

SUBMISSION TO MBIE ON EXPOSURE DRAFT OF WORKER PARTICIPATION REGULATIONS

31 October 2015

Thank you for the opportunity to comment on the exposure draft of the worker participation regulations intended to support the new Health and Safety at Work Act. The Health and Safety Association of New Zealand (HASANZ) is pleased to present this submission on the draft regulations.

HASANZ is the umbrella organisation for workplace health and safety professions in New Zealand. It is an incorporated society that was launched on 10 September 2014. HASANZ represents ten diverse organisations with a shared purpose – to raise professional standards to provide healthier and safer workplaces for New Zealanders. We promote excellence in workplace health and safety practice.

Our founding member organisations include:

- Australian/New Zealand Society of Occupational Medicine (ANZSOM)
- Human Factors and Ergonomics Society of New Zealand (HFESNZ)
- Maintenance Engineers Society of New Zealand (MESNZ)
- NZ Institute of Hazardous Substances Management (NZIHSM)
- New Zealand Institute of Safety Management (NZISM)
- NZ Occupational Health Nurses Association (NZOHNA)
- NZ Occupational Hygiene Society (NZOHS)
- New Zealand Safety Council (NZSC)
- Physiotherapy New Zealand (Occupational Health Group) (NZSP)
- Occupational Therapy New Zealand (OTNZ).

This submission

This letter contains our main comments on the exposure draft; detailed comments can be found in the appendix to this letter.

General comments

- HASANZ agrees with the findings of the Independent Taskforce on Workplace Health and Safety (Taskforce) that worker participation is critical to improving health and safety outcomes. There must be genuine engagement with workers by PCBUs and they must set aside adequate time and resources to do this properly. Many PCBUs need guidance on how to engage with their workers about health and safety matters. In particular, there are issues with the capability of frontline managers to have these conversations. The regulator, with the support of the unions, has a key role in delivering high quality information and education to PCBUs about the benefits of engagement with their workers and how to go about it.

- HASANZ notes that having a health and safety representative (HSR) is not the only type of worker participation system and that just having a HSR does not necessarily equate to adequate engagement. There must be consistent messages from the regulator about expectations of PCBUs in relation to worker participation – the exemption for small businesses not in high risk industries or sectors has the potential to confuse this. The regulator should carefully consider the full suite of its compliance options for regulating worker participation requirements. HASANZ encourages WorkSafe New Zealand (WorkSafe) to be explicit about its enforcement policy on these provisions.
- HASANZ is particularly disappointed that the Government confused the requirements for worker participation by introducing the concept of ‘high risk sectors or industries’ and exempting small businesses that are not in ‘high risk industries or sectors’. As the injury and fatality statistics illustrate, small business does not equal low risk (as a recent small quarrying operation demonstrated) and low risk does not necessarily equal low harm (the health risks associated with sedentary occupations are often overlooked). Health risks can be slow acting and the results are usually felt in the public health arena because they are not covered by ACC. It is now well understood that the current set of injury and fatality statistics does not adequately capture the impacts of occupational disease. Exempting businesses that are not in ‘high risk sectors or industries’ is likely to omit workplaces that may well benefit from a health and safety representative or committee – should one be requested by workers.
- Further, introducing the concept of high risk industries or sectors may well give the false impression that, unless a PCBU is in a high risk sector, it does not need to comply with the other changes that will come into effect from April 2016. There needs to be clear communication on this issue from both MBIE and WorkSafe in the lead up to the new legislation coming into force.

Specific comments

Subpart 1 – Criteria used to identify high risk sectors: the explanatory material released with the exposure draft refers to a number of proxies for high risk that have been used to classify high risk industries. HASANZ notes the inclusion of exposure to asbestos and silica dust, but is concerned that the proxy omits other factors relating to occupational health risk, such as exposure to chemicals (for example through cleaning agents, pest control or spray booths), or radiation (radiotherapy and UV light). This suggests that other industries should also be classified as high risk industries, for example, in the manufacturing sector. HASANZ also notes that since this construct is being applied to issues related to *worker* participation, consideration of data from specific *occupations* within the industry sectors may be an alternative way of addressing the problem.

Subpart 1 – Classifications: HASANZ is concerned about the minefield that this provision creates. The current classification has been determined on the basis of reported and/or claimed injuries and fatalities, along with some nod to occupational health risk (i.e., mention of risk from exposure to asbestos and silica dust). No further explanation has been given about why the specific severe injury rates and fatality rates, as described,¹ have been selected, other than that they are a ‘proxy’ for high risk. Why was a rate of 25 chosen rather than, say 20 or 30? If the average across all industries is a rate of 3, why was an eight-fold increase determined as the level for “high risk”? HASANZ finds it inconsistent that agriculture has been targeted by both WorkSafe and ACC as a high-risk sector, yet

¹ Average of 25 fatalities per 100,000 employees or 25 severe injuries per 1,000 employees per annum.

it does not appear in Schedule 2. HASANZ also notes that Schedule 3 allows for some sectors that are particularly low risk to be excluded from the classification of high- risk industries. It is unclear why the decision has been made to exclude some sub-sectors that are ‘low risk’ within the high risk sectors but then not do the reverse – include the sub-sectors that are ‘high risk’ within the low risk sectors. High risk sectors/industries should be defined by the level of *risk*, not by the number of reported deaths or serious injuries. Other jurisdictions use tools such as job exposure matrices to determine risk – this construct could be applied to New Zealand, in consultation with industry. If MBIE does carry out further work on the classifications, HASANZ would be happy to provide assistance. Lastly, given the level of debate on this issue, we recommend that the initial review is undertaken within two or three years, rather than the five years outlined in regulation 5(2)(b)(i).

Subpart 2 – Minimum ratio: overall, the minimum ratio of 1:19 seems logical, given that the threshold of “small business” is fewer than 20 employees. However, HASANZ does have some concerns about how this can really apply in practice if a PCBU uses a highly seasonal workforce where employee numbers can increase tenfold for a short period or on construction sites with a highly fluid workforce across multiple PCBUs. It would be useful for the regulator to explain its policies on how it would apply this requirement to such businesses.

Subpart 3 – HSR Training: in terms of the definition of “additional training” HASANZ notes the current Targeted Review of Qualifications (TROQ) that is underway, and the upcoming Unit Standards Review in this area which will change the type of training courses offered. It is important during this time of change that WorkSafe keeps PCBUs and HSRs updated (via its website and/or other channels) about the type of training available. This will help enable HSRs and PCBUs to, firstly, understand what is available and, secondly, aid in the selection of appropriate courses for the business and the needs of its workforce. HASANZ notes that, as drafted in regulation 23, the choice of additional training (and its respective cost) is completely at the HSR’s discretion. The only requirement for consultation with the PCBU is in regard to the date, time and location of the course. Usually, choice of training follows a needs assessment to ensure an appropriate training and development approach is put in place. HASANZ encourages MBIE to consider including a requirement for a needs analysis to be undertaken as part of the process leading up to the HSR’s two days of additional training per year.

Subpart 5 – specified issues that inspectors may decide: HASANZ has serious concerns about this part of the regulations. HASANZ agrees that some aspects relating to the worker participation regime may result in disputes, and it agrees that there should be some process for dispute resolution. However, HASANZ does not consider that it is appropriate that this dispute resolution is provided by WorkSafe inspectors. Firstly, inspectors are not trained mediators. The employment relations mediation service already exists and some aspects of health and safety blur into employment relations issues – clearly a dispute between a PCBU and an HSR about disbursements (R30(1)(b)) is not a health and safety issue, it is an employment relations issue. Secondly, an inspector has a conflict of interest when it comes to making determinations in this way. An inspector is in a position of regulatory authority and may have to take enforcement action; it is not appropriate for this same individual to be facilitating discussion between a PCBU and HSRs. HASANZ recommends that the regulations refer disputes to mediation services in this instance, rather than WorkSafe inspectors.

Concluding remarks

Worker participation is critical to improving health and safety outcomes. HASANZ is concerned that the distracting discussion about “high risk” industries detracts from the main point of the changes recommended by the Taskforce – that all PCBUs engage with their workers and communities on health and safety issues.

We encourage the Government and the regulator to continue to focus on working with businesses, unions, and health and safety professionals to improve this engagement.

For any questions in relation to this submission, please contact info@hasanz.org.nz.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Judy Currie', with a long horizontal flourish extending to the right.

Judy Currie
HASANZ Secretary

Appendix – Detailed comments

Tell us about yourself:	
Name:	Judy Currie (HASANZ Secretary)
Organisation:	HASANZ
Industry:	Workplace health and safety professionals
Submitter type: (select relevant categories)	Worker
	Employer/PCBU
	Industry organisation
	Union
	Lawyer
	Academic
Other (please specify):	HASANZ is the umbrella organisation for health and safety professions in New Zealand

Part 1: Preliminary provisions	
Draft regulation number	Comment
3(1) initial training	(Definition of “initial training”.) This initial training should be acquired within the first half to one year to enable health and safety representatives (HSRs) to use their power effectively and in a timely manner. The initial training should therefore be completed in two days as this is what a HSR is entitled to within a year.
	(Definition of “additional training”) HASANZ notes the current Targeted Review of Qualifications (TROQ) that is underway, and the upcoming Unit Standards Review in this area which will change the type of training courses offered. It is important during this time of change that WorkSafe keeps PCBUs and HSRs updated (via its website and/or other channels) about the type of training available. This will help enable HSRs and PCBUs to, firstly, understand what is available and, secondly, aid in the selection of appropriate courses for the business and the needs of its workforce.

Part 2, Subpart 1: High risk sectors or industries	
Draft regulation number	Comment
5	(High risk sectors or industries.) HASANZ is concerned about the minefield that this provision creates. The current classification has been determined on the basis of reported and/or claimed injuries and fatalities, along with some nod to occupational health risk (mention of risk from exposure to asbestos and silica dust). No further explanation has been given about why the specific severe injury rates and fatality rates, as described, ² have been selected, other than that they are a ‘proxy’ for high risk. Why was a rate of 25 chosen rather than, say 20 or 30? If the average across all industries is a rate of 3, why was an eight-fold increase determined as the level for “high risk”? HASANZ finds it inconsistent that agriculture has been targeted by both WorkSafe and ACC as a high risk sector, yet it does not appear in Schedule 2. HASANZ also notes that Schedule 3 allows for some sectors that are particularly low risk to be excluded from the classification of high- risk industries. It is unclear why the decision has been made to exclude some sub-sectors that are ‘low risk’ within the high risk sectors but then not do the reverse – include the sub-sectors that are ‘high risk’ within the low risk

² Average of 25 fatalities per 100,000 employees or 25 severe injuries per 1,000 employees per annum.

	sectors. High risk sectors/industries should be defined by the level of <i>risk</i> , not by the number of reported deaths or serious injuries. Other jurisdictions use tools such as job exposure matrices to determine risk – this construct could be applied to New Zealand, in consultation with industry. Given the level of debate on this issue, we recommend that the initial review is undertaken within two or three years, rather than the five years outlined in regulation 5(2)(b)(i).
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Part 2, Subpart 2: Workgroups

Draft regulation number	Comment
6(1)	(Minimum ratio of HSRs to workers.) Overall, the minimum ratio of 1:19 seems logical, given that the threshold of “small business” is fewer than 20 employees. However, it may be useful to qualify this by reference to regulation 7(2). The requirements for determining the number of HSRs should be related to the aspects that the PCBU must take into account when determining workgroups. It is the access to HSRs that is important and also that HSRs understand the work carried out by the workers they represent, and have the training to do so effectively.
7 (2)	(Determination of workgroups.) It is not easy to understand what the list means – it must be clarified that the PCBU and the workers should agree on the work groups and who the HSR/s should represent. If there is not agreement between the PCBU and the workers, then it is likely to fail.

Part 2, Subpart 3: Health and safety representatives

Draft regulation number	Comment
10 (c)	(Eligible to stand for election as HSR if work sufficiently regularly to carry out functions and powers effectively.) This criterion may be inadequate in terms of seasonal work and complex work areas such as construction sites. For example, a horticulturalist employing 25 pickers or pruners for a season may not have the opportunity to have an HSR.
19 (2)(a)	(HSR ceases to hold office if (s)he ceases to be member of workgroup.) This could be of concern if the PCBU removes the worker from the work group because he or she finds the representative difficult, for example, by raising too many issues or issues that the PCBU does not want to resolve. We suggest that, if this situation arises, an immediate replacement from within the workgroup must be found/elected.
19(2)(c)	(Majority of members of workgroup resolve that the HSR should no longer represent them.) There is the possibility for this provision to be misused, for example, if a representative tries to make workers comply with appropriate health and safety requirements in the workplace and they do not like it – perhaps due to impact on work speed and bonus rates. A dismissal of an HSR in this case would not meet health and safety goals. However, if the HSR does not communicate the workers’ health and safety concerns, then it could be justified. As it is written, this clause may cause conflict in the workplace. We suggest that a reference to ‘consistent with the purpose of the Act or these regulations’ or a ‘good faith’ element is added to this regulation, along with guidance setting out the regulator’s expectations in this regard.
22	(Meaning of “completed initial training”.) Without the ability to review the required HSR initial training course content, it is not possible to comment on whether the content or duration of training are adequate.

23	(Choice of training course.) HASANZ notes that, as drafted in regulation 23, the choice of additional training (and its respective cost) is completely at the HSR's discretion. The only requirement for consultation with the PCBU is in regard to the date, time and location of the course. Usually, choice of training follows a needs assessment to ensure that an appropriate training and development approach is put in place. HASANZ encourages MBIE to consider including a requirement for a needs analysis to be undertaken as part of the process leading up to the HSR's two days of additional training per year.
26(1)	(Maximum total number of days' paid leave for HSR training.) We suggest that in section 26(1), the wording from the Health and Safety at Work Act 2015 (Act) is replicated here so that the words "for health and safety representatives in the whole business or undertaking" are added after "required to allow for training". This is so that the regulations are clear in relation to the number of days for training, without needing to refer to the Act.
26 (2)	(Maximum total number of days' paid leave for HSR training.) The justification for the days of paid leave is unclear. It appears that larger companies do not have to set aside the same relative amount of time and money per employee as smaller companies.

Part 2, Subpart 4: Health and safety committees	
Draft regulation number	Comment
	No specific comments.

Part 2, Subpart 5: Specified issues Inspectors may decide under section 121(3) of the Act	
Draft regulation number	Comment
30(1)	HASANZ has serious concerns about this part of the regulations. HASANZ agrees that some aspects relating to the worker participation regime may result in disputes, and it agrees that there should be some process for dispute resolution. However, HASANZ does not consider that it is appropriate that this dispute resolution is provided by WorkSafe inspectors. Firstly, inspectors are not trained mediators. The employment relations mediation service already exists and some of the aspects of health and safety blur into employment relations issues – clearly a dispute between a PCBU and an HSR about disbursements (R30(1)(b)) is not a health and safety issue, it is an employment relations issue. Secondly, an inspector has a conflict of interest when it comes to making determinations in this way. An inspector is in a position of regulatory authority and may have to take enforcement action – it is not appropriate for this same individual to be facilitating discussion between a PCBU and HSRs. HASANZ recommends that the regulations refer disputes to mediation services in this instance, rather than WorkSafe inspectors.

Schedules	
Draft schedule number	Comment
3	(Types of work excluded from high risk sectors.) See comment under Part 2 subpart 1.

Offences and penalties: Do you have any feedback on which of the draft regulations should or should not be offences and the maximum penalties that can be applied by the Courts?

Draft regulation number	Comment
	The offences and penalties are reasonable; they should not be any lower.

Infringement offences and fees: Do you have any feedback on which of the draft regulations should or should not be infringement offences (on the spot fines issued by notice by a health and safety inspector) and the maximum levels that should apply?

Draft regulation number	Comment
	No specific comments.

Exemptions from regulatory requirements: Do you have any feedback on which of the draft regulations should or should not be subject to the power in the new Act for the regulator to grant exemptions from regulatory requirements (clause 228A)?

Draft regulation number	Comment
N/A	We presume you mean clause 220 of the Act here. Given the importance of worker participation, we believe that the regulator should not have the ability to exempt PCBUs from the overall section 58 duty to engage with their workers on health and safety issues. However, we consider that the requirements in these draft regulations are process orientated and there may be situations where an exemption is needed for practical reasons, provided that the duty to engage workers is not affected.

Do you have any other feedback on the draft regulations?

Importance of guidance material to assist understanding of worker participation regime
Those with duties need to be able to understand what these are, and know how to act appropriately. The split between the detailed material in the Act (in schedule 2) and material in these draft regulations makes it hard to understand the whole regime. It is imperative that the guidance material that covers the worker participation aspects of the new legislative regime sets out clearly what is expected of PCBUs and workers. HASANZ would like to see the development of a ‘good practice’ document to help PCBUs develop suitable worker participation systems. For example, the organisation of a health and safety committee for a small business versus that for a large employer. PCBUs do need some guidance as there are different ways of dealing with this, depending on a company’s size and structure – simply reading the legislation does not provide a “how to” guide.

Equality of care
We understand that there is no intention to exclude anyone in the workforce from their underlying responsibilities. Smaller firms conducting operations in lower risk sectors may not be required to utilise a process involving a health and safety representative, but the expectations on performance cannot be any less. The daily toolbox discussions or regular agenda item at staff meetings that the Minister has given as examples of appropriate mechanisms for these smaller and lower risk enterprises must of course provide equal or better results in workplace health and safety for all those in the work system. This expectation must be clearly stated in the guidance material.

Expectations of HSRs
For the system to work, it is imperative that HSRs have a clear understanding of their roles and limitations. We recommend that the guidance material reinforces the expectation that the position holder is there to act as a conduit for concerns and as a resource for identifying, and in some cases

sourcing, appropriate qualified help. The level of health and safety training they receive will be comparable to a basic first aid course for the general public. The potential risk of a poorly informed HSR becoming a barrier to effective health and safety systems in an organisation should be acknowledged.