



New Zealand Professional Firefighters Union

17 May 2023

The Manager, Accident Compensation Policy  
Ministry of Business, Innovation and Employment  
By email only to [ACregs@mbie.govt.nz](mailto:ACregs@mbie.govt.nz)

Dear Manager,

**NZPFU submission in response to review into the list of Schedule 2 occupational diseases**

1. We refer you to the MBIE Discussion Document seeking proposals for additions to the list of occupational diseases under the Accident Compensation Act 2001 to ensure fair access to cover for injuries cause by a gradual process, disease, or infection.
2. Please accept this correspondence as the New Zealand Professional Firefighters' Union's (the NZPFU) submission.
3. The NZPFU understands that this review is solely to consider the additions to the list of occupational diseases in Part 2 and is not to consider any changes to the legislative framework or provisions.
4. The NZPFU **does not** support firefighters' occupational cancers being included in the list of occupational diseases. It is widely accepted across international jurisdictions that the only effective mechanism for ensuring fair access to cover for firefighters' occupational cancer is a presumptive clause or specific legislation. Schedule 2 **does not** provide a presumption for the list of occupational diseases. The Act would need to be amended for Schedule 2 to operate as a presumption. The Act would need to be amended to provide any benefit or genuine path for firefighters to access cover as they would for any other work-related injury.
5. Our experience and recent case law demonstrates that inclusion in the Schedule 2 list of occupational diseases inclusion still requires investigation into the claim and by dint of that process having to provide evidence of exposure for causation to be accepted. For firefighters there is a requirement to submit an overview of their career, training, attendance at fires, location, era and uniform etc to prove exposure and causation.
6. The NZPFU urges that this review process is not used to recommend the addition of any recognised firefighters' occupational cancers to Schedule 2. To do so will cause firefighters a serious dis-service. Inclusion will not result in firefighters having fair access to cover for work-related illness.

7. Further inclusion in Schedule 2 will not be a stepping-stone for presumptive access to cover. Once included in Schedule 2 it is likely that Government will be of the belief it has dealt with firefighters' occupational cancer and presumptive legislation is not necessary.
8. The NZPFU respectfully and strongly submits that a specific presumptive clause is the only mechanism that will ensure firefighters can access their entitlements for occupational cancer and other illness. We strongly urge MBIE to refrain from recommending the inclusion of firefighters' occupational cancer in Schedule 2.
9. We would welcome an opportunity to work with MBIE, relevant Government representatives and FENZ to provide a presumptive mechanism to ensure fair and easy access for firefighters' work-related cancer.

### **Firefighters' occupational cancer**

10. The NZPFU represents almost every career firefighter employed by Fire and Emergency New Zealand of all ranks up to and including Senior Station Officer, trainers and fire investigators who are all regularly exposed to the toxins of a fire ground. Our membership also includes Commanders and Managers who have come up through the career firefighting ranks and continue to be exposed to the toxins of a fire ground.
11. The NZPFU overwhelmingly represents most career firefighters that are covered by ACC. FENZ volunteers are not covered by the legislation for their volunteer firefighting and therefore discussion regarding exposures to volunteer firefighters is not relevant to the review of Schedule 2. However, the NZPFU welcomes any opportunity to work with the MBIE and FENZ to ensure volunteer firefighters have access to cover and support when diagnosed with a firefighters' occupational cancer.
12. There is a plethora of toxins and carcinogens in every structure fire resulting due to building materials and furnishings and the increasing use of human-made fabrics and construction materials and plastics which include benzene, PAHs, dioxins, PFAS and PFOAs to name a few. Even fire retardants add to the deadly chemical cocktail. The toxicity of those chemicals as they combine upon combustion is not known. The firefighters are also exposed to car fires, chemical fires and other hazardous substances including asbestos.
13. Firefighters can never be fully protected as their firefighting uniform must breathe to avoid the firefighter suffering metabolic heat build-up. Firefighters exposed to smoke can inhale and absorb the carcinogens through their skin. Over the years the development of personal protection such as more effective uniform, the use of breathing apparatus and decontamination procedures has mitigated exposures, but the toxicity of fires has increased.
14. There is a wealth of credible international research that has repeatedly demonstrated that career firefighters have a significantly higher risk of contracting specific cancers due to the exposures on the incident ground. Firefighters should be able to access all usual entitlements for a workplace injury or illness for occupational cancer.

15. It is well established internationally that the mechanism to recognise firefighters' occupational cancer is a specific presumptive provision. It is necessary to apply a specific presumptive provision as firefighters are unable to meet the tests of causation or prove exposure as their workplace is dynamic and cannot be tested. A firefighter cannot categorically state which fires s/he was exposed to the specific carcinogens or what the level of exposure was.
16. We can provide for you a library of research into firefighters' occupational cancer if required. In the first instance we attach the Australian Senate 2011 Report into a Bill to provide presumptive legislation to recognise Australian Firefighters' occupational cancer and a NZPFU document which addresses the issue of causation and sets out the case for presumptive legislation.
17. Despite public statements to the contrary, the Corporation is not applying the Australian or Canadian models when considering New Zealand firefighters occupational claims. For example, a career firefighter in Australia or Canada with at least 15 years' service would be presumed to have occupational cancer if diagnosed with bladder cancer. In New Zealand they have to provide a history of their work as a career firefighter including location, uniform, equipment and types of fires. Even then they are often denied cover for cancers that are presumed elsewhere to be firefighter cancers.
18. In Australian and Canadian jurisdictions, the test is whether the firefighter has met the years of service corresponding to the relevant listed cancer in the list of occupational cancers. Their geography, uniform, equipment, or types of fires known during those years is not needed. The presumptive clause reflects the strong scientific evidence of the causal link to render any other clause unlikely but can be rebutted if another likely cause is identified such as genetics or a family predisposition to that cancer. There is now a list of 20 cancers accepted internationally as firefighter occupational cancers for the purposes of presumptive legislation.

### **Operation of the ACC legislative framework**

19. The claim in the MBIE discussion document that Schedule 2 provides a simpler pathway for cover does not accurately reflect the legislation, or how it is operated. The test still requires demonstration of exposure, and the legislation requires ACC investigation into the claim. That test and mandatory investigation undermines any claim that Schedule 2 operates on the basis that causation has been accepted.
20. Amendments to Section 30 are necessary to ensure Schedule 2 operates on the basis the causal connection of the disease and the occupational exposure is accepted, and that the onus is immediately transferred to the Corporation to prove otherwise.
21. Section 30(3)(b)(i) requires the employee to demonstrate that the disease listed in Schedule 2 was caused by exposure, or the prescribed level of exposure to the substances listed in relation to that disease, or to prove the exposure was a result of an occupation, industry or process described in that schedule. The onus remains with the employee to prove that exposure occurred and that it occurred because of the occupation or work task or process.

22. The requirement to prove exposure in accordance with section 30(3)(b)(i) is operated as a barrier to cover. There is no transparency as to legitimacy of the level of exposure applied and there does not appear to be any consistency. The requirement to prove exposure is in effect being used as a mechanism to prove causation.
23. Please see attached District Court decision ACR 203/21 *Joseph Wernham v ACC and Police* where an application was made under Schedule 2 for bladder cancer caused by exposures to aromatic amines through his work in collecting evidence in clan-labs over a 13-year career. The Toxicology Panel repeatedly found there was insufficient evidence to support cover and at times made extraordinary statements including that the cause may have been the deodorant he used. The Decision canvasses the tests required in detail and demonstrates that Schedule 2 does not operate on the basis that causation is accepted when diagnosed with a listed disease and can demonstrate exposure to the listed toxin. That case is an example of the years it can take to get cover at great cost to the applicant despite it being a claim for an occupational disease and identified exposure to the relevant toxin in accordance with Schedule 2.
24. Section 30(3A) further undermines any acceptance of causation and exposure through the mandatory investigation by the corporation of the claim in accordance with section 57.
25. The reversal of the onus of proof from the employee to the Corporation does not occur until after the section 57 investigation when section 60 may be applied to decline a claim.
26. Despite section 30(4) expressly providing a Schedule 2 occupational disease does not require an assessment of causation, the firefighter is still required to demonstrate exposure to a level that satisfies the Corporation.
27. All firefighter occupational cancer claims are investigated by the Corporations' Toxicology Panel which applies a Plausibility and Exposure index tool for firefighters' gradual process claims. We attach a copy of that "tool" to demonstrate the detailed tool applied before the panel recommends cover or does not recommend cover. The tool was devised by at least one member of the Panel and is not consistent with the scientific understanding of firefighters' occupational cancers. The information requested from FENZ contains irrelevant and unsubstantiated information. For example, there is not magic threshold of the number of fires attended necessary to determine causation. The geography of those fires or where the firefighter was employed is irrelevant. The development of uniform and breathing apparatus does not in itself demonstrate a greater or lesser risk as such a premise negates the impact on the increasing toxicity of fires including everyday residential fires.
28. The Toxicology Panel process does not reflect the science regarding the firefighters' exposures, it is used to delay decisions and causes the firefighter and their family stress in putting together irrelevant information when they should be concentrating on treatment and their precious remaining time. It is a drain on NZPFU resources who support the firefighter through the process to ensure the most comprehensive information can be provided regardless of whether the claim is made under Schedule 2 or Section 30, and then as many are rejected or deemed inconclusive, we again start the process or review an eventual decision. Without NZPFU support the firefighter and their family are unlikely to have the resources to provide the information being required by the Panel.

29. Rather than provide a simpler pathway, the Toxicology Panel process inserts another process that delays cover, is a mechanism for repeatedly delaying a decision on the basis of insufficient information, adds cost and stress to the firefighter having to provide exposure evidence which is not consistent with the scientific understanding of firefighters' occupational cancer.
30. The Panel has rejected firefighter occupational claims on a variety of reasons including in one instance that the firefighter ate red meat.
31. The Panel has been criticised for not applying the correct tests in accordance with section 30. Even where exposure is proven, the Toxicology Panel will not accept causation.
32. As an example, I refer to the attached Review Decision 6831684 Application by Stephen Tooley (attached) a firefighter of 25 years' service, diagnosed with leukaemia, had never smoked, had no relevant family medical history and no evidence of relevant genetics. The Panel refused to recommend cover denying a causal connection between his career firefighting. Had he been employed as a career firefighter in Australia or Canada his cancer would have been presumed to be an occupational illness. The criticisms of the Panel included:

*“Furthermore, the Panel designed their own test as to causation. The Panel did not employ the section 30 test but then applied a standard on the balance of probabilities, which is a legal concept, not a medical parameter. The Panel’s approach was to consider general premises and draw a conclusion to the individual case. This is called deduction. Section 30, however, employs the method of induction: a certain property or characteristic of a work task or a work environment is to be considered when assessing the cause or the causal contribution of that to the development of an injury or condition. Thus, the Panel applied the wrong test.*

*There was consensus among all specialists that CLL is a subtype of Leukaemia, which commonly occurs in the elderly. However, this circumstance by itself does not necessarily mean that CLL cannot occur in younger people. As pointed out by Dr Harman and the Panel, the cause of CLL is not known and the common assumption is that CLL occurs due to advanced age and a genetic predisposition. Although there is no scientific evidence for that. If there is no evidence that genetic predisposition and older age is responsible for the development of CLL, then it cannot be said that CLL can only be caused by genetics. Mr Tooley has no family history of cancer, and he was diagnosed at a young age. Thus, he does not fit the commonly accepted criteria for developing CLL.*

*Overall, the specialists’ opinions showed that firefighters are exposed to a significantly greater risk of developing cancers. Thus, it can be said that the third tier of the section 30 test is met in terms of a general risk to develop cancers.*

*I note that the Panel drew a comparison to atomic bomb survivors and wonder how this is comparable to the work of firefighters. It is not apparent how farmers who worked in the some sort of vicinity after an atomic bomb explosion compare to firefighters and whether the chemical combustion products of an atomic bomb explosion are comparable to the combustion products in house fires, car fires, rubbish bin fires, and electrical fires.*

*The Panel did not comment in this respect. I also do not accept the Panel's position that the significant exposure was comparable to cigarette smoke. The Panel did not provide references for such statement."*

33. In summary, section 30(3)(b)(i) and section 30(4) prevent Schedule 2 occupational diseases from operating as a presumption.

### **Work-related mental injury**

34. The Discussion document expressly excludes any consideration of work-related mental injury cover. Firefighters and 11 emergency call-centre dispatchers are repeatedly exposed to trauma because of their occupation. We would welcome an opportunity to work with MBIE and the Government to amend the current legislation to remedy the current barriers to cover.
35. The issues we would wish to cover are the current legislative barriers for cover for work-related mental injury as follows:
  - (a) Section 21B(1)(b) requires evidence to support the mental injury is caused by a single event. While this clause has been interpreted by the Court broadly, it requires amending to recognise the known cumulative effect of repeated exposed to trauma as a direct result of the occupation of firefighting or emergency call centre dispatching.
  - (b) Section 21B(5) and (6) is arguably a barrier to cover for work-related mental injury for 111 emergency call takers and dispatchers. Through their occupation they are exposed to trauma assisting victims, sometimes for long periods of time, until the emergency response arrives. There have been numerous situations where the dispatcher is not only the only person assisting but the last person to speak to the victim suffering on the other end of the telephone. The dispatcher is responding not just listening. The dispatcher is a front-line responder. Amendments are required to ensure those circumstances are not barred from cover.

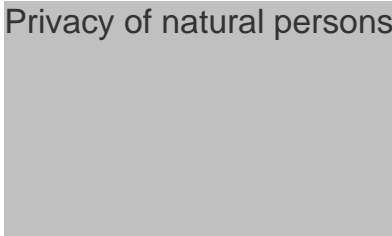
### **Conclusion**

36. The NZPFU **does not** support firefighters' occupational cancers being included in the list of occupational diseases.
37. The NZPFU respectfully and strongly submits that a specific presumptive clause is the only mechanism that will ensure firefighters can access their entitlements for occupational cancer and other illness. We strongly urge MBIE to refrain from recommending the inclusion of firefighters' occupational cancer in Schedule 2.
38. We welcome any opportunity to meet and work with FENZ, MBIE, and relevant Government officials and representatives to provide for a genuine presumption that will ensure fair access to cover for firefighters' occupational cancer, and fair recognition of work-related mental injury.

Please let us know if we can assist any further including providing any additional information.

Yours sincerely,

Privacy of natural persons

A large grey rectangular box redacting the signature of Ms Wattie Watson.

Ms Wattie Watson

National Secretary

NZPFU

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