PSA

Submission to the Transport and Industrial Relations Select Committee

On the

Health and Safety Reform Bill

For a better working life
New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

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Introduction

Who we are

The New Zealand Public Service Association *Te Pūkenga Here Tikanga Mahi* (the PSA) is the largest trade union in New Zealand with over 58,000 members. We are a democratic organisation representing members in the public service, and the wider state sector (the district health boards, crown research institutes and other crown entities, state owned enterprises and tertiary education institutions). We also have several thousand members in non-governmental organisations working in the health, social services and community sectors, and in local government.

Our interest in this bill arises from

Our interest in this bill arises from our role as a union on behalf of all members who face health and safety risks in their workplaces. The main hazards our members have to deal with tend to be those arising from dealing with the public, often in enforcement roles. Workplace violence is a big problem, along with workplace bullying. In addition we have pockets of members who face particular hazards such as those working with hazardous substances in crown research institutes, those (such as customs officers and biosecurity officers) who work with fumigants on the wharves and meat inspectors in our freezing works who are exposed to many of the same hazards as meat workers.

We also represent some of the public servants who will be most heavily involved in the implementation of this legislation once it is passed. We are the union for staff in WorkSafe New Zealand, including the Health and Safety Inspectorate, and we have members in other affected agencies such as the Civil Aviation Authority, the New Zealand Transport Agency, Maritime New Zealand and ACC. As the largest state sector union we also have an interest in the machinery of government and in the regulatory framework being established under this bill.

In developing this submission we sought the views of

In developing this submission we sought the views of our members in those agencies, and also from our network of nearly one thousand health and safety representatives.

The PSA is an affiliate of the New Zealand Council of Trade Unions *Te Kauae Kaimahi* (the CTU) and endorses their submission.

General comments

We welcome the introduction of the Bill

The PSA welcomes the introduction of the Health and Safety Reform Bill and the overall push by the Government to reform our workplace health and safety system. In the wake of the tragedy at Pike River and the subsequent report of the Royal Commission and the Report of the Independent Taskforce on Workplace Health and Safety, the Government is to be commended for responding with a comprehensive set of reforms.

Systemic failure

The Taskforce identified the following list of systemic failures:

- Confusing regulation
- Weak regulator (DOL)
- Inadequate leadership
- Poor worker engagement/representation
- Inadequate penalties and incentives
- A risk tolerant culture - "She'll be right"
- Hidden occupational health issues
- Poor oversight of major hazard facilities
- Compliance issues for small businesses
- Very poor data and measurement

And went on to conclude:

> *The Taskforce has found there is no single critical factor behind our poor health and safety record. Rather, our workplace health and safety system has a number of significant weaknesses that need to be addressed if we are to achieve the major step-change in performance that we as a nation should demand. Regrettably, there is no silver bullet and a piecemeal approach will not suffice. To the contrary, it is our firm conviction that the Government must adopt the full range of recommendations made in this report if we are to deliver the outcomes that all working New Zealanders deserve*[1].

The Taskforce presented a comprehensive set of recommendations, most which the Government has adopted in its policy response *Working Safer: a blueprint for health and safety at work.* One of the more important was the

[1] The Report of the Independent Taskforce on Workplace Health and Safety, April 2013, Chair's foreword p.4

recommendation to reform our health and safety legislation based on the Australian Model Law, and this is what the Health and Safety Reform Bill sets out to do.

We welcome the emphasis on govt. leadership

As the largest public sector union, the PSA was very pleased to note three policy decisions from *Working Safer*: exploring the use of government procurement processes to encourage better compliance by business; giving greater guidance and support to government agencies that operate in high-hazard areas; and using the government's leadership role to set an example in health and safety at work. We have already begun discussions with the State Services Commission, and with individual agencies (including WorkSafe New Zealand) about the government as a leader in health and safety.

We are also pleased to see the decision in the Health and Safety Reform Bill to bind the Crown, which is not currently bound by the Health and Safety in Employment Act 1992.

There are significant problems with the Bill

While the Bill is based on the Australian Model Law, and is comprehensive, there are a large number of problems with it. Some of these arise because we have better provisions than the Australians in some areas. For example, many aspects of the worker participation regime in the Health and Safety in Employment Act are superior to Australia's. Some arise because the Government is reluctant to go as far as the Australians, for example on rights of access for workplace health and safety permit-holders. Others arise because the Australian solutions don't necessarily fit the New Zealand employment context, for example the concept of "good faith" does not exist in Australian employment law.

We have concerns over worker participation

We have particular concerns about in worker participation and representation. Our members should have an effective voice in ensuring their own health and safety in the workplace but while many of the changes represent an improvement in what we have current, there is a real risk that overall we will end up with a worse system than we have at present. We identify what our concerns are in this submission.

We have recommendations on enforcement

The other significant area we address is enforcement. We are the union for the staff at WorkSafe New Zealand, including the health and safety inspectors. Our comments on the enforcement provisions are largely driven by their experience and suggestions for how the enforcement provisions in

the Bill could be improved so that they can do their job better in creating safer workplaces across New Zealand.

Domestic violence needs to be covered

Finally, we use the opportunity of making this submission on the Health and Safety Reform Bill to raise the issue of domestic violence and its impact on the workplace. This is a much wider matter than a workplace health and safety issue, but it does have implications for workplace health and safety, which we address in this submission.

We welcome the opportunity to make this submission and look forward to being heard by the select committee.

Part 1 Health and Safety at Work

Subpart 1 Preliminary provisions

Cl.3 Purpose

The PSA generally supports the purpose of the Act as set out in cl.3, particularly cl.3(2), which refers to the principle that workers and other persons should be given the highest level of protection against harm. However, we have some reservations and make the following recommendations:

- cl.3(1) refers to "a balanced framework". We acknowledge that this wording is derived from the Australian Model Law but it is not clear what it means and what must be weighed up to determine "balance". We recommend that the words "a balanced framework to secure" be deleted from cl.3(1)
- cl.3(1)(a) should be amended to read:
  protecting workers and other persons against harm to their health, safety, and welfare by eliminating <u>risks at source</u> or minimising risks arising from work <u>or in the course of work</u> or from prescribed high-risk plant <u>or substances</u>;
  The rationale for these changes is set out below this list of bullet points.
- Cl.3(1)(c) should also be amended along the lines of the Victorian OHS law, to read:
  providing for the involvement of workers, employers, unions and employer organisations, in the formulation and implementation of health and safety and welfare standards
  We believe that the use of the terms "involvement" and "formulation and implementation" better reflect a tripartite model than the proposed wording in cl.3(1)(c)
- Similarly we wish to retain s.5(f) as it refers to the good faith obligations in the workplace, which are central to New Zealand's employment laws. A new sub-clause would therefore read:

recognising that successful management of health and safety issues is best achieved through good faith co-operation in the place of work and, in particular, through the input of the persons doing the work

The recommendation to include the words "risks at source" and "substances" in cl.3(1)(a) is based on the wording from the object of the Victorian OHS Act, which talks about the need to "eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work". We think this makes it clear upfront that the obligation is to control risks and hazards at source, which then helps shape what is 'reasonably practicable'. The Victorian law also includes the reference to "substances" which we think makes for a more comprehensive purpose.

Domestic violence

The recommendation to include the words "or in the course of work" in cl.3(1)(a) is based on the need to ensure our workplace health and safety legislation can respond to issues such as domestic violence that might arise outside of work but manifest themselves at work. At the moment cl.3(1)(a) refers to "minimising risks arising *from* work", which could exclude hazards and risks, such as when an abusive partner shows up at work.

The PSA has recently been involved in the development of two pieces of research that demonstrate the extent of the problem. We circulated a survey by a Master's student from Auckland in support of her thesis on domestic violence in the workplace. It went to 10,000 members and the key results of her research, reported in March, were as follows:

Domestic violence affected the ability to get to work for 38% of participants, with 62% reporting that physical injury or restraint was responsible for their difficulties and 65% reporting that concerns over childcare were responsible. Over half (53%) of participants in paid employment reported that they needed to take time off from work because of the abuse. Most participants reported that the domestic violence impacted on their work performance by either making them late for work (84%) or making them distracted, tired or unwell (16%). Slightly more than half of participants (53%) did not disclose their abuse to anyone in their workplace, with privacy and shame being the most commonly cited reasons (92%)[2].

These are significant results and suggest that this is a major problem for women workers in New Zealand. Our health and safety legislation needs to

[2] Margaret Michelle Rayner-Thomas *The Impacts of Domestic Violence on Workers and the Workplace,* Thesis submitted in partial fulfilment of the requirements for the degree of Master of Public Health (MPH), The University of Auckland, 2013. p.ii

ensure that domestic violence is treated as a workplace hazard when it manifests itself in the workplace. We also address this issue under cl.12 with regard to the definition of 'hazard'.

Cl.5 Application of Act to the Crown

Subpart 2 Application of Act

The PSA strongly supports cl.5 that concerns the application of the Act to the Crown. It is hugely important that the country's health and safety legislation should bind the Crown, particularly if the Government envisages the state to be a leader in health and safety practice.

Cl.12 new definitions to reflect domestic violence

Subpart 3 Interpretation

We propose that cl.12 be amended to reflect that domestic violence is a workplace hazard to be managed by the employer.

We recommend that cl.12 be amended by inserting, in their appropriate alphabetical order:

> ***domestic violence*** *has the meaning given to it in section 2 of the Domestic Violence Act 1995*
> ***domestic violence document*** *has the meaning given to it in section 2 of the Domestic Violence Act 1995*
> ***victim of domestic violence*** *has the meaning given to it in section 5(2A)(b) of the Domestic Violence Act 1995.*

We recommend that the definition of "hazard" be amended by the insertion of a new (c) to read:

> *(c) for the avoidance of doubt, a hazard includes a situation in which a person's behaviour—*
> *(i) stems from being a victim of domestic violence or from being the person who inflicted the domestic violence referred to in the victim's domestic violence document; and*
> *(ii) is an actual or potential cause or source of harm, to the person or another person, within a place of work or outside a place of work.*

Cl.12 Definition of harm

We wish to retain the definition of 'harm' from the Health and Safety in Employment Act. The Health and Safety Reform Bill uses the term "death, injury or illness" in its place. On its face this amounts to a narrowing of the test and the loss of the reference to "mental harm caused by work-related stress" is of particular concern. Work-related stress is one of the main issues for PSA members and there was considerable debate at the time it was introduced. We do not want to lose this.

We recommend that c.12 be amended by insertion of the following definition:

***Harm** means illness, injury or both and includes physical and mental harm caused by work-related stress*

Cl.12 Definition of officer

One of the more important provisions in the Bill is the duty of due diligence on officers at cl.39. The PSA strongly supports this new duty but much depends upon who it applies to and we believe that the general approach taken by the Australian Model Law should apply here.

(b) in the definition of officer in the Bill has eliminated any reference to anyone who "participates" in making decisions that affect the whole or part of the business of a PCBU, leaving only the decision makers – i.e. the chief executives and directors. The exposure draft included this, which was an attempt to reflect the more comprehensive approach in the Model Law. This excludes others who have influence, such as human resources managers and chief financial officers who should probably be caught by the duty. The PSA therefore recommends that the definition of officer should include persons who participate in the making of decisions that affect the whole or a substantial part of the business of the PCBU, and that this should be framed in such a way as to not discourage worker engagement or participation.

Given that the Act will bind the Crown the PSA considers that the definition of "officer" should include wording based on s.247 of the Australian Model Law, by inserting a new (c) in the definition in cl.12 to read:

includes a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking of the Crown

A similar provision for an officer of a public authority exists at s.252 of the Australian Model Law and a new (d) should be inserted to read:

Includes a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking of a public authority

Definition excludes Minister of the Crown

The PSA notes that the definition of officer excludes, at (c), a Minister of the Crown. This is a difficult issue because decisions of Ministers can clearly have an impact on the health and safety outcomes within government agencies. For example, government decisions on public expenditure have led to increased workloads and also fatigue and staffing challenges for many

of our members. Groups like bailiffs and labour inspectors report having to drive longer distances to carry out their duties because regional offices have closed and/or because overnight stays are discouraged. This results in both fatigue and longer time on the road. Other members report that potentially risky home visits that used to require double staffing may now only involve one staff member.

We note that Johnstone and Tooma, writing about the exclusion of Ministers from the definition of officer, have been very critical:

> *In the case of the public sector, the highest level of leadership is quarantined from the duty for purely cynical political reasons. The exclusion of government ministers from the definition of an 'officer' in s 257 of the Model Act creates a misalignment of accountabilities, pitting public servants against their ministers. The filtering out of bad news for political purposes is likely to be a thing of the past as senior public servants will expressly put their ministers on notice of work health and safety matters in an effort to protect their own personal liability. In extreme cases, senior public servants are likely to refuse instructions or resign from their positions in protest.*
>
> *From a public policy perspective, the decision to exclude ministers from liability under the Model Act is difficult to defend. Ministers are at the apex of the hierarchy of their department. Their decisions directly impact upon work health and safety. Their leadership can be felt on health and safety matters as much as any corporate leader's can*[3]*.*

While the PSA is sympathetic to this view we are concerned at the potential constitutional implications of just broadening the definition and making Ministers liable. It raises issues about the relationship between the Minister and the chief executive of a department, and could act as a disincentive for people to put themselves forward as Ministers.

On the other hand Johnstone and Tooma make a fair point about the pressure the exclusion puts on chief executives who, in extreme situations, may be forced to resign should their advice on a decision with health and safety implications be rejected by a Minister. The CE is exposed as an officer under the Bill but the Minister is protected.

The PSA thinks that the appropriate solution is to treat Ministers of the Crown the same as elected members of local authorities and members of

[3] Richard Johnstone and Michael Tooma, *Work Health and Safety Regulation in Australia: The Model Act*, 2012 para.134

school boards of trustees (see cl.47). These remain defined as officers but are not considered to have committed an offence under cl. 42, 43, or 44 – they are not considered liable. This means that a Minister could be exposed in the "court of public opinion" but not face the same financial or custodial consequences as other officers. It may also help balance the relationship between the Minister and the CE where, under the proposal, all the risk falls on the CE.

Cl.13 Meaning of PCBU and cl.14 Meaning of worker

The PSA strongly supports the introduction of the concept of a "person conducting a business or undertaking" (PCBU) and the broadening of scope from "employee" to "worker". The challenges of the modern workplace mean that we have to look beyond the traditional employer/employee relationship to ensure that all who engage or employ workers owe health and safety duties to those who work for them, and that all those who undertake work are protected regardless of the legal relationship with those who engage or employ them. Although this is a major step forward there are some significant problems.

Cl.14(1)

cl.14(1) contains a statement of qualification on the meaning of worker. It states that a worker means a person who carries out work for a PCBU "unless the context otherwise requires". No such qualification exists in the Australian Model Law and it is unclear what is intended. We recommend that it be deleted.

Cl.13,14,15 exemptions from duties for home occupiers

Cl.13(1)(b)(iii) attempts to recreate the existing exemption from health and safety duties for home occupiers in relation to residential work. However, as framed in the Bill, the exclusion causes significant difficulties.

The definition of worker in cl 14(1) as "a person who carries out work in any capacity for a PCBU" means that those employed or engaged to carry out domestic work for the occupier of a home will not be workers for the purpose of the Bill.

As a result of these exclusions, a home will not be a workplace since this is defined in cl 15(1) as "a place where work is carried out for a business or undertaking" and "includes any place where a worker goes or is likely to be, while at work."

Domestic workers, including the thousands of home support workers who provide essential services supporting the elderly and people with disabilities to live in their own home, will therefore not have the full protections of the

Act. These workers are already poorly paid and exploited and this exclusion seems perverse.

Government policy on promoting the enhanced individualised funding model being rolled out regionally in relation to disability support, which allows disabled people to directly employ their carers[4] will make this situation worse. Given the exclusion in the Bill, disabled persons may believe (notwithstanding their common law employment obligations) that they are not responsible for ensuring that their employees have access to the same protections as their colleagues working in residential services.

We note that there is no similar exemption for residential work in the Australian Model Law.

Cl.16 Meaning of supply

The PSA supports the recommendation of the CTU that rather than a blanket exemption it would be better to decide which duties are deemed too onerous for home occupiers to comply with and exempt them from these specifically.

Cl.17 Meaning of reasonably practicable

We are concerned that there is a gap in both the Australian Model Law and proposed Bill in that services, such as information technology are not caught by the definition of supply. As shown by Novopay and other high profile failures, the provision of inadequate services can have significant consequences which potentially have adverse health and safety outcomes. Accordingly we recommend that the meaning of supply should include the supply of services.

The PSA supports the move to a "reasonably practicable" test from the current "all practicable steps". We think that the wording of this in cl.17 is clear and will prove helpful. It is also close enough to the current test to enable current case law to remain relevant.

However, if the intention is to ensure that the cost of remedying a risk can only be considered when it is grossly disproportionate to the benefit, then (e) as it is currently written does not convey this meaning - in other words it has a lower threshold because it is part of the list of relevant factors and whether the costs are 'grossly disproportionate' is only one consideration. This problem arises because of the word 'including' in the concluding part of the subsection which reads: "including whether the cost is grossly disproportionate". We also think that the calculation will be much easier for

[4] See http://www.health.govt.nz/your-health/services-and-support/disability-services/types-disability-support/new-model-supporting-disabled-people/enhanced-individualised-funding

the layperson if restricted to gross disproportion, rather than a PCBU being required to make the calculation following a finely tuned balancing of the degree of risk against the cost necessary to avert it. Accordingly we recommend that cl.17(e) should be amended by separating it out from the list of relevant matters to stand alone as clause 17(2) to read:

> *After assessing the extent of the risk and the available ways of eliminating or minimising the risk in 9(1) if the cost associated with the available ways of eliminating or minimising the risk is grossly disproportionate to the risk*

Cl.18 Meaning of notifiable injury or illness

There needs to be clarity about when injury and illnesses should be notified and the PSA is concerned that the reporting obligations in the HSE Act have been watered down by the definitions of notifiable injury or illness and notifiable incident in the Bill. We support a comprehensive reporting regime as this not only provides the Inspectorate with useful information but it can also have an educative effect on PCBUs and workers.

We recommend some specific changes to cl.18 *Meaning of notifiable injury or illness*:

- cl.18(b) – insert the words "would normally require" after the words "illness that" and delete the words "requires" and "immediate". We are concerned that incidents may occur where hospitalisation should take place but treatment is not sought. We are aware of the case involving members of the Rail and Maritime Transport Union at Kaimai tunnel who were exposed to carbon monoxide and experienced difficulty in breathing, headaches, blurry eyes and nausea but did not seek treatment
- c.18(c) – insert the words "would normally require" after the words "illness that" and change "48 hours" to "7 days". The arguments in favour of these changes are similar to the changes to cl.18(b)
- c.18(d) – delete the word "significant". It may not be possible to identify whether the work was a "significant" source of an infection.

'Serious harm'

We also question the loss of the term "serious harm" which was a feature of the Health and Safety in Employment Act and in the equivalent provision – s.25 'Recording and notification of accidents and serious harm'. Considerable work was done by the Department of Labour in 2008 over the redefinition of "Serious Harm", which defined it on three broad teams being "trauma injury", "acute illness or injury' or "chronic or serious occupational illness or injury". While the revised definition was quite detailed, it did provide clear and unambiguous definitions, while the proposed definition of what a "notifiable injury" is, is somewhat vague. It is foreseeable that some trauma injuries, acute injuries which are not immediately treated, and those

occupational diseases not specifically listed together with occupational caused mental illness will not be reportable. We are also concerned that the case law around this point may be lost, and the change in regime may encourage the courts to provide PCBUs with a "honeymoon period" to adjust to the new regulations.

If the definition of serious harm is not retained then consideration should be given to including a definition of the word "serious". While SafeWork Australia has provided some guidance materials there is a significant possibility of a honeymoon period of considerable time while some case law is established on exactly what a serious injury entails.

Cl.19 Meaning of notifiable incident

We recommend that the word "serious be deleted from cl.19(1) and that it be further amended to define an incident as one that "has, could or will expose" a worker to a serious risk from the incidents detailed. The clause as it is currently written could prevent many dangerous situations from being reported simply because there wasn't an immediate risk, while the course of the fire, explosion or other incident still merits the attention of the regulator. Similarly the use of term "serious" means that near misses are also likely to be reported.

Subpart 4 Key principles relating to duties

These principles are actually a mix of principles and duties and we believe that this subpart should be moved to *Part 2 Health and safety duties*.

Cl.22 Duty to manage risk

Cl.22 adopts the Australian approach on the duty to manage risk. The PSA considers the provisions of s.7 of the HSE on identification of hazards is stronger and clearer. The Australian approach means that there is no explicit duty on PCBUs to engage in a systematic and proactive process for the identification and controlling of hazards and risks, which may mislead a PCBU into believing that no such requirement for a systematic work health and safety management exists. We support the recommendation of the CTU that cl.22 be amended to retain this important function and endorse their proposed rewording.

Cl.27 Duty to consult other duty holders

Cl.27 concerns the duty to consult, co-operate and co-ordinate with other duty holders. This is an extremely important duty. It needs elaboration though – and one issue that has come up in Australia is that co-ordination and co-operation includes ensuring that hazards involved in the joint activities are addressed by a single co-ordinated systematic approach to health and safety management. The process for developing such an

approach would undoubtedly be enhanced by the provision the duty holders should be subject to express requirements to deal fairly with each other, not to mislead or deceive one another and to be active and constructive in discharging the duty.

We therefore support the recommendation of the CTU in this regard.

Cl.28 PCBU must not levy workers

We also support the amendments to cl.28(2) proposed by the CTU, which would ensure that a PCBU would be treated as having levied or charged any worker, and not just employees, if they require them to provide their own personal protective clothing or equipment.

Part 2 Health and Safety Duties

Subpart 1 Duties of persons conducting a business or undertaking

Cl.30 Primary duty of care

The PSA supports this primary duty on PCBUs in cl.30 but a question arises as to the relationship between the primary and further duties. The Australian Model Law and supporting regulations and guidance are silent on this relationship. Without that certainty there are risks that compliance with a further duty might be deemed to be compliance with a primary duty, or that breach of a further duty might be easier to prove than breach of a primary duty. We see value in distinguishing the duties in the supply chain and the important duty of the PCBU who manages or controls the workplace. We prefer the solution proposed in the 1st report of the National Review in Australia[5], which recommended that the Model Law should specifically provide that the primary duty should apply without limitation and in particular not be limited by the further duties. We therefore recommend that the primary duty of care should be expressed as applying "without limitation".

Cl.30 Application of primary duty to domestic violence

We have already raised the issue of dealing with domestic violence when it occurs in or around the workplace. It is important that this is caught by the primary duty but we are not sure if this is clear. It might be covered but we would ask the select committee to seek advice on whether an amendment is necessary to cl.30 to ensure that the primary duty of care encompasses an obligation to protect workers from behaviour that stems from being a victim of domestic violence or from being the person who inflicted the domestic violence.

[5] See Johnstone and Michael Tooma, para.91

Subpart 2 Duties of officers, workers, and other persons

Cl.39 Duty of officers

The PSA strongly supports the introduction of the duty of due diligence on officers under cl.39 of the Bill. We have some issues, which we have addressed above at cl.12 *Interpretation*

Cl.40 and 41 Duties of workers and others

The PSA strongly supports the duties on workers as they are set out in the Bill. Workers can only have limited ability to manage their own health and safety and the health and safety of others and this set of duties strikes an appropriate balance. The duties on other persons at a workplace are similarly well balanced.

Subpart 3 Offences relating to health and safety duties

Cl.42 Offence of reckless conduct in respect of H&S

Cl.42 sets outs the most serious offence under the Bill, that of "reckless conduct in respect of health safety duty". The PSA supports the intention here but our members in the Health and Safety Inspectorate believe, and we recommend, that in addition to reckless conduct, both grossly negligent and wilful conduct should be included. While the term "reckless" reflects the Australian Model Law, it is a considerably higher threshold than that for manslaughter.

We also disagree with the adequacy of the penalties under this provision. We note that the recent amendments to the Immigration Act provide for up to 7 years imprisonment for the exploitation of migrants, rather than 5 years under cl. 42(3) for injuring or killing them. Accordingly we support the recommendation of the CTU that the maximum term of imprisonment under cl.42 should be raised to 10 years.

We also disagree that these penalties should be only available for breaches of subparts 1 and 2 of this part of the Reform Bill, and we recommend that they should apply equally to breaches of any part of the Bill or regulations made under the subsequent Act.

The current legislation has two broad penalty ranges. While the new reform Bill nominally creates three broad penalty offences, it does in effect create a multitude of different penalties some of which for some lesser regulations amount to fines of little more than a few thousand dollars, which in many cases may well be significant below those that would be imposed by use of infringement notices. We also address issue this later in our discussion of cl.221(q).

Cl.43 Failing to comply with a

Again, in cl.43 we agree with the intention but believe that breaches of this section should carry a potential for imprisonment falling within Category

H&S duty that exposes individual to risk of death or serious injury

two of the Criminal Procedures Act, being up to 2 years. Cl.43(2) has no provision for any custodial sentence at the moment.

Cases will rarely be taken under cl.42 because the threshold is so high. Most will be taken under cl.43 and 44. Cases taken here will inevitably include those where death or serious injury has resulted but there is no custodial option for the courts.

Cl.44 Failing to comply with health and safety duty

We recommend that this provision applies to all parts of the Health and Safety Reform Bill and regulations, not just subparts 1 and 2 of this part of the Bill.

Once again we support the intention of this clause, which covers what are essentially technical failures, given that death or injury has not resulted, However, these technical failures can lead to injury, illness or death if not dealt with and so there also needs to be meaningful penalties here. We recommend that in addition to the maximum penalties that the penalty for continued breach be a fee for each day that the breach continues. Potential serial offenders would be much more inclined to comply with a notice if they knew that it was going to cost them for every additional day where they failed to comply.

Again we recommend that this provision applies to all parts of the Health and Safety Reform Bill and regulations, not just subparts 1 and 2 of this part of the Bill.

Subpart 4 Duties to notify notifiable event

Cl.52 Requirement to keep records

The PSA disagrees with the requirement to keep a record of just notifiable events for at least 5 years from the date of that event. The HSE Act requires a register of all accidents and near misses rather than notifiable events (the current equivalent is serious harm).

The current register of accidents and serious harm provides inspectors with one of most useful documents within any workplace for assessing the degree of compliance with legislation. At the same time it provides information about the typical types of injury within the workplace and their frequency. The absence of a register tells an inspector a lot about a business – it is hard for them to apply controls if they do not have the information about what is happening in a particular workplace.

This requirement is not detailed in the Australian Model Law, given that most of the Australian regulators are also the workplace insurers, and it is

under the accident insurance legislation that most Australian workplaces are required to maintain records of all accidents and near misses.

We recommend that the requirement to maintain an accident register in a prescribed form is carried over from the current Act into cl.52, that all accidents and near misses are recorded and that there be a requirement for the PCBU to investigate all accidents and near misses.

Cl.53 Duty to preserve sites

The duty to preserve a site is not a duty to ensure health and safety and therefore the qualification that the person with management or control of a workplace only needs to do this if it is "reasonably practicable" is unnecessary. It could well allow the cost of preserving the site to become a major consideration when deciding what steps must be taken.

We therefore propose that subclause 53(1), regarding the duty to preserve sites, be amended by deleting the words "so far as is reasonably practicable".

We disagree with subsection 53 (2)(b), which allows for the removal of a deceased person, and recommend its deletion, or if this subsection is to be retained that the authorisation of the Coroner be required.

The ability of the inspector to examine the deceased in situ can frequently form an important part of the initial enquiries into any fatal workplace accident. This is exactly the same concern that any homicide police officer would have if the victim was removed before they had chance to complete their enquiries and examinations. It may ultimately frustrate some enquiries if this section is allowed to remain in its current form.

Part 3 Engagement, worker participation and representation

General comment on worker participation

There is much research that demonstrates the importance of worker participation in delivering good health and safety outcomes.

Walters, in a paper prepared for the Engineering Printing and Manufacturing Union in support of their submission to the Royal Commission, reviewed a number of studies which looked at the effectiveness of worker participation based on proxy indicators and found that "generally they indicate that participatory workplace arrangements are

associated with improved OHS management practices, which, in turn, might be expected to lead to improved OHS performance outcomes."[6]

Walters concludes that:

The literature backs worker participation

> *… the weight of the evidence found in the international literature considering the effectiveness of worker representation on health and safety would seem to be in line with the idea that better health and safety outcomes are likely when employers manage OHS with representative worker participation and that, in various ways, joint arrangements, trade unions and worker representation on health and safety at the workplace are likely to be positively associated with such outcomes[7].*

Union involvement is important

It also appears from the literature review conducted by Walters[8], that union involvement can significantly improve the effectiveness of health and safety representatives through the provision of extensive and independent health and safety information, training and support for representatives to share their experiences and knowledge among themselves using union forums. Unions can also ensure that appropriate health and safety procedures are in place, even when the employer doesn't engage on health and safety matters.

The HSE Act as amended in 2002 introduced worker participation and health and safety representatives, giving them certain functions and powers including the right to advise workers to refuse to perform work that is likely to cause serious harm and to issue their employer a hazard notice. Employers of more than 30 staff are required to have an employee participation system negotiated with employees and any relevant union.

Walters identifies a number of factors that make things work better in worker and trade union representation on health and safety. These include:

- Effective training
- Management commitment to participative arrangements
- Good industrial relations factors
- A strong legislative steer
- Effective external inspection and control

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[6] Walters, David *The Role of Worker Representation in Managing Health and Safey: A report in support of the EPMU submission to the Royal Commission on the Pike River Coal Mine Tragedy*, p.11

[7] Ibid. p. 15

[8] Ibid. pp. 16-18

- Consultation and communication between worker representatives and their constituencies

We don't do well in worker participation

The conclusions of the Independent Taskforce on Workplace Health and Safety suggested that we were not doing well against these factors. It found that health and safety mechanisms are poorly implemented, if at all, or they are not fit for purpose given the increasing casualisation of the workforce. It identified a number of factors at play in this:

a. *there is limited support in the legislation for worker engagement, e.g. smaller firms are not required to have formal participation mechanisms such as health and safety representatives. Further, the law does not ensure that there is sufficient time for health and safety representatives to perform their functions*
b. *there is a lack of regulator enforcement of and guidance around the provisions, e.g. there are no ACoPs or support tools for small firms*
c. *employees often lack awareness of their rights and, if they are aware, fear reprisals if they exercise them*
d. *union density has fallen substantially, and there are increasing levels of unorganised, casual, contract and short-term labour in the workplace*
e. *many managers lack the awareness, motivation to engage and capabilities needed to respond effectively to workers raising health and safety issues*
f. *many businesses prioritise production targets over health and safety concerns*[9].

The Health and Safety Reform Bill represents a major opportunity to address the lack of a strong legislative steer. It can help assist issues of training, effective external inspection and control and the fear of reprisals. The Bill takes some important steps in the right direction but we are concerned that in moving to the Australian system of worker representation and participation we run the risk of losing many of the positive things from our current system, such as the default system from Schedule 1A of the HSE Act. We address these specific points below.

ERA amendments undermine good industrial relations

We also want to take the opportunity to point out to the Select Committee that at the same time as they are considering this Bill, Parliament is about to pass further amendments to the Employment Relations Act2000 that will undermine good industrial relations and weaken the role of unions, which are both factors that Walters identifies as being important for effective worker participation and representation in health and safety.

[9] The Report of the Taskforce, April 2013, para 98

The Act should contain key provisions

One point of principle that we want to address that this stage is the decision to relegate many of the more controversial aspects of the worker participation system to regulation. This means that submitters are not able to comment on, and the select committee is not able to consider, how the system of worker participation will work as a whole because important parts will be in regulation. We also draw the select committee's attention to the points made in the submission of the CTU, particularly the quote from the Legislative Advisory Council Guidelines which points out that issues of principle and policy should normally be debated in the politicised Parliamentary process surrounding the passage of primary legislation. It goes on to suggest that administrative policy matters might be able to be addressed in regulation but matters of controversy may be best addressed through the Parliamentary process where the likely public and political reaction can be tested.

We therefore support the recommendation of the CTU that controversial aspects of the worker participation framework currently proposed to be dealt with in regulation, should be set out in the primary legislation.

Industry health and safety representatives

We support industry HSRs

The PSA endorses the submission of the CTU on the establishment of regional health and safety centres and industry health and safety representatives. We know that there are major challenges in the modern workplace for worker participation, particularly in small enterprises, in de-unionised workplaces, in temporary or contract employment or for workers with English as a second language. Most of our members are in relatively stable workplaces with a strong union presence, however we recognise the problems that exist in the wider workforce.

A bolder solution is required than that proposed in the Bill and we support the recommendation of the CTU that regionally based Health and Safety Centres be introduced. These centres would be government-funded yet independent, and report to the Worksafe Board. The centres would employ Industry Health and Safety Representatives (IHSRs) who would be available to advise and mediate on health and safety issues in any workplace.

Submissions on this part

Cl.60 Outline of this part

The PSA does not see the point of cl.60, which merely lists provisions which are set out in this part of the Bill. It would be far more useful to have a purpose section based on the principles of worker participation developed by the Taskforce:

a. *the workplace rather than the employment relationship should be the focus for workplace health and safety systems – so all workers present in a workplace are covered by the system, including temporary, casual and contract workers*
b. *workers should actively participate in developing, implementing and monitoring the workplace health and safety system that is present in their workplace*
c. *all workers have a right to participate through an independent range of representation mechanisms of their own choosing, including workplace health and safety representatives, committees and unions where they are present in a workplace*
d. *workers should be encouraged to take active responsibility for their own actions and those of co-workers*
e. *workers should be provided with appropriate training, time, facilities and support to enable them to participate in the workplace health and safety system that is present in their workplace*[10].

Subpart 1 Engagement with workers and worker participation practices

Cl.61-63 Engagement with workers

Although we prefer the formulation from the HSE Act of "involving" workers and their unions in health and safety we are comfortable with the concept of "engagement". However, we think it inappropriate to qualify the duty on the PCBU to engage only "so far as is reasonably practicable" as the meaning in this context is different from cl.17. These words are not used in the equivalent provision in the Australian Model Law and should be deleted from cl.61(1).

Cl.62

We have argued earlier that there should be an overarching duty of good faith in this legislation to mirror the obligation in the Employment Relations Act 2000. We consider that cl.62, which is about the nature of engagement with workers should be subject to the duty of faith and it should be specifically referenced here.

Cl. 62

The evidence is also that health and safety representatives in unionised sites tend to be more effective. In fact health and safety representatives will be more effective when they know that they can call on advice and expertise as required. Where there are no health and safety representatives in a workplace, workers should be able access external advice as required. Accordingly we believe that cl.62 should include a requirement that workers be given reasonable opportunity to seek advice on the matter.

[10] Report of the Taskforce, para 264

Cl.62(2)

We also propose that the requirement in cl.62(2) to involve health and safety representatives in engagement on health and safety matters when the workers are represented by one, should extend to unions and health and safety committees.

Cl.64 Duty to have worker participation practices

The PSA agrees with the introduction of the concept of "worker participation practices". One of the weaknesses of the Australian Model Law is that there is no obligation on a PCBU to develop any kind of systematic approach to engaging with workers. There is only an obligation to have health and safety representatives if one or more workers ask for one, or a health and safety committee if 5 or more workers ask for one. We think it is a major omission under the Bill that If no-one asks nothing systematic need happen.

We think that cl.64(3) can be improved by including issues that may arise from the composition of the workforce. We recommend that the factors listed should include the composition of the workforce, including any issues of language, literacy or numeracy faced by the workers.

Subpart 2 Health and safety representatives

Cl.65 Request for health and safety representative

The HSE Act currently has provision for a default system of worker participation at s.19D for employers who have 30 or more employees, if they have not already put a health and safety system in place. The details are set out in schedule 1A of the Act and include an obligation to have health and safety representatives elected to represent the employees involved. By contrast cl.65 only provides for a health and safety representative to be elected if requested by a worker or at the initiative of the PCBU. This is a problem because it means that many workplaces will still not have a health and safety representative, or the representative will effectively operate as an arm of management.

The Act will need to be more prescriptive than this. The worker participation practices provisions in cl.64 is a start but it is not the whole solution. The solution may be developed in regulation but that is the wrong place for it. There should be more detail in the primary legislation and in the absence of anything better that should take the form of a default system, which will ensure the election of health and safety representatives in all workplaces above a certain size.

Cl.66-67 Determination of work groups

We note that cl.66-67 deal with the determination of work groups, a process which both the Taskforce and *Working Safer,* the Government's

policy statement, said was not necessary in the New Zealand context. The insertion of this provision is apparently because HSRs have stronger powers and it is necessary to make clear to which work group those powers can be applied – in other words to restrict the role of HSRs. Similarly the deputy HSR role has been created to make clear who covers in a work group when an HSR is away.

HSRs have to be elected by a constituency and we support the creation of 'designated work areas' for this purpose. This clearly suggests a degree of accountability back to those workers who elected the HSR, which we also agree with. However, we believe that restricting their role just to their work group is unnecessary and could put health and safety outcomes at risk. Pike River was an example of a situation where workers directly employed by the mine felt reluctant to challenge those employed by contractors and we have many other examples where having an HSR who can work across work groups or designated work areas is a real advantage. The system would also deal with the need to have deputies and enable HSRs to work collaboratively.

We recommend that instead of instituting formal work groups based on the Australian model, the Bill should build on the existing provisions of s.19C(5) which has a very simple and effective formulation for organising workers into groups for the purposes of representation:

> *A system may allow for more than 1 health and safety representative or health and safety committee and, in that case, each representative or committee may represent a particular type of work, or place of work of the employer, or another grouping.*

We also strongly recommend that health and safety representatives' powers must not be generally limited to their particular work group. Work groups should exist only for electoral purposes.

Cl.68 Requirements for conducting elections

Cl.68 simply states that an election for a health and safety representative must comply with the requirements prescribed in regulation. This pushes a potentially controversial issue off into secondary legislation when it is set out in primary legislation in both the Health and Safety in Employment Act and the Australian Model Law.

The PSA considers that it is important that the main requirements on the conduct of elections are set out in the Act, rather than legislation. We also consider that the provisions of cl.2(3) of schedule 1A of the Health and

Safety in Employment Act, which recognise the important role and valuable experience of unions in conducting workplace elections and running ballots. Unions regularly conduct elections for delegates and ballots on ratifying collective agreements. We therefore recommend that cl.68 should specify that elections are conducted by workers and their unions unless the workers ask that the PCBU or PCBUs facilitate the election.

We also consider it is imperative to remember that health and safety representatives are representatives of workers, not of the PCBU, and that their independence must be maintained.

In 2012 the CTU conducted an on-line survey of health and safety representatives, which provides a helpful insight into their experience of their role. There were over 1,100 responses to the survey, of which around 95 were from PSA members. The results of the survey suggest that independence and employer control of the election is an issue with 37% of representatives saying that they were appointed by their manager or employer without an election. For PSA representatives this figure was only 23.2%, which is likely to reflect the fact that these respondents were 100% union members compared to the overall group of whom 42.9% were not union members.

We therefore recommend that cl.68 should also contain restrictions on undue influence or attempted undue influence by the PCBU on the election.

Cl.69 Functions of health and safety representatives

Cl.69 sets out the functions of a health and safety representative, which differ considerably from the functions set out in s.2 of schedule 1A of the Health and Safety in Employment Act. We do not agree with the distinction in the Australian Model Law between the system-wide function of health and safety committees and the more individualised functions of health and safety representatives. The primary role of health and safety representatives under the Bill shifts from a general proactive function of representing workers to a more reactive one of representing workers in their workgroup. Many of the proactive functions have been allocated to health and safety committees.

Under the worker participation practices and worker engagement provisions of the Health and Safety Reform Bill, health and safety committees and health and safety representatives need not co-exist (which we do not agree with), and so it is important that each is able to work effectively in the absence of the other.

Accordingly we recommend that health and safety representatives should have system-wide and proactive functions included in cl.69, such as:

- to foster positive health and safety management practices in the place of work;
- to promote the interests of employees in a health and safety context generally; and
- to assist in developing any standards, rules, policies, or procedures relating to health and safety that are to be followed or complied with at the workplace.

Cl.70 Health and safety representatives may attend interview

Cl.70 empowers a health and safety representatives to attend interviews between inspectors or PCUBs and workers, both individually and collectively. The PSA supports this provision, which will provide useful support to workers who might be feeling nervous about the interview or traumatised by an event that they may have been involved in. It is also potentially useful for the representative to improve their understanding of a particular event or about the hazards and risks that exist in their workplace. However, we do not support the qualification in cl.70(2) that a representative may only attend an interview involving a group of workers if they represent that group and the group agrees. We have already addressed our concern about limiting the representative's role to their work group, and having additional requirement that the whole group must consent is creating an unnecessary barrier that may deny some workers representation.

If there is to be any qualification we would suggest Cl.70(2) should be based on the equivalent clause in the Model Law, s.68(2)(d), which empowers an HSR to attend an interview with a group of workers "with the consent of 1 or more workers in that group".

Cl.73 Health and safety representatives may be assisted by another person

Cl. 73 states that a health and safety representative may be assisted by another person and it is accompanied by a corresponding duty under cl.78(1)(h) for the PCBU to allow a person assisting the health and safety representative to have access to the workplace if that is necessary to enable the assistance to be provided.

This is an important provision because there are likely to be many situations in which representatives will need such assistance, whether it be technical, industrial or legal. It is not clear how these provisions interact with the access provisions under Part 4 of the Employment Relations Act, in

situations where the assistance is provided by a union official. Under that Act a union must seek and gain the consent of an employer before accessing a workplace (including for reasons relating to the health and safety of union members). Such consent must not be unreasonably withheld and if access is denied then reasons must be given in writing as soon as possible.

The Taskforce concluded that current arrangements for access were adequate and we did not need the mechanisms contained in the Australian Model Law such as workplace health and safety entry-permit holders[11]. If that is the case then we need to ensure that the provisions in the new Act align to those in existing legislation. We therefore recommend that the provisions of the Employment Relations Act 2000 requiring an employer to give reasons in writing for denying access to a union representative should be adopted to require a PCBU denying access to a person assisting a health and safety representative to also provide written reasons as soon as possible.

Another difficulty arises where the relationships are not covered by the Employment Relations Act 2000. Also, in health and safety matters a swift resolution is often required in order that health and safety is not compromised. To help deal with both these issues we recommend that c.71(6) of the Australian Model Law be included in the Bill:

> *If access is refused to a person assisting a health and safety representative under subsection (5), the health and safety representative may ask the regulator to appoint an inspector to assist in resolving the matter.*

Cl.76 Functions and powers of HSR limited to work group

Consistent with the points raised earlier about work groups the PSA believes that cl.76, confining the exercise of the functions and powers of the health and safety representative to the work group they represent, should be removed from the Bill.

Cl.77 Deputy HSRs

Given that the role of deputy health and safety representative exists because of the requirement to cover for a health and safety representative within their work group, we do not believe that there is a need for a deputy and propose that cl.77 be removed from the Bill.

[11] Report of the Taskforce para. 250

Cl.80 Requirement to allow HSRs to attend training

The results of the CTU survey of health and safety representatives indicated that representatives place high value on the training they receive, with 60% saying that further training would make them feel more confident in their role. An evaluation of health and safety representative training conducted by Research NZ in 2008[12] concluded that many health and safety representatives have been able to take the learnings from the training courses they have attended and apply them in their workplace. Comments in the survey were also supportive of the training delivered by the CTU.

Yet there are problems with the training regime. The CTU research indicates that:

- While a significant proportion (28%) have had training to level 3, 31.9% had only had training to level 1. (For PSA representatives the level 1 figure was 36.8%)
- 54% had not received any further training after receiving their initial training
- When asked how long since they had received their last training, 44.8% had not received training in the last two years and, within that 16.7% had not received training for more than four years
- Although 40% of representatives (33.3% of PSA representatives) received their first training from the union, employers, employer groups and others accounted for the rest
- The proportion who received their follow up training from a union slumped to 30.2% (26.2% of PSA representatives) while those receiving it from their employer increased from 19.7% to 33.4% (18.4% to 32.3% of PSA representatives). Other non-union providers also increased their proportion

These results suggest that many representatives are having to wait for additional training, including to levels 2 and 3 (which would be necessary for them to fulfil the full range of functions under the HSE Act). The proportion of representatives in the public sector who only have level 1 is even higher.

The sizeable role of the employer in the provision of training, which increases when additional training is undertaken, runs the risk that representatives are not receiving information that is independent of the employer, which Walters identifies as one of the strengths of union involvement. Once again public sector health and safety representatives are

[12] Research NZ *Health and Safety Representative Training Evaluation*, Presentation to Health and Safety Representatives workshop, 5 March 2008

less likely to receive union delivered training than health and safety representatives overall.

In light of these results the PSA is concerned about the lack of any concrete entitlements to training in the Bill and the absence of any right of the health and safety representative to choose their provider. The Health and Safety in Employment Act contain a basic entitlement of at least 2 days a year and the PSA recommends that this specific allowance be included in the cl.80. We further recommend that cl.80 be based on s.72 of the Australian Model Law as it sets out some fundamental obligations around health and safety training that belong in the Act rather than in regulation e.g. the right of the representative to attend training on full pay and their right to choose who provides the training.

Cl.81 & 82 Restrictions on use of functions, powers and information by HSRs

The Bill proposes, at cl.81 and 82, that the functions and powers of health and safety representatives, and any information obtained in the performance of their functions, can only be used for health and safety purposes. The PSA opposes these provisions because they betray a lack of trust in health and safety representatives when there has been no evidence of a problem, and there is no equivalent provision in the Australian Model Law. We therefore recommend that these provisions be removed from the Bill.

Cl.83 and 84 No duty on HSR and immunity of HSRs

The PSA strongly supports the provisions of cl.83 and 84 which state that nothing in the Act will impose a duty on health and safety representatives and that representatives have immunity from criminal and civil liability. The health and safety representative role is a difficult one and this basic protection is essential.

Cl.85 & 86 Regulator may remove HSR, and appeal against removal

On the other hand cl.85 and 86 which enable the regulator to remove a health and safety representative is a very wide and unnecessary provision. There has been no evidence in New Zealand of health and safety representatives abusing their position since the role was introduced in 2002. We therefore recommend that cl.81 and cl.82 be removed from the Bill. It is a serious matter to remove and elected representative, but if it is decided that some provision of this type is to remain then the following amendments should be made, which are based on the provisions of the Victorian OHS Act:

- The term “disqualification” be used rather than “removal”

- Rather than the regulator making the decision (which could result in the PCBU pressurising the regulator) the decision rests with the courts
- That the actions of the HSR have been taken with the intent to cause harm to the PCBU

Subpart 3 Health and safety committees

Cl.88-91 H&S committees

We strongly oppose changes proposed around health and safety committees. Under the Bill health and safety committees do not need to co-exist with health and safety representatives – they can be used as an alternative to health and safety representatives. They can be established at the behest of a PCBU, a health and safety representative or 5 or more workers. Clause 88 provides no process for how the workers and the PCBU come to an agreement for the constitution of the health and safety committee. There is no provision for committee members representing workers to be elected, they do not have a right to training nor do they have the powers of a health and safety representative (including the power to issue PINs and order work to cease). This is has the potential to undermine effective worker representation as it is open to abuse by unscrupulous employers who can set up a health and safety committee that is employer-dominated; meets irregularly; has few powers; or is made up of people who do not have adequate training.

We recommend that health and safety committees should only be established on the same basis as set out in s 4(2)(b) of schedule 1A of the HSE Act. That is,

- The committee is a requirement of the default system (or as decided by the workers in a way that is not inconsistent with the default system)
- Elected health and safety representatives must comprise at least half of the members of the committee.
- Management will be able to appoint the remaining members but where any other workers are to be involved to represent workers then they too should be elected.
- All members of health and safety committee should be entitled to training, which is essential if they are to do their job properly.

Cl.92-104 Provisional improvement notices

Subpart 4 Provisional improvement notices

The PSA supports the introduction of provisional improvement notices (PINs) as a useful new tool for health and safety representatives. We also endorse the wording in cl.92-104, with the exception of cl.101(3). This subclause states that a person may comply with a PIN in a different way from that directed by the health and safety representative. We disagree with the PCBU having this discretion and prefer the wording from the Australian Model Law which refers to the notice being complied with "to the satisfaction of the health and safety representative".

Cl.105-109 Right to cease or direct cessation of unsafe work

Subpart 5 Right to cease or direct cessation of unsafe work

The PSA strongly supports giving health and safety representatives the right to issue a notice of cessation of work on behalf of the workers they represent in appropriate situations. This is an improvement on the current provisions in the Health and Safety in Employment Act, which (like the Bill) empowers an employee to cease work but gives a representative no right to issue a notice to do so.

The only issue is that it refers to "serious risk", but this is not defined in the Bill. We recommend that "serious risk" be defined in the interpretation section and that this definition encompass both probability and severity.

Cl.110-118 Prohibition of adverse, coercive or misleading conduct

Subpart 6 Prohibition of adverse, coercive, or misleading conduct

The PSA strongly supports the addition of subpart 6, concerning the prohibition of adverse, coercive, or misleading conduct against a health and safety representative because of their role or the performance of their functions in that role. We note the discussion of this issue in the CTU submission concerning the difficulty of the split jurisdiction and the application of misleading conduct and we endorse the recommendations of the CTU that:

- The distinction between employees and other workers in clauses 110 and 117 of the Bill be removed. Should the distinction remain, redrafting of the amendments to the Employment Relations Act (Part 6, subpart 3 of the Health and Safety Reform Bill) should be made to address the issues raised above. Employees should be given the choice of procedures under the Act.
- If the split jurisdiction is retained then the same definition of adverse conduct should be used in both the Health and Safety at Work Act and the Employment Relations Act 2000.
- That civil proceedings ought to be available for misleading conduct.

Part 4 Enforcement and other matters

Subpart 1 Enforcement measures - General comments

The PSA supports the availability of a greater range of tools under these proposed provisions, but our members in the Health and Safety Inspectorate have some specific concerns about these tools as proposed and some suggestions for how the application of notices might be improved.

Cl. 127 Prohibition notices

The PSA disagrees that a prohibition notice should only be issued where there is an immediate or imminent exposure to a hazard, as proposed in cl. 127(1)(b). Inspectors prefer the current test which enables an inspector to act where there is a "likelihood of serious harm to any person" (HSE Act 41(1)).

Limiting the ability of an inspector to prohibit activities to only those that present an immediate or imminent risk potentially frustrates their ability to deal with intermittent or long latency hazards, whereas the current legislation, which talks about the likelihood of serious harm, allows for a more flexible and wide-ranging ability to deal with any form of workplace risk.

Cl. 130-133 Non-disturbance notices

The PSA welcomes this provision for non-disturbance notices but we are not sure about the relationship between this provision and cl. 185(1)(d) of the bill which, by requiring the PCBU to "ensure that the workplace, or any place or thing in the workplace specified by the inspector is not disturbed for a reasonable period pending examination, test, inquiry, or inspection," appears to duplicate the non-disturbance notice provision.

Cl. 136 Regulator may vary or cancel notice

The PSA questions the proposal in cl. 136 that only the regulator may vary or cancel an inspector's notice. Inspectors have had the ability to vary or revoke notices for a considerable period of time, which has allowed for a significant degree of flexibility, allowing more than one inspector to deal with an issue. In addition our members in the Inspectorate have very real concerns about the current and near term capability of the regulator to be able to dispassionately and independently vary or altar inspectors notices or subject them to internal review without this process being unnecessarily time-consuming.

Cl. 138-139 Issue and display of notice

The PSA and its inspector members agree with the issuing and displaying of notice provisions, however inspectors should have the ability (as necessary) to affix signs or labels to a building piece of plant or structure in the same way as a police officer affixes a "green" or "pink" sticker to a motor vehicle.

The ability to affix notices or signage to those items which are subject to an inspector's notice or direction serves as an additional reminder to workers and duty holders that the item in question is subject to a notice. The concerns within the Inspectorate would be that third parties would not necessarily be aware that an object is subject to, for example, a prohibition and may accidentally or unintentionally contravene an inspector's direction, putting themselves and others at significant risk.

Subpart 4 Enforceable undertakings

Cl. 144-150 Enforceable undertakings

The PSA agrees with the general provisions on enforceable undertakings. This tool, although in its infancy in Australia, has the potential to be a very useful means to bring about improvements by employers. However, much will depend on the capacity of the regulator to monitor the performance of the PCBU.

We are also concerned that the only exclusion for an enforceable undertaking is for an offence of reckless conduct under cl. 42. We are aware that this duplicates the exclusion under the Australian Model Law but if an enforceable undertaking is to apply to offences in cl. 43, as well offences under cl. 44, then it will be important that when a person accepts or a court imposes an enforceable undertaking, that it must be publicised.

Subpart 5 Reviews and appeals

Cl. 152-155 Internal reviews

Our health and safety inspector members have serious concerns about the proposals for internal reviews in cl.152-155. We recommend that the current external blanket appeal to the District Court within 14 days is retained (HSE Act s.46).

This concern arises in part because of the performance of the Department of Labour and MBIE in the recent past. Our members within the Inspectorate have advised that they are aware of inspectors who have either chosen not to take action on the basis that they would not be supported by management within the regulator, or have alternatively been instructed to remove a notice against their professional judgement.

Some recent cases in the public domain reinforce this view. The Department appears to have been unduly responsive to the concerns of employers in the case of *Bull and Speedy*, where they "did not force the issue and require the two men to attend an interview"[13] and Pike River where the Royal

[13] http://www.heskethhenry.co.nz/Articles/x_post/common-sense-prevails---court-of-appeal-overturns-bull-and-

Commission noted and rejected the view that, because the company was perceived as co-operative and responsive to informal safety recommendations, the compliance approach taken by the Department was appropriate[14].

The District Court provides independent and impartial judicial oversight, while an internal review could be perceived to have a lower threshold. The ability to stay proceedings while an internal review is being considered (cl. 155) may be used by some duty holders to deliberately frustrate and delay.

Subpart 6 Infringement offences

Cl.157-159 Infringement offences

The PSA strongly supports the new approach to infringement offences contained in cl. 157-159. Infringement Notices are an existing tool, but the higher fines and the discontinuation of the need for prior warning will mean they can finally be an effective alternative to prosecution.

Subpart 7 Legal Proceedings

Cl. 165 Private prosecutions

The PSA strongly supports the retention of the right to take a private prosecution but is concerned that the Bill merely restates the existing provisions (HSE Act s.54A), which are weak. Under current legislation if an infringement notice was issued to a single party, none of the parties could be privately prosecuted. This undermines the value of having the ability to privately prosecute. The possibility of private prosecutions or the simple fact of lodging a notification of interest can concentrate the regulator's mind, when considering enforcement actions.

We recommend that cl.165(1) be amended by the deletion of sub-clause 165(1)(a) and the deletion of the words "enforcement action or" from subclauses 165(1)(c)(i) and (ii), in order to allow for private prosecutions, even when the regulator has taken enforcement action, but not taken a prosecution action.

Subpart 8 Sentencing for offences

Cl.169 Sentencing criteria

The wording of cl.169 is substantially different to s.51A in the Health and Safety in Employment Act. Missing from the proposed provision is specific mention of actual harm done, pleading guilty, showing remorse, co-operation or remedial action taken. We also note the different wording in relation to the application of the Sentencing Act. It is not clear what the

speedy-decision-00051.html

[14] http://pikeriver.royalcommission.govt.nz/vwluResources/Final-Report-Volume-Two/$file/ReportVol2-whole.pdf p.285

intention is behind these changes or whether they have any implications for case law in sentencing in health and safety cases.

Until recently the District Court decisions on sentencing were wildly divergent in terms of the level of fine. In the early years the Court often incorporated a bizarre "honeymoon period" to give employers the opportunity to adjustment to new regulation and, until the late entry of *Hanham & Philp* in 2008, it was often almost completely unstructured in its reasoning. After the *Hanham & Philp* decision, at least most District Court decisions referred to the required graduated approach to the level of fines, provided in that decision and were also structured to a greater or lesser extent so as to reflect the legislation and the guidance on sentencing considerations provided in *Hanham & Philp*.

We are concerned that these changes could lead to the District Court once again declaring honeymoon periods for PCBUs. If there is no intention on the part of those drafting the Bill to effect a substantive change then we would urge the retention of the current provisions of s.51A.

The one change we would recommend is that the safety record and regulatory offending history of both subsidiary or parent corporate bodies is also taken into consideration and that the individual safety record of body corporate offices is also taken into account. The culture and safety performance of many subsidiary body corporates is frequently controlled or imposed by their parent bodies and this should be made relevant in any sentencing.

Cl.170-176 Orders and other tools

Orders for payment of the regulator's costs in bringing prosecution, adverse publicity orders, restoration orders, training orders, work health and safety project orders and injunctions are all useful additions to the tools courts will have available to them, and we strongly support them.

Other penalties

Our health and safety inspector members also consider that there is scope to add more punitive penalties to the sentencing options the Bill makes available to the courts. These could include pecuniary penalties such as those that apply under Part 7A of the Hazardous Substances and New Organisms Act 1996, where the court can order a penalty of up to $10 million in the case of a body corporate that has deliberately undertaken offending for commercial gain. The court could also be given the ability to disqualify a duty holder, either temporarily or indefinitely, from being a director or holding a similar position or office or from either managing or

supervising in the case of gross negligence, recklessness or wilful misconduct.

This is an option available in various overseas jurisdictions, including the United Kingdom where the Courts have the option of disqualifying those convicted of serious health and safety offending from having further management of businesses or undertakings. In the Republic of Ireland this disqualification is automatic upon conviction and prevents offending duty holders from simply winding up the current business and re-establishing it under a new name[15]

Subpart 9 Inspectors

Cl.181-197 Inspectors

The description of inspectors' powers in the Health and Safety in Employment Act and the Reform Bill are broadly the same as those in the Australian Model Law, our members suggest that they have the potential to impose significant restrictions which will both limit and frustrate the Inspectorate's ability to discharge its functions correctly. In particular there are problems with its ability to investigate potential breaches of legislation and hold individuals to account who are not PCBUs or individuals in charge of a particular workplace.

However, our inspector members welcome many of the provisions including their ability to exercise their powers in relation to all duty holders (whereas currently they cannot be used to investigate others such as suppliers and manufacturers in relation to their duties) and the provisions relating to search warrants.

We make the following recommendations for change:

- That in cl.182 the commonly used term "warrant card", be used instead of "identity card", to reinforce the authority of the inspector
- That s.165 of the Australian Model Law on the general powers of entry be adopted, instead of cl.185. Cl.185 is largely a restatement of the existing Health and Safety in Employment Act s.31 and does not provide for, for example, the power to require a statement from a worker or person other than a PCBU
- That s.171 of the Australian Model Law relating to the power to require production of documents and answers to questions, be adopted. Once again this is a more comprehensive power than is proposed in the Health and Safety Reform Bill as, for example, it gives the inspector the power to require any person, rather than just the PCBU or person in charge, to identify and produce documents and answer questions

[15] http://www.getreading.co.uk/news/cleaning-company-boss-fined-183000-6768640

- That ss.172 and 173 of the Australian Model Law, allowing for the abrogation of the privilege of self-incrimination under specific circumstances, be adopted. This abrogation is sufficiently qualified by the protection that it cannot be used in evidence against the person concerned
- That s.174 of the Australian Model Law, allowing the copying, extraction and retaining of documents, be adopted. The provisions in the Bill as currently proposed prevent inspectors being able to obtain the "best evidence" to support prosecution rather than copies which may be open to challenge by a defendant.
- That s.177 of the Australian Model Law, setting out the powers supporting seizure, be adopted. This includes the ability, if evidence is not or cannot easily be removed, to dismantle it and to prevent access to it to ensure it is not tampered with or altered. The Bill as proposed does not give inspectors explicit authority to dismantle parts of the machine which may be of evidential value rather than seizing the whole object which are both practical and physical reasons or alternatively allowing them to seal it off prevent access/tampering which again allows Australian Inspectors to provide the "best evidence" to the Court.
- That cl.192 of the Health and Safety Reform Bill regarding the power to require name and address, be changed to confer the same powers as currently exist under s.56D of the Health and Safety in Employment Act 1992. Cl.192 requires the inspector to 'reasonably suspect' a person as committed an offence to ask for these details or have 'reasonable belief' that the information is false before requiring them to give evidence of their name and address. It does not enable them to require details of their date of birth who they work for or the name of their employer or contractor. All of this raises the very real risk that failure to provide this information may frustrate and the Inspector fully discharging their functions
- That s.190 of the Australian Model Law making it an offence to either directly or indirectly assault threaten or intimidate an inspector, carrying a maximum penalty of $50,000 or two years imprisonment for an individual or $250,000 for a body corporate, be adopted. It is concerning that while the various other pieces of legislation specifically protect and discourage both actual assault and intimidation of officeholders the Bill has failed to provide this protection and deterrent to protest New Zealand inspectors when it is available to their colleagues undertaking the equivalent role in Australia
- That the select committee give consideration to whether health and safety inspectors can be given the means to seize or obtain information or items not directly covered by the Act, such as medical records. For example, at the moment when a workplace accident has occurred and serious harm is involved, inspectors cannot get any details from the ambulance or the hospital because of patient

privilege. It may be possible, for example, that once an ACC claim is initiated (as is usual in workplace accidents) then that information be made available to the inspector. Accessing this information can be problematic, particularly when an accident has resulted in death, but we recognise the important principles at stake and just recommend that the select committee seek advice on this matter

Adoption of s.165 of the Australian Model Law is particularly important because it gives inspectors (and interviewed workers) the right to conduct interviews in private. Many inspectors have experienced situations where lawyers representing the employer have sought to attend and advise employees during formal interviews. There is a disparity of power in the situations where employees do not feel that they can refuse, while at the same time the employer can claim an advantage by being able to prepare for any subsequent interview, knowing the possible lines of enquiry the Inspector may pursue. The EPMU report that this happened to their members in the wake of Pike River. It is wrong and should be explicitly prevented by the Health and Safety at Work Act.

Subpart 10 Health and safety medical practitioners

Cl.201 H&S medical practitioners may suspend workers

Our members in the Inspectorate consider that WorkSafe's health and safety medical practitioners should have the power to suspend from work or require the removal from the workplace of any person whose behaviour due to impairment through the consumption of alcohol or prescription or illegal drugs presents a significant risk of serious harm. This proposal warrants consideration but it needs to be qualified.

The issue of drug and alcohol testing in the workplace is a vexed one. The PSA does not condone drug use in the workplace and recognises the risks that can arise from workers working in safety sensitive areas who are impaired by the use of drugs. However, there are legitimate concerns about the infringement of the human rights of workers by employers (for example, the right to privacy and the right to be able to refuse medical treatment) and much drug testing currently carried out by employers is illegal[16]. We are very concerned that any change does not further undermine the human rights of ordinary workers.

Notwithstanding the sensitivity surrounding this topic the power proposed by our members in the Inspectorate may be acceptable provided:

[16] A 2013 survey of employers by the Northern Employers and Manufacturers Association found that 45% of employers were, for example, randomly testing all areas of the workplace to ensure it is drug free, rather than confining it to safety sensitive areas https://www.ema.co.nz/newsandmedia/news/Pages/Alarm-over-extent-of-workplace-drug-problem.aspx

- The power resides with a WorkSafe health and safety medical practitioner, rather than the employer
- There is evidence of impairment, not just drug use, and this is gained through testing conducted by the medical practitioner. This implies the use of oral fluid (saliva) testing rather than the more intrusive urine testing
- The focus is on the risk of serious harm
- The trigger for the intervention is just cause or post-incident (we expect that is most likely that a WorkSafe health and safety medical practitioner would be called in post-incident anyway)

We recommend that the select committee seek advice on this matter.

It is also important that WorkSafe medical practitioners are also focused on other physical impairments that can increase the risk of serious harm at work, particularly fatigue.

Part 5 Miscellaneous provisions

Subpart 1 Administration

Cl.205-210 Role of WorkSafe and other regulators

The Independent Taskforce on Workplace Health and Safety recommended that the workplace health and safety activities of the transport regulatory agencies be revised to ensure that they are led by WorkSafe through service-level agreements for specific health and safety services[17]. The WorkSafe New Zealand Act 2013 failed to provide WorkSafe with that leadership role and the provisions of cl. 205-210 also reflect the status quo, with some modifications.

The Taskforce had this to say about the issue:

> *With a plethora of regulating agencies working in the injury-prevention and enforcement space, agencies lack co-ordination. There is a lack of accountability for delivering progressively better health and safety outcomes.*[18]

Nothing in these clauses addresses this issue adequately. We know that officials are currently working with goodwill to try and improve co-ordination but to ensure that it is sustainable the legislation should provide the appropriate framework.

[17] Report of the Taskforce p.48
[18] Ibid. p.21

Cl.211 H&S at Work Strategy

We recommend a revision of Part 5, Subpart 1 – Administration, to give effect to the recommendations of the Taskforce on the leadership and co-ordination function of WorkSafe New Zealand.

Cl.211 requires the Minister to publish a 'Health and Safety at Work Strategy', setting out the overall direction in improving the health and safety of workers. The Minister must develop it jointly with WorkSafe New Zealand and the Minister may amend or replace it at any time. It is to be developed in consultation with the regulatory agencies and with "other persons who have an interest in work health and safety in New Zealand or with organisations representing those persons."

Cl.213-216 Information sharing

Given the importance of the tripartite relationship in workplace health and safety regulation it is recommended that cl.211(6)(b) be amended to expressly include the social partners in the consultation to develop the Health and Safety at Work Strategy: Business New Zealand and the CTU, together with unions more generally.

Until recently our members in the Health and Safety Inspectorate reported a major problem in aligning the information needs of ACC and the Labour Group of MBIE. The Health and Safety Group were informed of serious harm by the employers, but this was hit and miss and more often than not they heard about it first in the media. They also got their information from police communications when an ambulance has been called.

ACC holds information which would be very useful to inspectors but it has been very hard to access it and it is not always in a form that they can use. For example, there was no provision for information sharing so that if an inspector needs information on a particular employer to identify trends in workplace injuries they had to make an Official Information Act request. This could take time and given the 6 months statute of limitations under the Health and Safety in Employment Act justice could be compromised. The form in which information is held by ACC can also contribute to delays in accessing it. For example, it may be hard to access information where an inspector wants to examine injury trends across a group of companies with a common owner.

Cl. 217-218 Funding levy

We are aware that there are discussions between WorkSafe and ACC on information sharing, and the provisions in cl.213-216 will go a long way to improving the situation as well. However, we think that there is still scope for improvement and we would recommend that regulators should have

sufficient powers to require the provision of information from other agencies and relevant persons, subject to privacy and confidentiality considerations.

Cl.217-218 deal with the funding levy and the wording is largely the same as under the Health and Safety in Employment Act. The levy is collected by ACC and deemed to be part of ACC's Work Account, although it is then paid by ACC to WorkSafe New Zealand on a monthly basis. Like the ACC levy setting process, the setting of the health and safety funding levy should be open to public consultation and accordingly we recommend this.

Subpart 3 Regulations, approved codes of practice, and safe work instruments

The PSA notes that the formulation of regulation making powers in the Bill is an improvement on the provisions in the Health and Safety in Employment Act. However, there are some matters that need to be addressed.

The Taskforce had some explicit comments to make about the issues that should be addressed by regulation[19], including the need for PCBUs to address the risks associated with:

- young and old workers, workers who are new to roles, and temporary, casual and seasonal workers
- fatigue generally, and long hours of work leading to fatigue specifically
- workers with language, literacy and numeracy issues
- the use of performance pay systems
- the financial condition of a company or the competitive environment that a company faces
- new and emerging technologies

Other matters they considered should be addressed by regulation included: how accident investigations are undertaken; expectations of managers and supervisors; dealing with common occupational health risks and hazards.

Cl.221 Regulations relating to H&S

It is not clear to us that the provisions of cl.221 in particular address these points and so we recommend that the regulation making powers in cl.221 be amended to ensure that the full range of regulations, ACoPs and guidance material identified by the Taskforce are addressed by WorkSafe and MBIE when drafting standards.

[19] Report of the Taskforce, pp.97-98

Cl.221(q)

Cl. 221(q) appears to limit fines for offences under any regulations to $30,000, which would constitute a massive cut to the current maximum under s.50(1)(c) of the Health and Safety in Employment Act. While clause 2 of schedule 1 of the Reform Bill allows for regulations rollover and retains the maximum penalty of $250,000, if and when these regulations are replaced by new ones made under the new Health and Safety at Work Act the penalties will be reduced to a maximum of $30,000, representing a reduction of nearly 90%. Much depends on the relationship between the offences in regulations and the primary duties in the Act. We discuss this issue at cl.42 above and the change proposed there may assist this situation.

Strictly speaking every regulation is linked to the primary duties – if the regulation has been breached the higher duty will have been breached as well. However there is a real risk that the courts will look at the maximum in this provision and take them as a guide for sentencing purposes when the regulations have been breached. There is also the matter of perceptions – an apparent cut of this kind could send the wrong message to PCBUs.

We are not clear as to the rationale for the reduction and would propose that cl. 221(q) be amended to reinstate the current maximum for offences under any regulation to $250,000 as under s.50(1)(c) of the Health and Safety in Employment Act, rather than the figure of $30,000 stated in the clause at present.

Cl.226 Consultation requirements

At cl.226 the Bill repeats the provisions of the HSE Act in relation to consultation over regulations, and at cl.234 in relation to consultation over safe work instruments. We recommend that the tripartite nature of health and safety regulation be recognised by including a specific duty to consult unions.

Part 6 Amendments to other Acts

Subpart 1 Amendments to Accident Compensation Act 2001

Cl.244 New sections 174A to 174F inserted

Cl. 244 amends the Accident Compensation Act by inserting new sections 174A-174F, which create an express power for ACC to develop workplace incentive programmes. The PSA is sceptical as to the likely impact of any incentive scheme and we are concerned as to the likelihood of perverse outcomes for workers, such as pressure from employers to under-report workplace injuries.

The proposed s.174B sets out the process for developing such schemes. In 174B(1)(a) it sets out matters that ACC must have regard to, but none of these matters includes the issue of perverse incentives or outcomes. We recommend that the proposed s.174B(1)(a) be amended to include reference to the risks of perverse incentives and unintended consequences for workers.

The proposed s.174B also requires ACC to consult "the persons or organisations it considers appropriate", having regard to the "potential participants in the programme." PCBUs are the only likely participants in the programme, but there is no obligation to consult workers, who will be most affected by the programme, and their unions. It is recommended that proposed s.174B(2) be amended to explicitly require ACC to consult with workers and their unions.

Cl.249 New Sections 264A and 264B inserted

Cl.249 inserts new sections 264Aand 264B in the Accident Compensation Act 2001 which require ACC and WorkSafe to have workplace injury prevention action plan in place. The PSA welcomes this provision but is opposed to the requirement in proposed s.264B(2)(a)(i) that any injury prevention measures undertaken under these provisions must be "likely to result in a cost-effective reduction in actual or projected levy rates in the Work Account". This repeats the provision in the existing s.263(3)(a) of the Accident Compensation Act and both are wrong and should be repealed.

This provision is in conflict with the clear priority given to health and safety in cl.3(2) of the Bill, which is that workers should be given the highest level of protection against harm. The needs of levy payers would appear to come first under these provisions in the Accident Compensation Act. It also would not be effective in dealing with occupational illness and disease which are under-reported and due to their long latency period are difficult to relate back to any given employer. We recommend that s.263(3)(a) of the Accident Compensation Act be repealed and proposed new s.264B(2)(a)(i) be deleted.

Subpart 2 Amendments to Hazardous Substances and New Organisms Act 1996

Cl.251-294 Amendments to HSNO Act 1996

The PSA endorses the submissions of the CTU around hazardous substances, while noting that our members in Crown Research Institutes operate under the "Code of Practice for CRI and University Exempt Lab". Although the CRIs don't have 'approved handlers' and the removal of test certifiers won't have much impact on them, it appears that quite extensive changes to the

hazardous substances regime that be subject to separate scrutiny. We therefore support the CTU recommendation that the Committee should recommend that changes to the Hazardous Substances and New Organisms Act 1996 should be considered in a separate Bill to facilitate adequate consultation and scrutiny.

Subpart 4 Amendments to the WorkSafe New Zealand Act 2013

Cl.309 Section 9 amended

Cl. 309 would amend WorkSafe New Zealand's main objective by inserting the words "a balanced framework for" after the words "contributing to". The PSA is opposed to this change. We believe that the current objective is not strong enough and the introduction of the concept of a "balanced framework" would only weaken it further.

Cl.310 Section 10 amended

Given that amendments are also proposed to the functions of WorkSafe, we would recommend that major gaps in the list of functions, which the Taskforce listed in its report, should be filled. These include: promoting and supporting effective worker participation; carrying out diagnostic root-cause analysis investigations and reviews; collaborating with unions and other participants; encouraging a whole-of-life view of health and safety through good design of plant; and directing a particular focus on major hazards.

Neither the Workplace New Zealand Act, nor the current Bill provide WorkSafe with specific powers or duties as recommended by the Taskforce[20]. This is also another gap that the Bill should address. The duties were particularly useful because they made explicit that WorkSafe should publish a compliance strategy, publish its priorities, draw on the best information and consult widely, "applying the principle of tripartism."

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[20] Report of the Taskforce p. 51

Schedule A Summary of recommendations

Cl.3

That the following amendments be made to cl.3:

- That the words "a balanced framework to secure" be deleted from cl.3(1)
- That cl.3(1)(a) be amended to read:
  protecting workers and other persons against harm to their health, safety, and welfare by eliminating risks at source or minimising risks arising from work or in the course of work or from prescribed high-risk plant or substances;
- That Cl.3(1)(c) be amended along the lines of the Victorian OHS law, to read:
  providing for the involvement of workers, employers, unions and employer organisations, in the formulation and implementation of health and safety and welfare standards
- That we to retain s.5(f) from the Health and Safety in Employment, so that there would be a new sub-clause to read:
  recognising that successful management of health and safety issues is best achieved through good faith co-operation in the place of work and, in particular, through the input of the persons doing the work

cl.12

That cl.12 be amended by inserting, in their appropriate alphabetical order:

***domestic violence** has the meaning given to it in section 2 of the Domestic Violence Act 1995*

***domestic violence document** has the meaning given to it in section 2 of the Domestic Violence Act 1995*

***victim of domestic violence** has the meaning given to it in section 5(2A)(b) of the Domestic Violence Act 1995".*

We recommend that the definition of "hazard" be amended by the insertion of a new (c) to read:

(c) for the avoidance of doubt, a hazard includes a situation in which a person's behaviour—

"(i) stems from being a victim of domestic violence or from being the person who inflicted the domestic violence referred to in the victim's domestic violence document; and

"(ii) is an actual or potential cause or source of harm, to the person or another person, within a place of work or outside a place of work".

We recommend that c.12 be amended by insertion of the following definition:

***Harm** means illness, injury or both and includes physical and mental harm caused by work-related stress*

That the definition of officer should include persons who participate in the making of decisions that affect the whole or a substantial part of the business of the PCBU, and that this should be framed in such a way as to not discourage worker engagement or participation.

That the definition of "officer" should include wording based on s.247 of the Australian Model Law, by inserting a new (c) in the definition in cl.12 to read:

> *includes a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking of the Crown*

A similar provision for an officer of a public authority exists at s.252 of the Australian Model Law and a new (d) should be inserted to read:

> *Includes a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of a business or undertaking of a public authority*

Cl.13 That rather than a blanket exemption for home occupiers in relation to residential work it would be better to decide which duties are deemed too onerous for home occupiers to comply with and exempt them from these specifically.

Cl14 That the words "unless the context otherwise requires" be deleted from cl.14(1) setting out the meaning of "worker".

Cl.16 That the meaning of supply in cl.16 should include the supply of services

Cl.17 That cl.17(e) should be amended by separating it out from the list of relevant matters to stand alone as clause 17(2) to read:

After assessing the extent of the risk and the available ways of eliminating or minimising the risk in 9(1) if the cost associated with the available ways of eliminating or minimising the risk is grossly disproportionate.

Cl.18 That the following changes are made to cl.18 Meaning of notifiable injury or illness:

- cl.18(b) – insert the words "would normally require" after the words "illness that" and delete the words "requires" and "immediate"

- c.18(c) – insert the words “would normally require” after the words “illness that” and change “48 hours” to “7 days”
- c.18(d) – delete the word “significant”

Cl.18 That the definition of “serious harm” from the Health and Safety in Employment Act be retained.

Cl.19 That the word “serious be deleted from cl.19(1) *Meaning of a notifiable incident* and that it be further amended to define an incident as one that “has, could or will expose” a worker to a serious risk from the incidents detailed

Cl.22-29 That *subpart 4 Key principles relating to duties* be moved to *Part 2 Health and safety duties*.

Cl.22 We support the recommendation of the CTU that cl.22 be reworded to retain a systematic and proactive pro-active process for the identification and controlling of hazards and risks as exists in s.7 of the Health and Safety in Employment Act this important function and endorse their proposed rewording.

Cl.27 We support the recommendation of the CTU that Cl.27, concerning the duty to consult, co-operate and co-ordinate with other duty holders, be amended to ensure that the duty holders should be subject to express requirements to deal fairly with each other, not to mislead or deceive one another and to be active and constructive in discharging the duty.

Cl.28(2) We also support the amendments to cl.28(2) proposed by the CTU, which would ensure that a PCBU would be treated as having levied or charged any worker, and not just employees, if they require them to provide their own personal protective clothing or equipment.

Cl.30 That the primary duty of care on a PCBU in cl.30 be expressed as applying “without limitation”.

Cl.30 That the select committee consider whether an amendment is necessary to cl.30 to ensure that the primary duty of care encompasses an obligation to protect workers from behaviour that stems from being a victim of domestic violence or from being the person who inflicted the domestic violence

Cl.42 That the test of reckless conduct in cl.42 be extended to include both grossly negligent and wilful conduct.

Cl.42(3)	We also support the recommendation of the CTU that the maximum term of imprisonment under cl.42(3) should be raised to 10 years.
Cl.42(1)(a) and 42(3)	That the penalties under cl.42(3) should apply equally to breaches of any part of the Bill or regulations made under the subsequent Act, and not just be limited to offences committed under subparts 1 and 2 of part 2 of the Bill.
Cl.43	That breaches of cl.43 should carry the potential for imprisonment falling within Category two of the Criminal Procedures Act, being up to 2 years.
Cl.43(2)	That the penalties under cl.43(2) should apply equally to breaches of any part of the Bill or regulations made under the subsequent Act, and not just be limited to offences committed under subparts 1 and 2 of part 2 of the Bill.
Cl.44	That in addition to the maximum penalties that the penalty for continued breach of cl.44(1) be a fee for each day that the breach continues.
Cl.44(2)	That the penalties under cl.44(2) should apply equally to breaches of any part of the Bill or regulations made under the subsequent Act, and not just be limited to offences committed under subparts 1 and 2 of part 2 of the Bill.
Cl.52	That the requirement to maintain an accident register in a prescribed form is carried over from the current Act into cl.52, that all accidents and near misses are recorded and that there be a requirement for the PCBU to investigate all accidents and near misses.
Cl.53(1)	That subclause 53(1), regarding the duty to preserve sites, be amended by deleting the words “so far as is reasonably practicable”.
Cl.53(2)	That subclause 53 (2)(b) regarding the duty to preserve sites, which allows for the removal of a deceased person, and recommend its deletion, or if this subsection is to be retained that the authorisation of the Coroner be required.
Part 3 Worker participation	That controversial aspects of the worker participation framework currently proposed to be dealt with in regulation, should be set out in the primary legislation. That regionally based Health and Safety Centres be introduced. These centres would be government-funded yet independent, and report to the Worksafe Board. The centres would employ Industry Health and Safety

Representatives (IHSRs) who would be available to advise and mediate on health and safety issues in any workplace.

Cl.61(1) That the words "so far as is reasonably practicable" be deleted from cl.61(1), regarding the duty to engage with workers.

Cl.62 That cl.62, concerning the nature of engagement with workers, should be subject to the duty of faith and it should be specifically referenced here.

cl.62 That cl.62, concerning the nature of engagement with workers, should include a requirement that workers be given reasonable opportunity to seek advice on the matter.

Cl.62(2) That the requirement in cl.62(2) to involve health and safety representatives in engagement on health and safety matters when the workers are represented by one, should extend to unions and health and safety committees.

Cl.65 That the new Act contain a default system of worker participation, which will ensure the election of health and safety representatives in all workplaces above a certain size.

Cl.66-67 That instead of instituting formal work groups based on the Australian model (as proposed in cl.66-67), the Bill should build on the existing provisions of s.19C(5) which have a very simple and effective formulation for organising workers into groups for the purposes of representation:

> *A system may allow for more than 1 health and safety representative or health and safety committee and, in that case, each representative or committee may represent a particular type of work, or place of work of the employer, or another grouping.*

That health and safety representatives' powers must not be generally limited to their particular work group. Work groups should exist only for electoral purposes.

Cl.68 That cl.68 should specify that elections are conducted by workers and their unions unless the workers ask that the PCBU or PCBUs facilitate the election.

That cl.68 should contain restrictions on undue influence or attempted undue influence by the PCBU on the election.

Cl.69

That health and safety representatives should have system-wide and proactive functions included in cl.69, such as:

- to foster positive health and safety management practices in the place of work:
- to promote the interests of employees in a health and safety context generally; and
- to assist in developing any standards, rules, policies, or procedures relating to health and safety that are to be followed or complied with at the workplace.

Cl.70(2)

That Cl.70(2) should be based on the equivalent clause in the Model Law, s.68(2)(d), which empowers an HSR to attend an interview with a group of workers "with the consent of 1 or more workers in that group".

Cl.73 and 78(1)(h)

That the provisions of the Employment Relations Act 2000 requiring an employer to give reasons in writing for denying access to a union representative should be adopted to require a PCBU denying access to a person assisting a health and safety representative to also provide written reasons as soon as possible.

Another difficulty arises where the relationships are not covered by the Employment Relationships Act. Also, in health and safety matters a swift resolution is often required in order that health and safety is not compromised. To help deal with both these issues we recommend that c.71(6) of the Australian Model Law be included in the Bill:

> *If access is refused to a person assisting a health and safety representative under subsection (5), the health and safety representative may ask the regulator to appoint an inspector to assist in resolving the matter.*

Cl.76

That cl.76, confining the exercise of the functions and powers of the health and safety representative to the work group they represent, should be removed from the Bill.

Cl.77

That the provision for a deputy health and safety representative in cl.77 be removed from the Bill.

Cl.80

That a specific training allowance of at least 2 days a year for each health and safety representative be included cl.80.

That the wording of cl.80 be based on s.72 of the Australian Model Law to include some fundamental obligations around health and safety training e.g. the right of the representative to attend training on full pay and their right to choose who provides the training.

Cl.81 & 82

That cl.81 and 82, regarding restrictions on the right of health and safety representatives to use their functions and powers or any information obtained in the performance of their functions, only for health and safety purposes, be removed from the Bill.

Cl.84 & 85

That cl.84 and cl.85, regarding the removal of health and safety representatives and appeal against their removal. be removed from the Bill. However, if it is decided that some provision of this type is to remain then the following amendments should be made, which are based on the provisions of the Victorian OHS Act:

- The term "disqualification" be used rather than "removal"
- Rather than the regulator making the decision (which could result in the PCBU pressurising the regulator) the decision rests with the courts
- That the actions of the HSR have been taken with the intent to cause harm to the PCBU

Cl.88-91

That health and safety committees should only be established on the same basis as set out in s 4(2)(b) of schedule 1A of the HSE Act. That is,

- The committee is a requirement of the default system (or as decided by the workers in a way that is not inconsistent with the default system)
- Elected health and safety representatives must comprise at least half of the members of the committee.
- Management will be able to appoint the remaining members but where any other workers are to be involved to represent workers then they too should be elected.
- All members of health and safety committee should be entitled to training, which is essential if they are to do their job properly.

Cl.101(3)

That subclause 101(3) be amended to state that a person must comply with a PIN "to the satisfaction of the health and safety representative".

Cl.104-109	We recommend that “serious risk” be defined in the interpretation section and that this definition encompass both probability and severity.
Cl. 127(1)(b).	The current test for issuing a prohibition notice, which enables an inspector to act where there is a “likelihood of serious harm to any person” (HSE Act 41(1)) should be retained.
Cl. 130-133	We seek clarification of the relationship between the non-disturbance notices provisions and cl. 185(1)(d) of the bill which, requires the PCBU to “ensure that the workplace, or any place or thing in the workplace specified by the inspector is not disturbed for a reasonable period pending examination, test, inquiry, or inspection.”
Cl. 138-139	Health and safety inspectors should have the ability (as necessary) to affix signs or labels to a building piece of plant or structure in the same way as a police officer affixes a “green” or “pink” sticker to a motor vehicle.
Cl. 136	We question the proposal in cl. 136 that only the regulator may vary or cancel an inspectors notice.
Cl. 144-150	When a person accepts, or a court imposes an enforceable undertaking, it must be publicised.
Cl.152-155	We oppose the provisions for internal reviews and recommend that the current external blanket appeal to the District Called within 14 days is retained (HSE Act s.46).
Cl165	We recommend that cl.165(1) be amended by the deletion of sub-clause 165(1)(a) and the deletion of the words “enforcement action or” from subclauses 165(1)(c)(i) and (ii), in order to allow for private prosecutions, even when the regulator has taken enforcement action, but not taken a prosecution action.
Cl.169	If there is no intention on the part of those drafting the Bill to effect a substantive change to the sentencing regime then we would urge the retention of the current provisions of s.51A of the Health and Safety in Employment Act.
Cl.169	We recommend is that the safety record and regulatory offending history of both subsidiary or parent corporate bodies should also be taken into consideration when sentencing and that the individual safety record of body corporate offices is also taken into account.

Further sentencing options

We recommend that consideration be given to granting the court the power to issue punitive penalties such as pecuniary penalties and the ability to disqualify a duty holder, either temporarily or indefinitely, from being a director or holding a similar position or office or from either managing or supervising staff in the case of gross negligence, recklessness or wilful misconduct.

Cl.181-197

We make the following recommendations for change regarding the powers of health and safety inspectors:

- That in cl.182 the commonly used term "warrant card", be used instead of "identity card", to reinforce the authority of the inspector
- That s.165 of the Australian Model Law on the general powers of entry be adopted, instead of cl.185
- That s.171 relating to the power to require production of documents and answers to questions, be adopted
- That ss.172 and 173 of the Australian Model Law, allowing for the abrogation of the privilege of self-incrimination under specific circumstances, be adopted
- That s.174 of the Australian Model Law, allowing the copying, extraction and retaining of documents, be adopted. The provisions in the Bill are not explicit enough
- That s.177 of the Australian Model Law, setting out the powers supporting seizure, be adopted. This includes the ability, if evidence is not removed, to dismantle it, and to prevent access to it to ensure it is not tampered with or altered
- That cl.192 of the Health and Safety Reform Bill regarding the power to require name and address, be changed to confer the same powers as currently exist under s.56D of the Health and Safety in Employment Act 1992.
- That s.190 of the Australian Model Law making it an offence to either directly or indirectly assault threaten or intimidate an inspector, carrying a maximum penalty of $50,000 or two years imprisonment for an individual or $250,000 for a body corporate, be adopted.
- That the select committee give consideration to whether health and safety inspectors can be given the means to seize or obtain information or items not directly covered by the Act, such as medical records.

Cl.201

That the select committee seek advice on giving WorkSafe's health and safety medical practitioners the power to suspend from work or require the removal from the workplace of any person whose behaviour due to impairment through the consumption of alcohol or prescription or illegal

drugs presents a significant risk of serious harm, with the following qualifications:

- The power must reside with a medical practitioner, not the employer
- There is evidence of impairment, not just drug use, and this is gained through testing conducted by the medical practitioner. This implies the use of oral fluid testing rather than the more intrusive urine testing
- The focus is on the risk of serious harm
- The trigger for the intervention is just cause or post-incident

Cl.205-210 That Part 5, Subpart 1 – Administration, be revised to give effect to the recommendations of the Taskforce on the leadership and co-ordination function of WorkSafe New Zealand.

Cl.211 That cl.211(6)(b) be amended to expressly include the social partners in the consultation to develop the Health and Safety at Work Strategy: Business New Zealand and the CTU, together with unions more generally.

Cl.213-216 That regulators should have sufficient powers to require the provision of information from other agencies and relevant persons, subject to privacy and confidentiality considerations.

Cl.218 That the setting of the health and safety funding levy should be open to public consultation, on the same basis as the ACC levy setting process.

Cl.221 That the regulation making powers in cl.221 be amended to ensure that the full range of regulations, ACoPs and guidance material identified by the Taskforce are addressed by WorkSafe and MBIE.

Cl.221(q) That cl. 221(q) be amended to reinstate the current maximum for offences under any regulation to $250,000 as under s.50(1)(c) of the Health and Safety in Employment Act, rather than the figure of $30,000 stated in the clause at present.

Cl.226 and 234 That the tripartite nature of health and safety regulation be recognised by including a specific duty to consult unions in the development of regulations (cl.226) and safe work instruments (cl.234).

Cl.244 That the proposed s.174B(1)(a) of the Accident Compensation Act 2001 be amended to include reference to the risks of perverse incentives and unintended consequences for workers in the development of workplace incentive programmes.

Cl.244	That the proposed s.174B(2) of the Accident Compensation Act 2001 be amended to explicitly require ACC to consult with workers and their unions in the development of workplace incentive programmes.
Cl. 249	That existing s.263(3)(a) of the Accident Compensation Act be repealed and the proposed new s.264B(2)(a)(i) of the Act in cl.249 be deleted to remove reference injury prevention measures having to result in a "cost-effective reduction in actual or projected levy rates in the Work Account."
Cl.309	That Cl. 309(1) inserting the words "a balanced framework for" after the words "contributing to" in the main objective of WorkSafe New Zealand, be removed from the Bill.
Cl.310	That following functions for WorkSafe New Zealand identified by the Taskforce in its report, be included s.10 of the WorkSafe New Zealand Act 2013: • promoting and supporting effective worker participation • carrying out diagnostic root-cause analysis investigations and reviews • collaborating with unions and other participants • encouraging a whole-of-life view of health and safety through good design of plant • directing a particular focus on major hazards.
Subpart 4 – powers and duties of WorkSafe	That the specific powers and duties for WorkSafe New Zealand identified by the Taskforce in its report be included in the Workplace New Zealand Act.