

Legal update - Health and Safety Reform Bill: Recommended changes

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On 24 July 2015, the Transport and Industrial Relations Select Committee (the Committee) provided its long-awaited report on the Health and Safety Reform Bill (the Bill). By majority, it recommended a large number of changes to the Bill as originally proposed. In this update, we summarise three significant changes recommended by the Committee. These are:

- The duty of due diligence being restricted to directors, partners, and those with "*significant influence*" in the management of a business or undertaking
- The creation of exceptions in relation to health and safety representatives and committees for PCBUs (a person conducting a business or undertaking) in low-risk sectors with less than 20 workers
- A distinction between 'volunteer workers' and other volunteers.

Due diligence

Recommended changes

The Bill sets out a due diligence duty for 'officers'. Amongst other things, this will require officers to take reasonable steps to learn about work health and safety, to ensure that they understand the hazards and risks associated with their PCBU, and to ensure that their PCBU has processes in place for complying with its health and safety obligations.

Originally, any person that made decisions affecting the whole or a substantial part of a PCBU's business came within the definition of 'officer', and therefore would have been obliged to exercise due diligence. The Committee recommended narrowing this definition to directors, partners, and "*any other person occupying a position in relation to the business or undertaking that allows the person to exercise significant influence over the management of the business or undertaking (for example, a chief executive)*". It also recommended expressly excluding from the definition of 'officer' any person who simply advises or makes recommendations to officers.

Opposition and comment

Labour has expressed concern about this recommendation. In its view, limiting the due diligence obligation in this way runs counter to evidence that senior management leadership is critical to achieving positive health and safety outcomes. The Greens also consider that this change would mean that people advising decision-makers will not be obliged to acquire and maintain health and safety knowledge.

The recommended change to the officer definition is significant. However, if this change is enacted, a person who works for a PCBU in any capacity will still have health and safety duties. These will include an obligation to take reasonable care to ensure that the person's acts or omissions do not adversely affect the health and safety of other persons (which may include acquiring knowledge about health and safety). People who act negligently with regard to health and safety while at work will be in breach of their duty, whether or not they are officers.

Also, for workers who are not officers but are involved in management, 'due diligence' provides a helpful framework within which to operate to ensure that they are taking reasonable care, even though legally the concepts are distinct.

Health and safety representatives and committees

Recommended changes

The Bill proposes requiring PCBUs to hold an election for a health and safety representative, where notified by a worker that an

election is required (a PCBU may also conduct an election at its own initiative). Also, a health and safety representative or workers may request that a PCBU establish a health and safety committee. These requirements are part of new provisions aimed at enabling greater worker participation in health and safety.

The Committee considered that there was a need for greater flexibility and simplicity in relation to worker participation, particularly for "*smaller, low-risk businesses*". On that basis, the Committee recommended exempting PCBUs with fewer than 20 workers and which are not in a "*high-risk sector or industry*" from the requirement to initiate an election for a health and safety representative. The sectors or industries which are 'high-risk' would be specified by regulation, as no definition is provided in the Bill (a low-risk PCBU would therefore appear to be any PCBU which is not specified as high-risk).

Such PCBUs would also be exempt from a proposed new duty to decide whether to establish a health and safety committee, after receiving a request that one be established. Originally, the Bill would have required PCBUs to establish a health and safety committee within two months of receiving a request. However, the Committee has recommended that, for PCBUs with 20 workers or more, or PCBUs in a high-risk sector or industry, the requirement to establish a health and safety committee be replaced with:

- A requirement to consider whether to establish one
- The power to refuse to establish a health and safety committee, if the PCBU considers that its existing practices meet a separate, stand-alone duty in the Bill to have worker participation practices (ie practices which give the PCBU's workers reasonable opportunities to participate effectively in improving work health and safety).

Opposition and comment

Both Labour and the Greens oppose these recommended changes. According to Labour, the changes to the provisions on health and safety representatives would exclude a large number of people from access to "*one of the most effective ways they can make themselves safer at work*".

If the changes do proceed, all PCBUs will continue to be subject to a stand-alone duty to engage with workers on health and safety, as well as being required to have worker participation practices as referred to above. The duty to engage will include a requirement to share relevant information about any work health and safety matter with directly affected workers in a timely manner, and a requirement to allow workers a reasonable opportunity to express their views and to contribute to the decision-making process on the matter.

It is the case however that, under the Committee's recommended amendments, workers who do not have a health and safety representative or committee will not have the benefit of the specific functions and powers set out in the Bill for these representatives and committees. There is also evidence that collective worker participation (including through health and safety representatives) has positive effects on work health and safety, while other research suggests that employees engaging on an individual basis with managers has little effect on health and safety outcomes at work.

Volunteers

Recommended changes

The Committee has also recommended changes to the Bill's provisions on volunteers (not opposed by the minority).

Under these changes, a 'volunteer worker' (a person who works on an ongoing and regular basis for a PCBU with its knowledge or consent, and who is integral to the business or undertaking) would be included in the Bill's definition of 'worker'. As a worker, the relevant PCBU would be obliged, so far as is reasonably practicable, to ensure the volunteer's health and safety at work.

Under the Committee's recommendations, such volunteer workers would be expressly excluded from the Bill's provisions on worker engagement (eg the duty of PCBUs to engage with workers on health and safety matters).

Also, the proposed definition of 'volunteer worker' does not include a volunteer:

- Fundraising
- Assisting an educational institute, a sports club, or a recreation club with sport or recreation
- Assisting an educational institute with activities that take place outside the institute's premises or
- Caring for another person in the volunteer's home.

According to the Committee, these recommended changes are intended to maintain the distinction made between casual volunteers and employees in the current health and safety legislation.

Comment

It is unclear what practical effect these recommended changes will have. PCBUs will still be obliged to ensure, so far as is

reasonably practicable, that the health and safety of volunteers who are not 'volunteer workers' are not put at risk from work carried out as part of the PCBU's business or undertaking.

Other changes

The Committee recommended many other changes to the Bill as originally proposed. These include changes to:

- The definitions of "worker", "workplace", "notifiable injury or illness", "notifiable incident", and "notifiable event"
- Obligations where several duty holders exist in relation to the same matter
- The liability of office holders including members of a local authority or board of trustees
- Provisions on work groups (i.e. groups of workers, represented by health and safety representatives)
- Private prosecutions
- Limitation periods for prosecutions
- Fines for regulatory offences.

We can assist with any queries you have about these changes, or the changes summarised above. Note also that further amendments may be made before the Bill is enacted, which we'll cover in future updates.

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