New Zealand Law Society
Te Kāhui Ture o Aotearoa

Health and Safety at Work Amendment Bill

Submission of the New Zealand Law Society Te Kāhui Ture o Aotearoa

18 March 2026

1 Introduction

1.1 The New Zealand Law Society Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Health and Safety at Work Amendment Bill (**Bill**), which will amend the Health and Safety at Work Act 2015 (**HSWA**) and the WorkSafe New Zealand Act 2013 (the **WorkSafe Act**).

1.2 This submission, prepared with input from the Law Society's Criminal Law, Employment Law, and Public Law Committees,[1] makes recommendations to improve the clarity and workability of the Bill, and to ensure the Bill meets its underlying policy objectives.

1.3 The Law Society does not wish to be heard in relation to this submission, but would be happy to appear before the Select Committee to answer any questions, if that would be helpful.

2 Meaning of 'small PCBU' (clause 8)

2.1 The Bill proposes to impose only limited health and safety requirements and duties on 'small PCBUs' with fewer than 20 workers.[2] A PCBU with a fluctuating workforce (the Bill provides an example of a PCBU that undertakes seasonal work) would need to 'reasonably expect' to have fewer than 20 workers for at least nine months in a financial year in order to qualify as a 'small PCBU'.

2.2 The definition of 'small PCBU' appears to accommodate workforce fluctuations only in those circumstances where the PCBU will briefly have a higher number of workers due to seasonal demands (for example, during Christmas or harvesting periods).[3] It does not:

(a) Take into account the fact that the size of a workforce could – and likely will – fluctuate over the course of each financial year, even when the PCBU is conducting 'business as usual', and for reasons unrelated to seasonal events or demands (such as worker resignations, restructures or the creation of new roles).

(b) Consider that it may not be possible for a PCBU to 'reasonably expect' the number of workers to either exceed or dip below 20 in circumstances where the workforce hovers around the 20 worker threshold, but fluctuates frequently due to staff turnover.

(c) Offer any clarity as to what factors a PCBU should base any 'reasonable expectation' on, and what evidence they would be expected to provide in support of a decision to characterise themselves a small PCBU.

(d) Specify a period (i.e., within each financial year) within which a PCBU must assess whether they 'reasonably expect' worker numbers to exceed, or fall short of, 20

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1 Information about these committees is available on the Law Society's website: www.lawsociety.org.nz/professional-practice/law-reform-and-advocacy/law-reform-committees/.

2 Clauses 8(4) and 11.

3 Ministry of Business, Innovation and Employment *Regulatory Impact Statement: Work Health and Safety Reforms – Further Policy Decisions on the Reform Bill* (20 May 2025) (**May RIS**) at pages 16-17.

workers (and whether, for example, it would be appropriate to make this assessment partway through a financial year).

2.3 As a result, this definition could cause difficulties in determining whether a PCBU qualifies as a small PCBU, and create uncertainty regarding the status of some PCBUs. Such outcomes will undermine the underlying objective of these reforms to increase clarity and certainty for small PCBUs regarding their obligations under the HSWA.[4] Clarity regarding the precise scope of this term is also particularly important given small PCBUs have less onerous health and safety obligations under the HSWA than larger PCBUs. We therefore recommend amending clause 8(4) of the Bill to address the concerns we have identified at [2.2].

3 Overlap of requirements under the HSWA and other legislation (clause 12)

Changes to the scope of the HSWA

3.1 Clause 12 of the Bill seeks to replace section 35 of the HSWA, which currently provides that a person or court that is determining whether a person has complied with duties under the HSWA 'may have regard to' any health and safety requirements imposed on that PCBU by other enactments. New section 35 now states that a person who has complied with relevant requirements under other legislation to manage a risk must be treated as having complied with their duties under the HSWA.

3.2 Both the Bill and its Regulatory Impact Statement (**RIS**)[5] state these amendments seek to *clarify* (rather than to *change*) the law in order to address 'continued misinterpretation' of the current legal position.[6] This would suggest the current legal position is that, if a PCBU is required to comply with another law relevant to the health and safety of any person, the HSWA does not require that PCBU to do more than what is required by the other law.

3.3 We query whether this is the current legal position: the recognition in section 35 that a person 'may have regard' to the requirements imposed under another enactment may not necessarily mean that a person who has complied with those requirements has also complied with their HSWA duties. As a result, the amendments in clause 12 could potentially have the effect of changing, rather than clarifying, the current legal position and the scope of the HSWA. If that is the intention, this should be clearly conveyed in the Select Committee's report and in any departmental material provided to the Select Committee (and we acknowledge that a change rather than a clarification may be necessary to address the concerns identified in the RIS about confusion arising from overlapping legislation, over-compliance and excessive costs).[7] This matters because

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4 May RIS at page 15.

5 Ministry for Business, Innovation and Employment *Regulatory Impact Statement: Work Health and Safety Reforms* (12 March 2025) (**March RIS**) at page 19.

6 The general policy statement in the Explanatory Note of the Bill refers to the Bill 'clarifying' overlaps with other legislation. Similarly, the March RIS notes, at page 19, that the amendments in clause 12 seek to 'clarify' the relationship between the HSWA and requirements imposed on PCBUs under other law that can affect health and safety. It further notes, at page 24, that 'legislative amendment has proven necessary through a continued misinterpretation'.

7 March RIS at page 19.

whether the purpose of the amendment is to change, or only clarify, the existing law, could be relevant to future interpretation of the amended provision.

3.4 If the scope of the HSWA is to be changed, this would also require careful consideration of whether such changes could give rise to any unintended consequences or the creation of gaps. While the RIS briefly contemplates these points, it does not include any detailed assessment of these matters – it simply notes that 'there is a large legal risk that the drafting of the legislation leads to unintended consequences or the creation of gaps [and] MBIE recommends this requires more thorough consideration'.[8] The RIS and the Bill do not clarify if these matters have subsequently been considered in more detail. We therefore invite the Select Committee to seek advice from officials on this issue, and to direct officials to undertake further policy work around unintended consequences and gaps in the legislation (if this work has not been completed). If this work cannot be completed, we recommend deleting this clause.

Duty to manage a 'specified risk'

3.5 New section 35(1)(a) provides that this section applies if a person is subject to a duty imposed by or under the HSWA to manage a specified risk. The term 'specified risk' is not defined or explained in the HSWA or the Bill, although the example provided in clause 12 suggests it could include the duties imposed under sections 37 to 43 of the HSWA. However, absent a clear definition, it is unclear whether this phrase would encompass other duties, for example, under:

(a) section 36 of the HSWA (primary duty of care);

(b) sections 44 to 46 (duties of officers, workers, and other persons); or

(c) sections 55 to 57 (duties to preserve sites and notify notifiable events).

3.6 We understand it is likely the underlying intention is for this phrase to include these duties. However, as currently drafted, the scope of new section 35, and the overlaps with other enactments which engage this section, are unclear. We therefore recommend amending new section 35 to more clearly specify the circumstances in which this section would apply (if this clause is to remain in light of our feedback above).

Potential overlap with the duty of good faith

3.7 It is possible that new section 35 could apply where there is overlap between the duty of good faith to employees under section 4 of the Employment Relations Act 2000 and the worker engagement duties in the HSWA (for example, where a PCBU is proposing to implement a new policy that affects employee health and safety). It would be useful if this overlap could be addressed in an example under new section 35, given these two enactments and duties have different underlying purposes.

4 Development and review of approved codes of practice (clauses 27 and 28)

4.1 New section 222A in clause 28 provides that, in addition to the regulator, any person or organisation (a **third party**) can develop a draft code of practice (**COP**) or a proposal to

[8] March RIS at page 24.

revoke an approved COP (**proposal**). This new section also empowers the regulator to review and amend draft COPs and proposals developed by third parties, and recommend them to the Minister for approval.

Requirement to refer draft COPs and proposals to the regulator

4.2 Where a third party develops a draft COP or proposal, it is unclear whether they would:

(a) be *required* to give the draft COP or proposal to the regulator for referral to the Minister; or

(b) have the ability to refer the draft COP or proposal directly to the Minister for approval,

noting new section 222A(3) only provides the third party 'may' give the draft COP or the proposal to the regulator for recommendation to the Minister.

4.3 The amendments in clause 27, which enable the Minister to approve a draft COP or proposal only on the *regulator's* recommendation, suggest it should be the former (i.e., the third party must provide the draft COP or proposal to the regulator, which may then make a recommendation to the Minister under new section 222A(4)(c)). If that is the intention, we recommend:

(a) amending new section 222A(3) to clarify that the third party *must* provide the draft COP or proposal to the regulator; and

(b) ensuring regulators are adequately resourced to be able to review and amend such draft COPs and proposals, and make recommendations to the Minister (noting the RIS states that WorkSafe's resourcing is currently impacting the development of COPs).[9]

4.4 An amendment requiring referral to the regulator would also help improve the drafting process by:

(a) ensuring independent oversight and review of third party COPs and proposals; and

(b) enabling the regulator to ensure any approved COPs continue to apply appropriate health and safety standards which accurately reflect requirements under the HSWA (and we note this is particularly important given the Bill now provides that a person with a duty under the HSWA who complies with an approved COP must be taken to have also complied with the HSWA).[10]

Procedural matters relating to these amendments

4.5 The RIS notes that the amendments in clause 28 aim to address, among other things, concerns about 'slow and arduous' processes for developing new COPs.[11] However, the Bill is silent on procedural matters where the drafting process involves a third party. It does not, for example:

9 At page 15.
10 Clause 29.
11 March RIS at page 15.

(a) specify a timeframe within which the regulator must review (and where needed, amend) a draft COP or proposal prepared by a third party, and decide whether to refer it to the Minister;

(b) require the third party to confirm they have consulted the groups identified in section 222(2) of the HSWA;

(c) require the third party to share with the regulator copies of any cost-benefit or other analyses they have undertaken in relation to the draft COP or proposal; or

(d) prescribe timeframes within which the Minister must consider, and if appropriate, approve a COP or proposal.

4.6 We query whether these matters should be addressed in the Bill. We invite the Select Committee to seek advice from officials on these points (including on whether the intention is to address these matters in operational guidelines), and to amend the Bill if statutory requirements are considered necessary.

Minimum standards for designing and developing COPs

4.7 The RIS states that officials intend to develop a set of minimum standards which would apply to the COP approval process, and these would include a requirement for there to be 'clear industry support' for the COP.[12] It is suggested that the Minister could choose not to approve a COP if it does not meet these minimum standards (including the 'clear industry support' standard).[13]

4.8 The Law Society supports the publication of minimum standards to assist third parties that choose to draft COPs and proposals, but does not support inclusion of 'clear industry support' as a minimum standard. While consultation with industry bodies (as required under clause 27 of the Bill and section 222 of the HSWA) is necessary and appropriate, it is not appropriate or practical to require clear industry support for a COP (particularly where, for example, industry bodies are likely to oppose requirements which will cause them to incur additional costs, or require more resources to enable compliance). We therefore recommend excluding this particular standard from any operational guidelines and minimum standards.

4.9 We also reiterate that the Select Committee should consider whether these minimum standards, and in particular, those identified at [4.5] above, should be included in the Bill (rather than in operational guidelines) to ensure Parliamentary oversight of the standards which will apply to the COP approval process.

4.10 We acknowledge this feedback does not relate to the content of the Bill, and may not be a matter which can be addressed at Select Committee. However, we note our concerns here for officials, as they relate to matters which are discussed in the RIS, and arise from the amendments in the Bill.

12 March RIS at page 16.
13 March RIS at page 16.

5 Duties of officers (clause 21)

5.1 Clause 21 of the Bill amends section 44 of the HSWA to clarify that officers' due diligence duties extend only to governance work.[14] Where an individual acts as both an officer and a worker, new section 44(4) provides that the due diligence duties in section 44 apply only to their role as an officer.

5.2 The RIS states these amendments seek to reduce confusion and ambiguity about who is an officer, and the extent of their duties.[15] However, the amendments in clause 21 do not appear to fully achieve this objective: in our view, the confusion between governance and management responsibilities is, as noted in the RIS,[16] a product of the flexibility of the current definition of 'officer' in section 18 of the HSWA (which will remain unchanged). This means officers will continue to include not only those who hold governance positions, but also any person who holds 'a position in relation to the business or undertaking that allows the person to exercise significant influence over the management of the business or undertaking' (for example, a chief executive).[17]

5.3 It is then unclear how the definition of 'officer' will sit alongside proposed new section 44(4) in circumstances where an individual acts as both an 'officer' and a 'worker', and their governance and non-governance roles cannot be clearly distinguished. While the RIS assumes it will be possible to differentiate between the two roles (and therefore, the duties they each engage),[18] this will not always be the case. For example:

(a) In large entities with formal governance structures, the chief executive's role typically serves as the interface between governance and management functions (and such roles often involve, for example, operationalising decisions by the board, reporting to the board, and being accountable to the board for the implementation of decisions made by the board).

(b) Similarly, sole traders and business owners of small PCBUs tend to routinely carry out non-governance work (for example, management and operational activities) alongside their governance work.

5.4 In such circumstances, there could be ambiguity as to which HSWA duties are engaged when an individual 'wears both hats', and their governance work cannot be distinguished from their non-governance work. Consequently, there would also be ambiguity as to which offences and penalties apply in respect of those duties (noting the penalties which apply to officers are significantly higher than those which apply to workers).

5.5 In our view, the most appropriate way to address concerns regarding uncertainty about who is an officer would be to amend the definition of 'officer' in section 18 of the HSWA. Such an amendment would better reflect the fact that officers' duties are determined by what is reasonable given the position they occupy in the PCBU.

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14 See Explanatory Note of the Bill.
15 May RIS at page 38.
16 May RIS at page 38.
17 Sections 18(a) and (b).
18 May RIS at pages 41-42.

5.6 We also note the RIS contemplates, as an additional non-legislative reform option, the development of COPs and guidance which clarify the meaning of 'officer', and the due diligence requirements which apply to those roles.[19] The Law Society would welcome such guidance, particularly in light of the ambiguities identified above.

6 Requiring WorkSafe to prioritise critical risks (clause 34)

6.1 Clause 34 of the Bill amends the WorkSafe Act to refer to WorkSafe's 'main functions' and (in effect) other functions. The Law Society notes the following in relation to these amendments:

Distinction between main functions and other functions

6.2 It is unclear how, in a practical sense, WorkSafe would be expected to discharge its functions in a way that distinguishes its main functions and other functions (noting this is not discussed in any detail in the RIS). For example, would WorkSafe be expected to prioritise its main functions over its other functions?[20] Would it need to set aside the bulk of its funding and resources to discharge those main functions (and only use any surplus to discharge its other functions)?

6.3 The Crown Entities Act 2004 does not distinguish between different functions of Crown entities in this way, and simply states that the functions of a statutory entity are those which are set out in that entity's Act. However, we acknowledge there are other statutes which distinguish between main functions and other functions – for example, sections 11 and 12 of the Fire and Emergency New Zealand Act 2017 set out the 'main functions' of Fire and Emergency New Zealand (**FENZ**) as well as its 'additional functions'. However, that Act specifies that 'before performing any [additional] functions under this section, FENZ must ensure that it retains the capacity and capability to perform the [main] functions specified in section 11 efficiently and effectively'.[21]

6.4 We query whether the Bill should include a similar provision to explicitly recognise, in the legislation, any requirement for WorkSafe to prioritise its functions, and to retain its resources and capacity to discharge those functions as a priority. We invite the Select Committee to seek advice from officials on this point, and to make any necessary amendments to the Bill.

19 May RIS at pages 44-45.

20 The Explanatory Note suggests this might be the case: it states that the Bill reorganizes section 10 of the WorkSafe Act 'to prioritise the existing functions of WorkSafe'. However, this is not clearly is not reflected in the wording of clause 34.

21 Section 12(2).

Minor drafting error

6.5 There appears to be a small drafting error arising from the amendments in clause 34: clause 34(1) adds new subsection 10(1) to the WorkSafe Act, which means section 10 (which currently has no subclause) must become subsection (2). We recommend amending section 10 of the WorkSafe Act to reflect this change.

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