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Ministry of Business, Innovation & Employment
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Wellington

By email: HSWregs@mbie.govt.nz

Exposure Draft Health and Safety at Work (Infringement Offences and Fees) Regulations

Introduction and summary

- 1 The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the exposure draft of the Health and Safety at Work (Infringement Offences and Fees) Regulations 2015 (draft Regulations). The following comments focus on issues associated with the draft Regulations applying infringement fees to the statutory offences set out in the Health and Safety Reform Bill (Bill).
- 2 The Law Society's key concern is about the consequences of applying infringement fees to the statutory offences, which arise because of the definition of "infringement offence" in the Summary Proceedings Act 1957 (SPA). The draft Regulations create some infringement offences by simply applying infringement fees to statutory offences. While this is not uncommon, it has created issues in the past. Once an infringement fee is specified for an offence, the offence becomes an "infringement offence" as a result of the SPA definition, even if the infringement fee is in addition to a statutory penalty. This leads to two consequences which appear to be inconsistent with the goals of the Bill:
 - (a) Where there is serious, charge-worthy conduct, leave of the Court is required before the prosecutor can lay a charging document. This creates unnecessary administration and is not required for other equally or even more serious offences.
 - (b) Even if a finding of guilt is made (or a plea is entered) no conviction can be entered. This is regardless of whether the offence was originally charged (i.e. by charging document) or was the subject of an infringement notice.

Analysis

- 3 Technical issues arise when the Bill provides for a penalty (for example, cl 28(1) of the Bill), and the draft Regulations also specify an infringement fee for the same

offence. This is because where an infringement fee has been specified (regardless of whether a statutory penalty has also been provided for), the offence falls within the definition of “infringement offence” under section 2 of the SPA:

... infringement offence means any offence under any Act in respect of which a person **may** be issued with an infringement notice [emphasis added]

4 Such offences are also “infringement offences” under section 5 of the Criminal Procedure Act 2011 (CPA), which refers to and adopts the SPA definition. It does not matter whether the prosecution commences by charging document or by infringement notice: the offence is an “infringement offence” because it “may” be the subject of an infringement notice.

5 The first consequence identified above, that leave is required to prosecute, arises because section 21(1)(a) SPA requires the prosecutor to obtain the consent of a District Court Judge or Registrar before laying a charging document for an infringement offence. Section 21 of the SPA has survived the enactment of the CPA.

6 The second consequence, the inability to convict for offending, arises pursuant to section 375 CPA. Section 375 provides that, whether an infringement notice has been issued or not, a defendant may not be convicted for an infringement offence.

7 To use clause 28(1) of the Bill as an example: if an offence under clause 28(1) were being prosecuted there would be two choices:

(a) an offence under clause 28 can be alleged (by laying a “charging document”),
or

(b) an infringement notice can be issued.

8 The first option is reserved for more serious conduct. To pursue this option, the prosecutor would require leave pursuant to section 21(1)(a) SPA. Assuming serious offending is involved and leave is granted, there is still no risk of conviction.

9 The Explanatory Note to the Bill provides:

The new regime recognises that a well-functioning health and safety system relies on participation, leadership, and accountability by government, business, and workers. This includes—

- an effective enforcement regime with graduated categories of offences and penalties to provide better guidance to the courts about appropriate fine levels:

10 Clause 221 of the Bill provides for making Regulations:

Infringement offences

(r) prescribing infringement offences for the purposes of this Act and regulations:

(s) setting the infringement fee payable for an infringement offence, which may not exceed \$20,000, and setting different infringement fees for different infringement offences or in respect of different persons or individuals:

- (t) prescribing the form of infringement notices and infringement offence reminder notices:

- 11 The two consequences identified above are inconsistent with the goal of “graduated categories of offences and penalties” set out in the Explanatory Note. In addition, requiring leave creates an inconsistency with many other offences (some more and some less serious) where leave is not required.
- 12 There is nothing about the offences in the Bill and the draft Regulations that sets them apart, except for the “piggy backing” of infringement fees onto statutory offences. It is undesirable that this should result in the extra administrative load required by the leave process.
- 13 An inability to convict is also at odds with Parliament’s intent. As drafted, the Bill envisages that conviction will follow contravention of statutory offences. Using the clause 28 example again, clause 28(4) expressly refers to “liable on conviction”.

Recommendation

- 14 The issues identified in this submission stem from the definition of “infringement offence”. To address these issues, the Law Society recommends either:
 - (a) Drafting separate infringement offences, rather than applying infringement fees to pre-existing statutory offences; or
 - (b) Inserting wording into the Bill that expressly addresses the issues identified above by removing the section 21 SPA need for leave where charging documents are laid and removing the section 375 CPA restriction on convictions. The Bill could also be drafted to provide that the offence is a statutory *or* infringement offence based on the way the prosecution is commenced, rather than based on whether an infringement fee is specified.

Conclusion

- 15 If you wish to discuss these comments, please do not hesitate to contact the convenor of the Law Society’s Criminal Law Committee, Jonathon Krebs, via the committee secretary Karen Yates (04 463 2962, karen.yates@lawsociety.org.nz).

Yours sincerely



Chris Moore
President