

Health and Safety Reform Bill: A risk worth taking?

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The current Health and Safety in Employment Act 1992 (HSE Act) has shown that duty holders often struggle to determine what steps to take to meet their health and safety obligations.

They're also often not sure if they have done enough to meet their obligations. Often, this results in duty holders putting workers at risk by not doing enough, but it may also result in an over-cautious approach that increases the cost and burden of compliance unnecessarily.

Helpfully, the proposed new legislation will be accompanied by more detailed supporting regulations, codes of practice and guidance. Unlike the current set of regulations under the HSE Act, which are inconsistent, difficult to understand and piecemeal in their coverage, the proposed regulations should provide duty holders with better clarity and certainty on what practical steps they should take to create a safe and compliant workplace.

It is anticipated that 15 sets of regulations will be developed. Of these, three will be adapted from existing regulations under the HSE Act, 10 will be adapted from the Australian Model Law, and two will be developed anew (including regulations for geothermal operations). Seven of these are currently available to the public in draft form for consultation.

General Risk and Workplace Management Regulations

The key proposed regulation, relevant to all duty holders, will be the Health and Safety at Work (General Risk and Workplace Management) Regulations (General Risk Regulations). These regulations will prescribe a risk management process that duty holders may apply in order to meet their primary duty of care.

While the main focus of the General Risk Regulations will be on providing and maintaining safe working environments with safe systems of work, they also set out the minimum standards for workplaces in respect of:

- Providing information, training, instruction and supervision to workers, to ensure they know how to work safely
- The provision of general workplace facilities such as toilets, eating and rest areas, seating and lighting
- Providing first aid facilities
- Emergency planning
- The provision and use of personal protective equipment
- Managing the particular risks of remote or isolated work, hazardous atmospheres, falling objects, hazardous containers, loose but enclosed materials, and limited attendance child care centres
- The duties owed to young workers
- Monitoring of workplace conditions.

Though many of these minimum standards are provided for under the current regulations, the General Risk Regulations will set out a consolidated and common sense approach to determining what the minimum standard will be for the particular workplace.

Risk management under the General Risk Regulations

The hierarchy of control measures set out in regulations 5 to 8 of the General Risk Regulations illustrate the wider change between the current and proposed new health and safety regimes.

Risk management will change from being focused on hazards to being focused on risks – that is, the duty holder may no longer focus on merely identifying hazards but must take a wider approach and identify all of the risks that the hazard poses, and the steps that can be taken to eliminate or minimise these risks. In addition, the new Act does not allow for control measures that merely isolate a hazard.

The key qualifier under the new health and safety regime, and therefore risk management, will be 'reasonably practicable', which replaces the current HSE Act test of 'all practicable steps'. 'Reasonably practicable' was preferred by the government because it gives a better sense of what is expected of duty holders, by incorporating the concept of reasonableness based on a risk assessment and cost-benefit analysis.

Identification of risks

This requirement to identify hazards and the risks these may give rise to is the first step for duty holders, under regulation 5.

It is likely the Australian model guidance will also be followed in New Zealand (in line with the common sense approach of the new legislation), which provides a risk assessment is not necessary if:

- Legislation requires some hazards or risks to be controlled in a specific way
- An applicable code of practice or other guidance details how to control a hazard or risk and the duty holder chooses to follow this code or guidance or
- Well-known and effective controls are in use in the particular industry, and are applicable to the situation.

In this way, the new Act would require a risk management process to be completed in its entirety by the duty holder only in situations or for activities where the additional compliance cost has been determined to be outweighed by the benefits. If one of these three situations applies, the controls could simply be implemented and the risk assessment omitted.

Otherwise, the new Act and the General Risk Regulations will require a duty holder to consider the likelihood, as well as the extent of the risk that the hazard poses. If harm is more likely to occur, then it will be reasonable to expect more to be done to eliminate or minimise the risk.

The greater the degree of harm that could result from the hazard or risk, the more significant this factor will be when weighing up all matters to be taken into account and identifying what is reasonably required (i.e. what is reasonably practicable) in the circumstances. This means that if there is a risk of death or serious injury, then the duty holder will be expected to eliminate the risk (rather than minimise it).

The risk associated with the hazard will differ in the different localities/workplaces in which they arise.

Eliminating or minimising risks?

The next step, under regulation 6, is for duty holders to take risk-control measures to minimise risks to health and safety. Importantly, these control measures should not be taken if it is reasonably practicable to eliminate the hazard.

If it is reasonably practicable to eliminate the risk, this is the sole step that duty holders will be allowed to take and minimising the risk will not be sufficient to comply with their duties. This requirement will be mirrored in section 22 of the new Act.

For example, identifying a slipping hazard will no longer be sufficient. Duty holders must not only identify the slipping hazard but also consider the risks associated with the hazard and how these can be addressed.

Rather than cordoning off the slipping area, or alerting workers to take care around the area, the focus is on eliminating the risk, such as changing the flooring material to be non-slip. If an accident occurs and minimisation measures have been taken instead of elimination when the latter is reasonably practicable, duty holders will be considered to have failed in their duties.

Hierarchy of control measures

If it is not reasonably practicable to eliminate, regulation 6 of the General Risk Regulations sets out a hierarchy of control measures to minimise the risk, summarised as follows:

- Substituting (either wholly or in part) the hazard with an alternative giving rise to a lesser risk

- Isolating the hazard from the worker exposed to it (e.g. guarding of the machinery)
- Preventing contact with the hazard (e.g. presence sensing devices)
- Implementing engineering control measures (e.g. two handed controls and emergency stops).

If the preceding risk control measures do not sufficiently reduce the risk, duty holders must then minimise the remaining risk by:

- Implementing administrative controls (e.g. signage to warn of hazard)
- Providing and ensuring the use of suitable personal protective equipment.



Maintain and review control measures

Finally, under regulations 7 and 8, duty holders will be required to ensure the control measure implemented is effective and maintained. The duty holder must regularly review and revise control measures, particularly when monitoring demonstrates the measure is ineffective, or if a notifiable incident occurs. Review must also occur if there is a change in the workplace, engagement with workers indicating a review is necessary, or a review is requested by a health and safety representative.

Relevance of cost

Costs are only to be considered after taking into account the extent of the risk and the available ways of eliminating or minimising the risk. These factors assess what can be done and would ordinarily be expected to be done, if cost was not a consideration.

Only if the cost is 'grossly disproportionate' to the risk, taking into account the possible harm, and the extent to which it will be reduced, will the control measure possibly not be reasonably practicable to implement. For example, where there is a low likelihood of minor injury and the cost of risk control is high, this cost will not reasonably be incurred.

The verdict

The risk management process set out in the General Risk Regulations should make it easier for businesses and workers to understand and comply with health and safety duties. But the clear emphasis is to eliminate risks and hazards, not minimise them, so duty holders will have to show that if they do not implement a control measure that eliminates a risk, the cost of this was grossly disproportionate to the harm that might be caused. Therefore, where significant harm or death could result from the risk, in our view it will be very difficult to justify not eliminating the risk.

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