



**Health and Safety at Work
(Worker Engagement,
Representation and
Participation) Regulations
Exposure Draft**

Submission

to the

**Ministry of Business, Innovation and
Employment**

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For a better working life

New Zealand Public Service Association
Te Pūkenga Here Tikanga Mahi

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Preamble

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 62,000 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, local government, tertiary education institutions and non-governmental organisations working in the health, social services and community sectors).

In developing this submission we sought the views of

We have been assisted in our submission by the contributions of members of the PSA health and safety network. This consists of around 900 health and safety representatives from across the union's coverage.

We welcome the opportunity to submit on these regulations and as an affiliate of the New Zealand Council of Trade Unions *Te Kauae Kaimahi* (the CTU), we endorse their submission.

Introduction

The new Act has weakened worker participation in key ways

These regulations are being drafted in the context of a new Act in which the worker participation provisions have been seriously weakened in significant ways compared to the existing provisions of the Health and Safety in Employment Act 1992. Decisions on these regulations also have to be made in the context of decisions made by cabinet.

Some workers denied representation

We have three main concerns about where all this has ended up. Firstly, the concept that any workers who want a health and safety representative will be denied the right to have one because of the size of the PCBU and the risk profile of the PCBU is repugnant. That right exists under the current law and this legislative change is a significant step backwards when one of the main findings by the Independent Taskforce on Workplace Health and Safety was that worker participation needed to be strengthened, not undermined. The difficulties of deciding what a high-risk industry is compounds the problem.

PCBU directed

Secondly, the system has shifted from one that is agreed between workers and employers or PCBUs to one that is largely decided by PCBUs. This will undermine ownership by workers and runs the risk that health and safety representatives (HSRs) will end up seeing themselves as a representative of management rather than the workers.

Worker participation practices

Thirdly the Act establishes a duty on the PCBU to have worker participation 'practices' which could be other than health and safety committees and HSRs, but does not provide any further requirements on those practices nor guidance on what they could be.

These draft regulations struggle with the issues this legislative framework provides. They do not adequately resolve the question of what is a high risk industry (although arguably this is almost impossible in the context of worker participation); they cannot challenge the hegemony of the PCBU in deciding how worker participation will operate; and they do not attempt to place any further requirements on the PCBU with regards to worker participation practices.

Exemption of small PCBUs in low risk industries from the duty to have health and safety representatives or committees

The PSA's interest

It is unlikely (although not impossible) that many of our members will be working for a PCBU who can claim exemption from the duty to have HSRs and health and safety committees based on the number of workers. Our main interest is in achieving an outcome that is as fair and workable as possible given the constraints of the legislation – the best law possible under the circumstances.

Problems with the definition

The definition as proposed has a number of serious flaws:

- There is no consideration of injury rate generally. The purpose of a health and safety framework is to protect people at a workplace from injury not only injuries that result in a week off work or more.
- There is no consideration of occupational disease in the categorisation of 'high risk.' Gradual process injuries are also excluded, which are an issue in many of our workplaces.
- The model excludes deaths and injuries to bystanders and children under 15, which seems arbitrary and raises questions about industries like agriculture in which children are often killed or injured;
- The model is based on accepted claims to ACC, which relies on people making claims to ACC and these claims being accepted. There is good evidence many industries significantly under-report accidents.
- An annualised average is extremely problematic. Many seasonal industries have periods of much greater risk (such as seasonal workers working for the Department of Conservation).

The definition is flawed

- There is no consideration of the death and injury rate in small and medium enterprises for each industry, although evidence suggests strongly that SMEs have higher rates than larger businesses.
- There is no consideration of the effect of previous interventions in the industry. Some high risk activities can be well managed. That might bring injury rates down but should not change the risk profile.
- The model allows for averaging over subindustries. For example, Government administration, defence and public safety would contain both high risk frontline agencies such as Corrections and Police as well as those with a lower risk profile such as the Ministry of Culture and Heritage. None of these agencies will have fewer than 20 workers but this demonstrates the problem of averaging. Against that is that disaggregation may lead to less reliable data as the size of sub-industries reduces.
- Some of the types of work or sectors excluded from high-risk sectors or industries in schedule are likely to bring the regulations (and the Act) into disrepute. We have already had the worm farming example, and reference to turtle hunting and buffalo hunting in a set of New Zealand regulations will invite ridicule. We need this law to be taken seriously.

We need to rework the indicators

The PSA supports the call of the CTU for a complete rework of the indicators used in defining high risk in order that they address all of the above bullet points. We also support their call for the review of high risk definitions to be every two years in the first instance, rather than the proposed 5 years, should the problems identified above remain unresolved.

What does 'predominantly' mean?

Application of the definition

Draft regulation 5(1)(b) provides that a PCBU would be classified as high risk if it is operating predominantly in a high risk sector or industry. It is presumed that 'predominantly' would mean at least 51% of its operations, but what would apply should their operations be split 50%? What does 'operations' mean? Does it mean that the money value of the operations are predominantly in one sector or does it mean the number of staff?

The PSA supports the recommendation of the CTU that the words "operates predominantly" should be changed to "operates" in draft regulation 5(1)(b).

PCBUs should not be able to self-determine their industry

Further, it appears that the Minister intends that PCBU would self-determine which industry category they fit. This is an obvious incentive for PCBUs who do not want to have health and safety representatives to argue that a high risk part of their business is not the predominant one. We should remember that this would result in a loss of rights for the workforce and we should be careful before writing a provision like this into law.

The PSA supports the recommendations of the CTU that:

- an offence should be created for misrepresenting the nature or size of the business or undertaking to avoid an obligation to elect health and safety representatives or consider appointing a health and safety committee.

- an inspector should be given the power under draft regulation 30 to determine whether a business or undertaking is operating in a high risk or otherwise specified industry and the number of workers undertaking work for the PCBU.

Health and safety representatives

Minimum ratio

We support 1:19 but guidance needed

PSA support the default model of 1 health and safety representative per 19 workers – this should remain as actual workers as opposed to full time equivalents. However, we think that guidance will need to address issues that may arise, such as where those 19 workers are covering shift operations words things need to be arranged so that there is an HSR on each shift.

We also note that this ratio is variable at will by the PCBU if they consider that it is inappropriate. This places strong importance on the criteria used to decide workgroups (under draft regulation 7).

Determination of work groups

Reference to reg 6

The PSA supports the list of criteria for determining workgroups in draft regulation 7 but there needs to be a new criterion which requires the PCBU to have regard to the “prescribed minimum ratio for a work group referred to in regulation 6.” This is a relevant consideration for the PCBU, without it being a rigid ratio.

Multiple PCBU work group arrangements

Draft regulation 8 would allow a PCBU to withdraw from an agreement or negotiations for an agreement at any time by giving reasonable notice to the other parties.

PCBUs may evade scrutiny

The PSA is concerned that this provision will be used by PCBUs to evade scrutiny. A health and safety representative can generally only exercise their powers on behalf of their workgroup. A PCBU could potentially use this provision to manipulate or avoid other requirements under the legislation. For example, they may be able to evade a PIN by giving notice of their withdrawal from the workgroup structure as soon as they received the PIN; PCBUs with less than 20 workers may choose not to have representatives even if asked; and others may choose not to have a workgroup which covers a group of workers. We note that there is no such unqualified right of withdrawal under the Australian system.

We support the recommendation of the CTU that either that draft regulation 8 is deleted or that a much longer minimum notice period is specified (such as three months) to prevent PCBUs from opting out to avoid investigations or action by health and safety representatives.

Initiation and conduct of elections are different

Election of HSRs

S. 62(2) of the Health and Safety at Work Act requires a PCBU to initiate the election of 1 or more HSRs within the time period prescribed by regulations, but the regulations fail to make a clear distinction between initiation and the conduct of the elections. Draft regulation 12 could address this more clearly if it read: "Upon notification by a worker under s 62(1) the PCBU is required to initiate an election."

3 months is too long

Draft regulation 21(1) also gives the PCBU 3 months within which to initiate the election. This timeframe is too generous. Feedback from our members who are health and safety representatives suggests that elections are routinely conducted within one or two weeks. Accepting that PCBUs conducting an election for the first time are likely to take longer, 3 months is still too long. We would propose (again based on feedback from our HSRs) that 6 weeks would be appropriate for PCBUs where there is no existing health and safety representatives, and four weeks otherwise.

The draft regulations envisage an election process which is far too dominated by the PCBU. Draft regulation 13 allows the PCBU to conduct the election process in some circumstances as well as providing that in all cases, the PCBU will undertake much of the election process (such as calling for nominations) in draft regulation 16.

Workers and unions should conduct elections

Under Schedule 1A of the Health and Safety in Employment Act the responsibility for the conduct of the election falls upon the workers "together with any unions representing them". This is important for maintaining the independence of the health and safety representatives, which is vital in ensuring they are accountable to worker and not employers. In the 2012 survey of HSRs conducted by the CTU 23.2% of PSA respondents said that they had been appointed by management. If workers view HSRs as representatives of management rather than their representatives, this will undermine their confidence in the system.

The default process should be that the workers, together with any representatives, should be responsible for the conduct of the election. The PCBU should only be involved if there is no union in the workplace or if the union fails to act. We therefore support the recommendations of the CTU that:

- Draft regulation 13 should include a clause based on cl 61 of the Model WHS Act that states: "The workers in a work group may determine how an election of a health and safety representative for the work group is to be conducted."
- Draft regulations 16(d) and (e) should not be enacted. The calling for nominations is clearly part of the election process. It is also a part of the process where the PCBU can exercise considerable influence on who stands.

Further, as part of ensuring the independence of the process the PCBU ought to only provide resources and assistance that are requested by the person conducting the election (draft regulation 16(1)(a)).

We also note and support two other recommendations by the CTU:

- In draft regulation 13(1) it is misleading to suggest that an election can be in any form. The election must be a vote of some description. This provision should be deleted or the form (preferably a vote) should be specified.
- In draft regulation 15 it would be clearer and more helpful to state in both subclauses “the vote need not be conducted” rather than “the election need not be conducted.”

Training

We are not sure of the rationale behind the definition of additional training that links any additional training to the New Zealand Qualifications Framework occupational health and safety subfield. We recommend that additional training be subject to a tripartite approval process facilitated by WorkSafe to ensure that it is useful and fit for purpose.

Training should have tripartite approval

Transitional training is not linked into the set of requirements and protections under the regulations for initial or additional training. This means that a PCBU is not required to provide access to or funding for this training, which will be a significant problem given the need for an HSR to receive transitional training before being able to exercise their full powers under the new Act. This could be open to manipulation by some PCBUs to avoid allowing their health and safety representatives to undertake transition training.

Access and funding for transitional training

The ratio for training days in draft regulation 26 is inappropriate with regard to the initial training. This is needed for health and safety representatives to understand their role properly and exercise their powers. Unlike Employment Relations Education Leave, there is a clear cap on the amount of initial training provided by the number of health and safety representatives elected.

Ratio for training days

We support the recommendation of the CTU that the training cap in draft regulation 26 should only apply to additional training and not initial training.

Health and safety committees

Training

In our submission on the Health and Safety Reform we expressed our concern at the lack of any obligation on a PCBU to provide any training for health and safety committees and that concern extends to these regulations. Where health and safety committees have a membership based on health and safety representatives this will not be a problem but the Act envisages situations where these committees

Committees need training

will not necessarily have HSRs as members. The PSA believes that all representatives on the health and safety committee (including both worker and PCBU representatives) should be properly trained to undertake their role.

HSRs on health and safety committees

Model WHS Act

We are also concerned at an apparent watering down of health and safety representatives' representation on the health and safety committee. Draft regulation 28(2)(c) states only that each health and safety representative who consents to be a member of the committee is eligible to be a member of the committee. We support the recommendation of the CTU that draft regulation 28(2)(c) be replaced by the wording of s 76(2) and (3) of the Model WHS Act.

Other provisions

Other matters that inspectors may decide on

Issues inspectors may decide on

The PSA strongly supports giving inspectors the ability to decide on certain matters. This should enable quick resolution when there are disputes. We support the recommendations of the CTU that inspectors ought be able to:

- Decide whether a PCBU is operating in a high risk industry (or a specified industry for the purpose of draft regulation 5)
- Decide work groups for the PCBU where those chosen are inadequate to represent worker's health and safety interests
- Determine election processes for health and safety representatives where these are in dispute.

In addition, feedback from our health and safety network members suggests that it would be helpful if an inspector was able to decide on whether the PCBU has provided the H&S rep with sufficient resources (e.g. time, access to information, union support, workgroup colleagues etc.) to perform their role, as this has been a persistent problem for a small but significant group of HSRs. In the CTU survey of HSRs 11.7% of PSA respondents reported that they were not provided with any time to carry out their role.

Exemptions process

Concern about exemptions

The PSA is concerned about the blanket approach to exemptions under s.220 of the Act and we support the recommendations of the CTU with regard to the exemptions process:

- Adopting a similar set of principles to guide decision-making around exemptions as those that apply in Australia
- That applications go through a set process rather than ad hoc as part of consultations on unrelated regulations.

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