	14
Total	15	47	62

Submissions generally indicated that a change of definition would have a minimal effect on employees' ability to exercise the right to refuse work under section 28A of the HSE Act.

Various employers, and industry and professional associations submitted that an employee's decision to exercise the right is determined by "common sense" rather than the definition, and so it did not have a practical bearing on the situation.

Some employers said that the lower threshold set by the draft definition could see employees refusing to perform tasks that were not really dangerous, and the situation would be further clouded and not improved.

Other employers, and one union [76], took a broader view and said that better alignment of the definition with the 2002 amendment could only improve employees' understanding of their right to refuse unsafe work, particularly with respect to psychosocial hazards. Union submitters generally emphasised the importance of supporting information if employees were to be more aware of and able to exercise their right to refuse work they believe is likely to cause them serious harm.

The Department notes that a potential effect of lowering the threshold for serious harm is an impact on an employee's use of the right to refuse work that could cause them serious harm.

It also notes that an employee's right to refuse unsafe work arises in a particular set of circumstances, which are then resolved. The Department's view is that even a degree of "overuse" of the right would result in minimal loss of efficiency in workplaces, while the benefits of resolving concerns or dealing with hazards could be considerable from even a minor increase in the use of the right.

5. RECOMMENDED REVISED DRAFT DEFINITION FOR CABINET APPROVAL

The following revised definition incorporates the changes recommended in response to submissions on particular questions.

We recommend further consultation with the delivery arm of the department and related agencies before it is forwarded to the Parliamentary Counsel Office for drafting, in conjunction with amendments to the Health and Safety in Employment (Prescribed Matters) and forwarding to Cabinet for approval.

Serious harm, for the purposes of the Health and Safety in Employment Act 1992 means death, or:

1. Trauma injury

Physical incapacity caused by an accident or event and leading to:

- a) permanent loss of bodily function (including from any amputation of body part); or
- b) a person being unable to perform their normal duties for a period of 7 or more calendar days.

2. Acute illness or injury

Acute illness requiring treatment by a medical practitioner, or any loss of consciousness, caused by:

- (a) lack of oxygen; or
- (b) absorption, inhalation, or ingestion of any hazardous substance; or
- (c) contact with any electrical, combustible, or mechanical energy source; or
- (d) a fall from one height to another.

3. Chronic or serious occupational illness or injury

Physical or mental harm:

- (a) resulting in hospital admission for more than 24 hours; or
- (b) requiring in-patient surgery; or
- (c) diagnosed and confirmed as caused by exposure to a workplace hazard by a medical practitioner who is a registered specialist operating within the appropriate scope of practice.

APPENDIX: SUBMISSIONS RECEIVED

Ref	Submitter
1	Buddle Findlay
2	K.B. Contracting and Quarries Ltd
3	Business New Zealand
4	Transpower New Zealand Limited
5	Department of Corrections
6	Contact Energy
7	OK Health Service Limited
8	Cadbury Confectionery Ltd NZ
9	United Group Rail Ltd
10	Toll Owens Limited
11	National District Health Boards
12	Christian Healthcare Trust
13	IHC
14	Transfield Services (NZ) Ltd
15	SHERIS Ltd
16	Electricity Engineers Association
17	Federation of Rail Organisation of New Zealand (Inc)
18	Teemay Consultants Ltd
19	Motor Trade Association
20	Oceana Gold (NZ) Ltd
21	Toll NZ
22	Gordon Purdie
23	Fletcher Building Ltd
24	Guardian Healthcare Group
25	EMA (Central)
26	Department of Conservation
27	Ministry of Health
28	South Canterbury Chamber of Commerce
29	New Zealand Defence Force
30	BP Oil New Zealand Ltd
31	Foodstuffs (NZ) Ltd
32	Solid Energy New Zealand Ltd
33	Aviation Industry Association of NZ (Inc)
34	Scion & Ensis
35	NZISM Auckland Branch
36	Amalgamated Builders 2001 Ltd
37	Dilworth School
38	Anne Todd-Lambie and Aimee Todd
39	Hilary Allison
40	Juanita O'Brien
41	Hawkes Bay District Health Board
42	ASB Group of Companies
42	Bank of New Zealand
42	Westpac
43	Meat Industry Association of NZ

Ref	Submitter
44	Juken New Zealand Ltd - East Coast Mill
45	St John
46	Waikato District Health Board
47	Post Primary Teachers Association
48	Retail Meat New Zealand
49	University of Otago
50	NZ Council of Trade Unions
51	Human Resources Institute of NZ
52	Canterbury Manufacturers' Association
53	National Union of Public Employees
54	EnviroWaste Services Ltd
55	Ports of Auckland
56	Massey University
57	Professor Stephen Legg
58	Occupational Health and Safety Industry Group
59	NZ Institute of Safety Management
60	Employers and Manufacturers Association (Northern) Inc
61	Federated Farmers of New Zealand (Inc)
62	Invitrogen Oceania
63	Hospitality Association of NZ
64	Canterbury District Health Board
65	Fulton Hogan
66	Employment Law Group, Simpson Grierson
67	Air New Zealand
68	Roading New Zealand
69	Lakes District Health Board
70	NZ Amalgamated Engineering Printing and Manufacturing Union (EPMU)
71	Fisher and Paykel Appliances
72	Civil Aviation Authority
73	Margaret Favell
74	ERMA New Zealand
75	Horowhenua Masonic Village & Arohanui Hospice
76	Southern Local Government Officers Union
77	Alliance Group Ltd
78	OH&S Services Ltd
79	Huhtamaki NZ Ltd
80	Independent Stevedoring Ltd
81	NZ Bus Ltd (previously Stagecoach NZ)
82	Sands Management Systems
83	Transpacific Industries Group NZ Ltd
84	NZ Occupational Health Nurses Organisation
85	Ministry of Foreign Affairs and Trade
86	Lloyd Consulting
87	Practical Solutions (2004) Ltd
88	Delta Utility Services
89	Lyttleton Port Company
90	Company Health Services Ltd
91	Dexcel Ltd

Ref	Submitter
92	Injury Prevention Research Unit, University of Otago
93	Mainpower Contracting Ltd
94	Rail & Maritime Transport Union
95	New Zealand Sugar Company
96	Altex Coatings Ltd
97	BOC Ltd
98	Summit Wool Spinners Ltd
99	OCS Ltd
100	Presbyterian Support Otago
101	Progressive Enterprises Ltd
102	Jason Farquharson
103	TQS Ltd
104	Manukau Institute of Technology
105	Workplaces Against Violence in Employment
106	Minex Health and Safety Council (NZ)
107	Alloy Yachts International Ltd
108	Corus International - New Zealand
109	Fonterra
110	Marie VanEs
111	API Consumer Brands
112	Delmaine Fine Foods Ltd
113	Endoscopy Auckland and Laparoscopy Auckland
114	Air Liquide NZ Limited
115	Institute of Applied Learning
116	Ecowise

FOR FURTHER INFORMATION ON EMPLOYMENT RELATIONS VISIT WWW.DOL.GOV.T.NZ OR PHONE 0800 20 90 20

