



# **Cook Islands Occupational Safety and Health National Reform**

# **Final Draft National Occupational Safety and Health Policy**

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# Preamble

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<b>Purpose</b>	This policy sets out the Government of the Cook Islands' approach to Occupational Safety and Health (OSH), including a comprehensive OSH regulatory framework.
<b>Commitment</b>	The Government of the Cook Islands is committed to providing a clear policy and regulatory framework for OSH that supports public and private employers to provide safe and healthy workplaces. This includes establishing enabling OSH legislation and providing the resources needed to implement and enforce the law.
<b>Aims</b>	<p>This policy aims to:</p> <ul style="list-style-type: none"><li>▪ Raise OSH standards across the Cook Islands;</li><li>▪ Prevent occupational ill-health (encompassing occupational injuries, diseases, and deaths);</li><li>▪ Protect workers and other people from harm to their health, safety or welfare arising from work;</li><li>▪ Eliminate risks in workplaces as the primary strategy to prevent harm;</li><li>▪ Promote cooperation between and the involvement of employers, workers, their representatives and experts in identifying, assessing and controlling risks and in developing OSH standards;</li><li>▪ Promote continuous improvement in OSH standards throughout the Cook Islands;</li><li>▪ Promote awareness of OSH; and</li><li>▪ Build effective and efficient institutional arrangements for OSH, including an OSH regulator that promotes best practices in workplaces.</li></ul>
<b>Scope</b>	<p>This policy:</p> <ul style="list-style-type: none"><li>▪ Applies to all workplaces – Government and private sector, large and small.</li><li>▪ Applies to all workers – permanent, casual, local or migrant, paid or volunteer.</li><li>▪ Covers both occupational safety and occupational health and recognizes that an integrated approach to OSH is critical. In particular, attention to the role of work in addressing non-communicable diseases (NCDs) is essential in the Cook Islands.</li></ul>

# Institutions

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In order to give effect to this policy, the following government Ministries and tripartite bodies have important roles.

## **Ministry of Internal Affairs**

The Ministry of Internal Affairs (INTAFF) is the primary government agency with responsibility for OSH. Specifically, INTAFF is responsible for:

- Advising the Minister for Internal Affairs on OSH matters.
- Preparing OSH Codes of Practice, policies and procedures on specific issues (e.g. procedures for incident reporting), guidance on how to undertake specific activities (e.g. guidelines on workplace consultation) and relevant standards (e.g. technical standards for the safety of high risk equipment or relating to hazardous substances).
- Facilitating and supporting the preparation of legislation – the OSH Act and Regulations.
- Monitoring and enforcing the law, in accordance with the policy set out below, including providing an inspectorate and acting as the Regulator.
- Conducting awareness campaigns.
- Promoting OSH research, education and training.
- Investigating risks and incidents where appropriate.
- Conducting investigations and inquiries into OSH matters upon request of the Minister for Internal Affairs.
- Advising duty holders about their obligations under the law, including employers, workers and their representatives, and suppliers
- Working in cooperation with the Ministry of Health to collect accurate and reliable data about the extent of occupational ill-health and to provide a quality Occupational Health Service (if a feasibility study supports establishing such a service).
- Providing a secretariat for the tripartite National Labour Advisory Board (NLAB) and the Independent Labour Tribunal (ILT).

Each year, INTAFF will prepare and publish a workplan for its OSH program based on relevant OSH data and consultation with NLAB.

## **National Labour Advisory Board**

The tripartite National Labour Advisory Board (NLAB) has the following functions:

- Advise the Minister for Internal Affairs, through INTAFF, on OSH matters.
- Provide a forum to discuss national OSH policy and strategy.

- Review and advise on OSH laws, regulations, guidance and policies.
- Promote continuous improvement in OSH throughout the Cook Islands.
- Provide annual reports to the Minister for Internal Affairs about its activities and contributions to improving OSH in the Cook Islands.

These functions will be specified in the OSH Act.

## **Ministry of Health**

The Ministry of Health has the following functions in relation to OSH:

- Collect and disseminate accurate and reliable data about occupational ill-health in coordination with INTAFF.
- Establish and operate an Occupational Health Service, as a joint venture with INTAFF, if a feasibility study supports establishing such a service.

# Legislation

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## Legal framework

The Government of the Cook Islands will establish a legal framework built on the following legal hierarchy:

- An **OSH Act of Parliament**, providing the primary legal foundation and setting out the overall legal requirements for OSH. This Act will bind the Crown and will give effect to the key requirements of this National OSH Policy.
- **Regulations**, which provide further detail on how to comply with the general requirements of the OSH Act, e.g. in relation to specific hazards or workplace circumstances. Breaches of Regulations will be evidence of breaches of the overarching Act.
- **Codes of Practice**, which provide specific practical guidance on how to meet the obligations of Regulations and the Act. Following the advice of a Code of Practice would normally be taken as evidence of compliance with the relevant Regulations and the Act. Using a different method to meet the same obligations to the required standards is also possible, however – failing to follow a Code of Practice will not in itself provide evidence of a breach of the law.
- **Guidance and information products**, which advise on how to achieve good practice and meet legal obligations. These will not have formal legal standing, but will form part of the available body of knowledge about how to control workplace risks.

The legislation will be reviewed every five years to determine whether the law is on track to achieving its purposes and objectives.

## Definitions

The OSH Act will include clear definitions of key roles and terms used in the legislation, including the following definitions:

- **Employer**: a person who employs workers under either contracts of employment or contracts of training. Employers can be individuals, companies, unincorporated organisations, governments, partnerships or associations.
- **Health**: includes physical and mental health.
- **Incident**: an unplanned event that results or could have resulted in harm to people in the workplace or as a result of activities in the workplace. This includes accidents and near-miss incidents.
- **Reasonably practicable**: something is reasonably practicable which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—
  - (a) the likelihood of the hazard or the risk concerned occurring; and
  - (b) the degree of harm that might result from the hazard or risk; and

(c) what the person concerned knows, or ought reasonably to know, about—

(i) the hazard or risk; and

(ii) ways of eliminating or minimising the risk; and

(d) the availability and suitability of ways to eliminate or minimise the risk; and

(e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

- **Senior Officer:** a person who makes or participates in making decisions that affect the whole or a substantial part of an employer's undertaking or who exercises significant influence over the management of an employer's undertaking, e.g. as a Chief Executive, Director, Executive Committee Member, Partner or Chief Operating Officer or senior official of a government agency.
- **Serious incidents:** any incident that involves –
  - (a) Fatalities at a workplace or as a result of work.
  - (b) Incidents which result in serious injuries.
  - (c) Failure of a prescribed item of high risk plant (even if no injuries resulted).
  - (d) Collapse of an excavation or part of a building (even if no injuries resulted).
  - (e) An explosion or fire or leakage of a substance (including dangerous goods).
- **Serious injuries:** any injuries with any of the following features –
  - (a) any injuries that require the person to have immediate treatment for (other than first aid):
    - (i) the amputation of any part of his or her body.
    - (ii) a serious head injury.
    - (iii) a serious eye injury.
    - (iv) a serious burn.
    - (v) the separation of his or her skin from an underlying tissue (such as degloving or scalping).
    - (vi) a spinal injury.
    - (vii) the loss of a bodily function.
    - (viii) serious lacerations.
  - (b) an injury or illness that requires, or would usually require, the person to be admitted to a hospital for immediate treatment.

(c) an injury or illness that requires, or would usually require, the person to have medical treatment within 48 hours of exposure to a substance.

(d) any serious infection (including occupational zoonoses) to which work is a significant contributing factor, including any infection that is attributable to carrying out work—

(i) with micro-organisms; or

(ii) that involves providing treatment or care to a person; or

(iii) that involves contact with human blood or bodily substances;  
or

(iv) that involves handling or contact with animals, animal hides, animal skins, animal wool or hair, animal carcasses, or animal waste products; or

(v) that involves handling or contact with fish or marine mammals.

(e) any other injury or illness declared by regulations to be a notifiable injury or illness for the purposes of this section.

- **Supply:** to supply and resupply by way of sale, exchange, lease, hire or hire-purchase, whether as a principal or agent;
- **Worker:** any person who works for an employer, whether as an employee, sub-contractor, casual employee, temporary employee, volunteer, intern, trainee, outworker, or foreign worker.
- **Workplace:** any place where workers need to be or go for their work, whether under the direct or indirect control of their employer, including public (such as church halls) or private places (such as homes).

## Objectives of the law

The objectives for the OSH Act are to:

- Prevent occupational ill-health (encompassing occupational injuries, diseases and fatalities);
- Protect workers and other people from harm to their health, safety or welfare arising from work;
- Eliminate risks in workplaces as the primary strategy to prevent harm;
- Promote cooperation between and the involvement of employers, workers, their representatives and experts in identifying, assessing and controlling risks and in developing OSH standards; and
- Promote continuous improvement in OSH standards throughout the Cook Islands.



**Immediate priorities for supporting regulations and guidance**

Based on the OSH National Reform Project, the following priorities have been identified for supporting regulations and guidance:

- How to implement the new OSH Act (including guidance as to appropriate formats for an Accident Register);
- Workplace OSH consultation;
- Asbestos, and hazardous substances more generally;
- Working arrangements, including job design, bullying and harassment (especially because of the links to non-communicable diseases);
- Plant, particularly mobile plant and specifying prescribed high risk plant;
- Manual handling; and
- Working at heights (including use of ladders).

In consultation with the NLAB, INTAFF will determine how best to provide support to workplaces on these priorities and incorporate this into its first annual plan.

# Duties in the workplace

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The overarching OSH Act will specify general duties for all of those with a role in providing a safe and healthy workplace. Specific duties for different issues and risks will be stated in Regulations. This provides the best possible foundation for addressing occupational safety and health, particularly the work-related risk factors for NCDs.

## **Employers' duties**

Employers have the greatest capacity to control what happens in their workplaces and so will have the overarching duty to take all reasonably practicable steps to provide a working environment that is safe and healthy. This includes the following specific duties to, so far as reasonably practicable:

- Control the risks to health and safety in the workplace by seeking to eliminate risks so far as reasonably practicable. If risks cannot be eliminated, they must be reduced so far as reasonably practicable. Risks include those associated with the working environment, chemical and biological substances, plant and tools, work organisation and processes (e.g. causes of harassment and bullying), and working equipment, based on eliminating risks wherever possible. This encompasses controlling workplace risks that are associated with a full range of diseases, including NCDs, not just injury risks.
- Provide adequate personal protective clothing and equipment to workers to protect them where a level of risk remains in spite of reasonably practicable measures to control the risk being implemented.
- Obtain advice, assistance and services from suitably qualified professionals about OSH issues about which the employer does not have sufficient knowledge or expertise.
- Provide adequate information, education, training and supervision to workers (including providing information, education and training in appropriate languages) so that they can fulfil their work duties without risk to themselves or others.
- Provide information to workers in appropriate languages about the OSH arrangements at the workplace and what workers should do to contribute to OSH.
- Provide adequate measures to deal with accidents and emergencies, including first aid, investigations and record keeping.
- Maintain a Register of Accidents.
- Report serious incidents to INTAFF by telephone as soon as they become aware of the incident, followed up by written notice.
- Consult with workers and their representatives about OSH, including consultation about the OSH consequences of any proposed workplace changes in advance of finalizing changes.

- Consult with and coordinate with others who have control or influence over the workplace to ensure the workplace is safe (e.g. when there are a number of subcontractors on a building site).
- Monitor working conditions to ensure that risks are prevented and controlled to be as low as reasonably practicable if they cannot be prevented.
- Ensure that people other than employees are not exposed to risks as a result of the work, e.g. customers, clients, visitors and passers-by.

**Senior Officers’ duties**

Senior Officers will have the duty to exercise due diligence to ensure that their organisation meets its duty of care. This will include the responsibility to satisfy themselves that the workplaces over which they have management authority are, so far as reasonably practicable, safe and without risks to health.

**Self-employed people’s duties**

Self-employed people will have the duty to ensure, so far as reasonably practicable, that others are not exposed to OSH risks as a result of their business and to control risks to themselves while at work, so far as reasonably practicable. This will include compliance with relevant regulations.

**Suppliers’ duties**

Those who supply workplaces will have the duty to ensure that the equipment, goods or services they provide are, so far as reasonably practicable, safe and without risks to health, even when the source of these supplies is outside the Cook Islands. They will be required to provide all relevant information to the workplace on the intended purpose and the safe and proper use of the equipment, goods, services, or substances.

**Employees’ duties**

Employees’ duties are based on the fundamental duty to take reasonable care to ensure their own and others’ health and safety at work. Employees’ duties will also include the responsibilities to:

- Cooperate with their employer in OSH management.
- Not intentionally or recklessly interfere with OSH equipment or strategies.
- Use protective equipment and devices provided properly in accordance with the training provided.
- Report any hazards or risks that they observe to their immediate supervisor.
- Participate in consultative arrangements.
- Participate in OSH training programmes to increase awareness on health and safety in the workplace and how to mitigate risks to themselves and others.

The OSH Act will also acknowledge employees’ common law right to refuse to do work that they reasonably believe represents a serious and immediate danger to their own or others’ health or safety.

**Duties of those who manage or control a workplace**

Employers are not always in complete control over a workplace, e.g. when they rent or share premises with others or when workers provide services in other premises. Workers in these workplaces must still have the risks to their health and safety controlled, so far as reasonably practicable.

The OSH Act will specify a duty for those who manage or control a workplace to ensure that the workplace (including access ways) is safe and without risks to health so far as reasonably practicable.

**Duties of others with influence over a workplace**

People other than employers and employees can influence health and safety in workplaces. Visitors, customers and clients can create risks, e.g. by harassing employees or behaving recklessly. The OSH Act will specify that people other than employees have duties based on the fundamental responsibility to take reasonable care to ensure their own and others' health and safety in workplaces. These include the responsibilities to:

- Not intentionally or recklessly behave in a manner that could cause harm to themselves or others or interfere with or misuse anything provided in the interests of health or safety.
- Notify management of any hazards or risks that they observe.
- Cooperate with the employer so far as they are able by following relevant procedures and guidelines.

# Enforcing the law

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For the OSH Act to be effective and lead to improvements in OSH outcomes, it must be enforced. Enforcement is a necessary function for effective regulation by requiring compliance and deterring non-compliance with the law. The OSH Act will provide a clear and flexible enforcement framework that supports continuing capacity development and that encourages duty holders to comply voluntarily.

## **Principles for enforcement**

The Government of the Cook Islands is committed to an enforcement approach based on the following principles.

### *Objective*

Enforcement actions should have:

- Clear outcomes.
- Basis in reliable evidence.

### *Proportional and responsive*

Enforcement actions should be:

- Appropriate.
- Timely.
- Commensurate with the regulatory breach, the risk and its potential impact.

### *Transparent*

Enforcement actions should demonstrate:

- Impartiality.
- Balance.
- A clear basis for decision-making.

### *Consistent*

Enforcement actions should:

- Result in similar enforcement outcomes in similar circumstances.
- Provide certainty in the responses that are available to an inspector.

### *Constructive*

Enforcement actions should:

- Aim to change the behaviour of employers and other duty holders.
- Contribute to compliance and deter non-compliance with the relevant law.
- Contribute to creating a level playing field for industry by reducing or eliminating financial or other incentives for non-compliance with the relevant law.

### *Impartial*

Enforcement actions should be:

- Equitable.
- Nondiscriminatory.

<i>Targeted</i>	<p>Enforcement actions should aim at:</p> <ul style="list-style-type: none"> <li>▪ Areas of greatest need – highest risk, most vulnerable workers.</li> <li>▪ Matters that will maintain public confidence in the administration of the law.</li> <li>▪ Those with the duty of care.</li> </ul>
<i>Natural justice</i>	<p>Procedures for enforcement should:</p> <ul style="list-style-type: none"> <li>▪ Include the opportunity for duty holders to present other evidence in relation to compliance.</li> <li>▪ Provide an avenue for appeal against an enforcement decision.</li> <li>▪ Require that any conflicts of interest are declared by inspectors.</li> <li>▪ Be implemented within the powers and processes of the relevant law.</li> </ul>
<b>OSH Inspectorate</b>	<p>The OSH Act will specify that the Labour and Consumer Division of INTAFF will be the Inspectorate with the powers to enforce OSH laws. Individual employees of the Labour and Consumer Division will be appointed as inspectors with specific powers as set out below.</p>
<b>OSH Regulator</b>	<p>The OSH Act will specify that INTAFF will be the Regulator with the authority to prosecute duty holders for breaches of this Act.</p>
<b>Enforcement powers</b>	<p>So that they can enforce the law, the OSH Act will give inspectors in the Labour and Consumer Division of INTAFF the powers to:</p> <ul style="list-style-type: none"> <li>▪ Enter workplaces without notice or hindrance at any time, along with any assistance needed to conduct an inspection.</li> <li>▪ Examine, test or make inquiries about anything relevant to OSH in a workplace.</li> <li>▪ Interview any relevant people about compliance with the law and OSH in the workplace.</li> <li>▪ Require employers to provide information about the workplace, workers and anything relevant to the OSH compliance of the employer.</li> <li>▪ Collect information about OSH in a workplace, including taking photographs and measurements, making recordings, and collecting any relevant records or samples.</li> <li>▪ Require an employer not to disturb the workplace or part of it for a reasonable period until examination, testing, or some other investigation is carried out.</li> </ul>
<b>Enforcement tools</b>	<p>The OSH Act will provide the following enforcement tools to inspectors:</p> <ul style="list-style-type: none"> <li>▪ Improvement notices, requiring a duty holder to undertake a specific action to remedy a contravention of the law by a specific time (e.g. to take action to remedy a risk, to provide particular equipment or training).</li> </ul>

- Prohibition notices, prohibiting certain activities until particular steps are taken (e.g. prohibiting the use of a machine until a guard is installed).

Only the inspectorate and the Regulator will have the power to take enforcement action. Those affected by a decision not to exercise this power will have the right to seek review of this decision.

## **Prosecutions**

The Regulator will have the power to recommend that the Director of Public Prosecutions:

- Prosecute a duty holder for particular breaches of the Act, e.g. gross failure to comply with a duty that results in death or serious injury, failing to comply with an inspector's notice, or discriminating against employees for taking action to address OSH issues.
- Use Enforceable Undertakings as an alternative to prosecution in appropriate circumstances.

## *Offences and penalties*

The OSH Act will set out a hierarchy of offences, to make clear what kinds of offences are considered most serious and appropriate for prosecution. There will be three categories of offence – from most to least serious – attracting different penalties. For example, anyone who recklessly and knowingly risks the lives of others because of their actions or inactions will face more serious charges than someone who failed to comply with an improvement notice. Obstructing an inspector in their work will be treated as a serious offence, to signal that the role of the inspector is critical to achieving the objectives of the Act. For the same reason, discriminating against an employee or other person for exercising their rights to take action on OSH will be a serious offence.

Consistent with more recent Cook Islands' laws, penalties will be expressed in penalty units and the quantity of penalty units will vary with the category of the offence.<sup>1</sup> More serious offences will, of course, attract a higher number of penalty units. As well as fines, imprisonment will be included as an option for the most serious offences to demonstrate the severity of the offence. It will also be possible for a prosecution to result in an order for a duty holder to take specific actions in relation to the issues surrounding the breach or some other action that the Court considers appropriate.

## **Review of enforcement actions**

In order to maintain confidence in the enforcement system, a mechanism to review enforcement actions will be established. The OSH Act will set up the following process:

- Persons who are affected by an inspector's decision will have a mechanism to seek review, including those specifically targeted by an enforcement decision as well as those who are impacted by a decision not to take enforcement action.

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<sup>1</sup> The use of penalty units provides for changes to the level of fines by an administrative change to the value of a penalty unit rather than a need to respond to changing circumstances by amendment to the Act itself.

- In the first instance, an internal review by the INTAFF Secretary will be undertaken regarding any notice or enforcement decision that an affected person is dissatisfied about.
- If the applicant for review is not satisfied by the outcome of this internal review, the matter can be referred to the Independent Labour Tribunal.
- If the applicant is not satisfied with the outcome of the independent review, then an appeal to the Supreme Court will still be available.

## **Enforcement policy**

Alongside the law, INTAFF will finalise an enforcement policy in consultation with the NLAB. This Enforcement Policy will aim to ensure effective regulation by deterring non-compliance with the law. It will set out a clear approach to enforcement that will provide certainty for inspectors and those with legal responsibilities under the OSH Act about the actions that are appropriate in different circumstances.

## **Enforcement approach**

The ways in which the inspectorate enforces the law will contribute to achieving OSH outcomes and will impact on organisational culture across Cook Islands' workplaces. A flexible approach is required because workplaces in different circumstances will have different capacities, for example compliance by a small shop will be quite different to compliance by a large infrastructure company.

At the same time, duty holders need a consistent approach from the inspectorate – the same situation should be dealt with in the same way at all times. This requires clear policy and well-executed procedures across the inspectorate.

Evidence from around the world reinforces the value of an approach to enforcement that combines strategies for both deterrence (punishment) and compliance (persuasion) – such combined strategies are more likely to have impact and are more likely to build organisational cultures that support effective OSH management. A combined strategy allows the regulator to use persuasive approaches for enterprises that only require support, while retaining the option to use legal force on those duty holders that will not comply voluntarily.

The choice of specific enforcement action will be based on:

- The seriousness of the breach of the law and the potential consequences of the breach;
- The compliance history of the duty holder responsible for the breach;
- Any mitigating or aggravating circumstances, eg whether the duty holder knew of the breach and did not take action to rectify it;
- The likelihood that the breach would continue or be repeated without enforcement action;
- The availability of measures to rectify the breach;
- The immediacy of the risk;



- The general deterrence effect of any enforcement action, ie the impact the enforcement action would have on discouraging other duty holders from breaching the OSH Act;
- The specific deterrence effect of any enforcement action, ie the impact the enforcement action would have on discouraging further breaches by the specific employer or duty holder involved in the action; and
- The public interest issues involved (eg effects on public confidence in the administration of the law).

These considerations guide progression through a graduated approach to enforcement. This graduated approach has been described as the *Enforcement Pyramid* (Ayres and Braithwaite 1992) and is represented below, using the enforcement tools that will be included in the OSH Act.



The Enforcement Pyramid

**Encourage and assist compliance**

The powers of inspectors under the OSH Act do not preclude the use of information, guidance, advice and education to encourage compliance with the law. In many cases, simply drawing attention to breaches or risks and advising those with responsibilities about how these can be addressed will achieve compliance and no further action would be warranted. Inspectors already spend the majority of their time providing information and advice in Cook Islands’ workplaces.

The starting point for enforcement will continue to be for inspectors to provide information and education where these seem likely to achieve the desired change in behaviour, with the capacity to use the coercive power of notices if voluntary compliance cannot be achieved. The potential for

coercive notices to be issued provides an incentive for duty holders to use the advice to remedy any breaches. A duty holder's record of non-compliance (including the need to issue coercive notices to gain compliance) would inform decisions around potential prosecution or provided to a court as evidence of failure to take OSH responsibilities seriously.

Given the previous weak legal framework, the absence of clear standards and expectations and consequent low levels of enforcement, the key to improving safety and health standards in Cook Islands' workplaces is to empower workplaces to identify hazards and to control risks themselves. Relying on the intervention and presence of government inspectors to be the only catalyst for knowledge, understanding and improvement will fail. A focus on "persuade" strategies is likely to have success as an initial approach, particularly when accompanied by the planned awareness-raising campaign.

This will necessarily involve a staged approach to providing information and guidance to employers about their responsibilities and accepted standards of safety and health and to workers about what is required and what they are entitled to expect in their workplaces. A key principle of any enforcement strategy in this environment must be to focus on building knowledge, skills and capacity in Cook Islands' workplaces in order to facilitate compliance in the first instance prior to any planned strategy to use coercive legislative powers to enforce standards that will result from the reform process.

*Criteria for using this measure*

Information, guidance, advice and education will continue to be the usual approach to achieving compliance in Cook Islands' workplaces. In particular, information and education should be used when:

- The alleged breach is remedied voluntarily by the person with responsibilities under the OSH Act as soon as the inspector draws attention to the matter and in their presence; or
- The risk is not immediate and can be remedied before workplace exposure occurs (e.g. when purchasing equipment);
- The duty holder gives a commitment to remedy the identified breach within a reasonable time and the inspector follows up to ensure that this commitment is met; or
- The duty holder is voluntarily seeking assistance to improve their standards of compliance and takes action on the information provided.

**Improvement Notices**

Improvement Notices provide clarity and focus about the steps necessary to address an alleged breach and to control risk. They can also be used for other alleged breaches, for example, when duty holders would benefit from clarity about the inspector's expectations in relation to such matters as provision of information and the role of health and safety representatives.

*Criteria for using this measure*

Improvement Notices should be used when:

- The alleged breach or risk exposure is not an immediate risk to health and safety; and
- The alleged breach or risk exposure is not or cannot be corrected immediately; and
- The alleged breach will continue or is likely to be committed again; and
- The details of how the alleged breach or risk exposure should be addressed need to be clearly specified, either because there is a clear legal standard that must be met or because the inspector has reason to believe that the duty holder would benefit from such clear direction (e.g. the inspector has previously provided information and advice about the issue that has not been acted on).

**Prohibition Notices**

Prohibition Notices allow an inspector to prohibit certain activities until particular steps are taken to make the activities safe. This can include suspending particular operations or closing particular areas of a workplace until the identified risks have been controlled so far as reasonably practicable. Such instructions ensure that an activity or circumstance that creates an immediate risk stops immediately and does not continue until the risk has been eliminated or controlled to as low as reasonably practicable.

*Criteria for using this measure*

Prohibitions Notices should be issued when:

- There is or is likely to be an immediate and serious risk to the health or safety of a person from the operation or circumstances; and
- The duty holder has previously demonstrated their incapacity or unwillingness to control the risk; and
- The alleged breach will continue or is likely to be committed again; and
- Measures to rectify the breach or to control the risk are not immediately available.

**Sanctions**

The Regulator may recommend prosecution of an employer or individual duty holder to the Director of Public Prosecutions as the most significant punitive action available. Prosecution would usually result from an investigation of a breach so that there is sufficient admissible and reliable evidence that an offence has been committed. Prosecution may be recommended even if any Improvement or Prohibition Notices issued have been complied with.

*Criteria for using this measure*

Prosecution aims to provide both specific and general deterrence – it should act as a deterrent for employers and other duty holders to discourage future breaches of the OSH Act and to encourage compliance with enforcement activities at lower stages of the enforcement pyramid. Prosecution is the most serious enforcement action available under the OSH Act and should be reserved for the most serious breaches of the OSH Act, e.g. where fatalities have resulted from deliberate and

negligent actions. Specifically, prosecution should be considered when there is sufficient admissible and reliable evidence that:

- A serious breach of the OSH Act has occurred, e.g. discrimination against an employee for exercising their rights under the OSH Act; or
- A high risk of harm has resulted from the breach, e.g. employees were exposed to the risk of death or serious injury, whether or not this result actually occurred; and
- The breach was intentional or negligent; or
- Improvement or Prohibition Notices were not complied with; or
- The employer has previously demonstrated their unwillingness to meet their legal obligations, either by failing to comply with notices or by continuing to breach their obligations or by intentionally or negligently failing to apply known and available remedies.

Further considerations are that:

- Prosecution would provide more valuable general or specific deterrence impacts than imposing a fine (e.g. reputational issues are more likely to have impact than financial costs for the employer concerned); or
- Public confidence in the administration of the law would be damaged by failure to take the most significant punitive action available in the circumstances; and
- There is a reasonable prospect of a conviction.

# Workplace consultation arrangements

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The Government of the Cook Islands will promote workplace consultation arrangements as a foundation for effective OSH policy. The OSH Act will provide for the right of workers to elect another worker to represent them on OSH issues; a cornerstone of contemporary OSH legislation around the world. Employee representation is a reflection of a worker's right to have a say over their own OSH. It also recognises that no inspectorate can possibly be in all workplaces at all times, so a way to encourage effective local scrutiny is necessary.

## **Safety and health representatives (SHRs)**

The OSH Act will provide for Safety and Health Representatives (SHRs). SHRs will not have specific OSH duties or responsibilities in addition to their duties as employees. Their role will be to represent workers, deal with and raise OSH issues with employers.

Any worker will have the right to notify their employer that they want to arrange elections to appoint one or more SHRs in a workplace or workplaces. Upon receiving such notification, an employer will be required to cooperate with their employees to arrange elections for SHRs. An inspector can be requested to provide advice and assistance in making these arrangements.

## *Electing SHRs*

The mechanisms for electing SHRs will be defined in the OSH Act.

The "electorates" for SHRs will be defined through consultation between employers and workers, taking the following matters into account:

- the number of employees at the workplace(s);
- the nature of each type of work performed at the workplace(s);
- the number and grouping of employees who perform the same or similar types of work or who work under the same or similar arrangements;
- the areas at the workplace(s) where each type of work is performed;
- the nature of any hazards at the workplace(s);
- any overtime or shift-working arrangements at the workplace(s);
- whether other languages are spoken by the employees;
- the most effective ways to enable the health and safety interests of the workers to be represented; and
- ensuring that a SHR will be accessible to the workers that he or she represents.

The procedure for electing SHRs shall be determined by the represented workers.

*Roving safety and health representatives*

The Government of the Cook Islands recognizes that workers in small workplaces face particular barriers to gaining effective representative structures in OSH. Such workers frequently feel vulnerable when making reports of hazards and incidents and are often concerned, rightly or wrongly, that taking a stand over OSH issues can have negative consequences for their ongoing employment. Difficulties raising concerns can be a specific problem in family-owned businesses, where sometimes a worker might have to make a report to a more senior member of their own family.

The OSH Act will allow for ‘roving’ safety and health representatives (RSHRs) to address this challenge. RSHRs are safety and health representatives who are elected to cover a number of workplaces without a direct employment relationship in all of them. For example, all of the employees from the shops in a shopping centre could together elect one of them to be the SHR for the whole shopping centre. Such an arrangement would reduce the risk of negative employment consequences and would provide the elected representative with the opportunity to develop and apply skills in OSH.

Specific provisions in the OSH Act will be provided to facilitate local agreements that will allow for this type of SHR. In particular, the definition of SHR electorates will not require that an SHR is employed by the same employer as those in the electorate, so that RSHRs could be elected to cover a number of employers and workplaces. RSHRs will have the same rights and powers as other SHRs.

*SHR rights and powers*

SHRs will have the following rights and powers in relation to the workers they represent:

- To have the time and resources they need to properly fulfil their representative functions.
- To meet and consult with the workers they represent and to access the relevant parts of the workplace during working hours.
- To be given access to all relevant information about OSH matters.
- To be consulted about any relevant matters that impact on OSH, particularly planned changes to the workplace.
- To contribute to decisions about OSH.
- To contact inspectors and accompany them in the relevant parts of the workplace.
- To have the right to obtain advice to support them in their role.
- To issue “Provisional Improvement Notices” to their employer in order to draw attention to particular OSH problems.
- To instruct that work should cease when there is an immediate and serious threat to health and safety.

Most importantly, SHRs will be protected from discrimination or dismissal as a result of fulfilling this role – such offences will be categorised as serious by the OSH Act.

**OSH committees**

The OSH Act will also allow for joint worker-management committees where requested by employees or as an initiative of the employer. Such committees provide a useful forum for discussing OSH matters in workplaces. Through meeting regularly, OSH committees can foster good communication about OSH issues in workplaces and can be a key mechanism for consultation and cooperation about OSH matters and workplace changes. OSH committees are particularly useful for large employers where it is not possible for all employees to have direct involvement in OSH decisions.

**Dealing with disagreements about workplace consultation arrangements**

If disagreements arise between the workplace parties in establishing workplace consultation arrangements, any party can request an inspector to determine how to establish the arrangements. If any party disagrees with the inspectors' decision, they can seek a review of that decision, in line with the Review of Enforcement Decisions mechanism set out above.

# OSH data

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The Cook Islands Government is committed to improving the quality of OSH data available in the Cook Islands. Currently, the Cook Islands lacks reliable and comprehensive data about work-related ill-health, an important support to good decision-making about OSH. In workplaces, knowing where incidents are occurring helps identify where risks exist, even if injuries and diseases have not yet resulted. For the whole nation, data about the extent of occupational ill-health and the nature of serious incidents will help to prioritise inspectorate attention and the provision of specific guidance and information as well as determine what kinds of regulations should be developed.

## **Register of Accidents**

The OSH Act will require employers to keep a Register of Accidents and will specify the information that must be recorded in the Register. Employers will be encouraged to also record incidents that could have but do not result in harm to people in the workplace to help identify the potential for harm to occur. In particular, the OSH Act will require employers to use the Register of Accidents to monitor and respond to emerging OSH issues and to make it available to inspectors when they visit workplaces.

Suitable guidance as to the form this Register should take will be provided in guidance material.

## *Required information*

The Register of Accidents must include the following information:

- The name of the worker(s) involved
- Their occupation or job title
- The time and date of the accident
- The exact location of worker(s) at the time of the injury
- A precise description of how any injury was sustained
- The nature of injury and the body part/s affected
- Names and positions of witnesses to the injury, if any
- The date of entry in register
- The name and position of the person making the entry
- What action has been taken or is proposed in order to prevent a recurrence of the injury.

## **Reporting serious incidents**

So that INTAFF can appropriately respond, employers will be required to report serious incidents to INTAFF by telephone as soon as they become aware of the incident, followed up by written notice. This will include incidents defined as serious according to the definition set out above.

The OSH Act will prohibit disturbance of a site where a serious incident has occurred until an inspector has been able to examine the site (so that



## **Collecting and using data nationally**

the inspector can investigate the causes of the incident) or has otherwise given permission for some action to be taken. Of course, if the site must be disturbed in order to assist injured persons or to prevent further harm, the OSH Act will allow this to be done immediately, but only to the extent necessary.

While the injury surveillance system in the Cook Islands has improved considerably over recent years, the approach to data gathering is still not thorough or sophisticated. Without reliable data about the extent and nature of occupational ill-health, setting priorities and designing effective regulatory interventions has been hampered.

The Government of the Cook Islands is committed to achieving further improvements to data collection about occupational ill-health. Improvements in the workers' compensation system will certainly contribute to improved data on occupational ill-health, but a coordinated approach between INTAFF and the Ministry of Health is needed to collect information about work-related ill-health whether or not it results in a workers' compensation claim. This will be an important tool for monitoring and evaluating the impact of OSH reform.

INTAFF and the Ministry of Health will establish an agreement to cooperate and collaborate in collecting sound data about the extent of occupational ill-health. This will include agreeing on a minimum data set for occupational ill-health and guidance for medical practitioners on how to identify and record occupational injuries and diseases without breaching patient confidentiality. INTAFF and the Ministry of Health will publish an annual statistics report about occupational ill-health that includes workers compensation and other data.

This agreement will also address how INTAFF and the Ministry of Health will cooperate to improve services and skill levels in OSH, e.g. through joint training courses and sharing the costs of accessing expertise where necessary.

## Accessing professional and expert advice

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Employers' duties in the new OSH Act will include the obligation to obtain professional advice in circumstances where the employer does not have the knowledge or expertise to ensure they meet their duties. INTAFF itself will also need access to quality professional advice in relation to technical issues. Unfortunately, accessing professional and expert advice on OSH can be challenging in the Cook Islands where the size of the economy does not support a vigorous private market for OSH advisors.

The Government of the Cook Islands is committed to improving access to appropriate professional and expert advice to support implementing effective risk controls. To this end, INTAFF and the Ministry of Health will conduct a feasibility study into establishing an Occupational Health Service as a joint venture between INTAFF and the Ministry of Health.

Occupational Health Services are professional services that advise workplaces on OSH issues, particularly on how to prevent occupational ill-health. They are professionally staffed with relevant specialists, such as OSH officers, occupational hygienists, ergonomists as well as health professionals such as occupational nurses.

An Occupational Health Service in the Cook Islands could also provide support to the workers' compensation system as well as advising on prevention. In addition to providing technical advice to INTAFF, the services could be available to workplaces on a fee for service basis. A core staff could be employed full time, e.g. an occupational nurse, and a generalist OSH adviser, with more specialized professionals called in for short term contracts to undertake specific projects, e.g. an occupational hygienist to monitor particular hazardous substances exposures.

## Education and awareness

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Raising the awareness of everyone in the Cook Islands about OSH and their roles and responsibilities is a priority of the Government of the Cook Islands. A key aspect of the OSH National Project is the awareness raising campaign that has commenced. Upon completion of this campaign, INTAFF will evaluate its effectiveness and determine how awareness raising about OSH can continue, in consultation with NLAB.

As well as awareness, Cook Islanders need the skills and knowledge that underpin good OSH. INTAFF will consult and work with the Ministry of Education to investigate how OSH could be incorporated into education and training across all levels, including schools, technical and trade training.