

Legal alert - Health and Safety Reform – Government releases exposure draft of Bill for public comment

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This alert highlights the principal elements of the Government's exposure draft of Part 2 (duties) and Part 3 (worker participation) of the proposed Health and Safety Reform Bill that was released yesterday. There is an opportunity to comment by **15 November 2013**.

Workplace Health And Safety Reform

In August 2013, the Government announced a package of reforms representing the most significant changes to our workplace health and safety system in 20 years. The reforms include replacing the Health and Safety in Employment Act 1992 (HSE Act) with a new Health and Safety at Work Act based on the Australian Model Law. These changes will be included in the Health and Safety Reform Bill which is to be introduced into Parliament this December.

In advance of this, the Government has released an exposure draft of Part 2 (duties) and Part 3 (worker participation) of the proposed Bill for public comment. The purpose of the exposure draft is to give an early indication of the key provisions of the new law and provide an initial opportunity to comment on the drafting of them before the select committee process. Feedback is due by **15 November 2013**.

Once introduced, the Bill will go through the select committee process, which will provide a further opportunity for public comment, including on broader issues relating to the underlying policy decisions.

An overview of the principal elements of the exposure draft is below.

Part 2 (duties)

PCBUs

Under the proposed new law, the primary duty for ensuring workplace health and safety falls on "a person conducting a business or undertaking" (PCBU). This is a broad concept, which is designed to capture all types of modern working relationships. There is no definition of "business" or "undertaking" in the proposed law and the Government has suggested that guidance similar to that issued by Safework Australia ([Interpretive guideline - Model Law](#)) will be needed to reflect New Zealand-specific circumstances and the New Zealand regulatory environment.

A PCBU must ensure, as far as is reasonably practicable, the health and safety of workers and others affected by the work. The equivalent qualifier in the HSE Act is "all practicable steps", and while the new "reasonably practicable" test may give a better sense of what is expected of duty-holders, the matters that are to be taken into account and weighed up are largely analogous.

The proposed new law also sets out particular duties for PCBUs who:

- Manage or control workplaces
- Manage or control fixtures, fittings or plants at workplaces, or

Design, manufacture, import, supply, or install plants, structures or substances that are to be (or could reasonably be expected to be) used as or within a workplace.

Officer liability

As previously indicated, the proposed new law will create a positive duty on "officers" of the PCBU to exercise due diligence to ensure that the PCBU complies with its duties or obligations under the Act. This is a significant change from the current law, where an individual would only be liable for the failure of a body corporate (as an employer and duty holder) to comply with the legislation if the individual participated in, contributed to, or acquiesced in that failure.

This new positive and personal duty will extend to directors, chief executives and other senior managers, and requires the officer to take reasonable steps to:

- Understand the PCBU's operations and associated hazards
- Ensure that the PCBU has, and implements, appropriate health and safety processes, and that these processes are sufficiently resourced and verified.

One issue that the Ministry has flagged for consideration is whether elected members of territorial authorities and potentially persons in other elected positions (for example, elected members of DHBs) should be specifically excluded from these due diligence duties. The Australian Model Law expressly excludes elected members of local authorities from the definition of "officer". As currently drafted, the proposed new law does not contain a similar exclusion.

The proposed new law has, however, adopted the exclusion for volunteers. A volunteer is anyone acting on a voluntary basis who receives only out-of-pocket expenses (for example, members of a school board of trustees or officers of a sports club). Unincorporated associations are also excluded from prosecution, although any professional officer of the association would still have a due diligence duty.

Offences

The proposed new law will introduce a tiered penalty regime with a significant increase in the maximum liability levels over the current law (the most serious offending has a maximum penalty of \$3,000,000 for a body corporate, and \$600,000 or five years imprisonment (or both) for an individual). This is seen as an important change and deterrent, with more serious sanctions reflecting the importance of workplace safety. It is intended that the use of graduated categories of offences and penalties will provide better guidance to the Courts about appropriate fine levels.

Part 3 (worker participation)

Worker participation and health and safety representatives

Part 3 of the proposed new law sets out the general duty on PCBUs to consult with workers on health and safety matters. It provides details as to the nature of consultation required, and particular circumstances in which consultation is required (eg when making decisions about the adequacy of facilities for the welfare of workers, and when proposing changes that may affect the health and safety of workers). While the duty of consultation is not new, the broad definition of "worker" (which includes contractors, subcontractors and their employees (among others)) means that the scope of the required consultation will be wider.

Under the proposed new law, all PCBUs are required to have worker participation practices that provide reasonable opportunities to participate effectively in improving work health and safety in the business or undertaking, on an on-going basis. This is a change from the current law where employee participation systems are required only where there are 30 or more employees or where an employee or union has requested it. A PCBU will be treated as complying with this requirement if, in respect to the workplace, there is an elected health and safety representative, or a health and safety committee has been established.

Part 3 also sets out the procedure for electing health and safety representatives, their functions and powers, and the obligations of PCBUs. Health and safety representatives may request information from the PCBU and are empowered to issue provisional improvement notices (provided that the representative has completed the necessary training). A provisional improvement notice must be complied with, unless a request is made for a review by the inspector in which case the notice may be confirmed, modified or cancelled.

Worker protections

The current right of employees to refuse to perform work that is likely to cause them serious harm is extended under the proposed new law to include all workers, and to allow workers to refuse to carry out work that may expose another person to a serious health and safety risk.

There are also new protections for workers who are discriminated against in relation to health and safety matters.

We will continue to update you on the health and safety reforms. If you have any specific questions or would like assistance in preparing your comments on the exposure draft, please contact one of our experts below.

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