

MINISTER OF LABOUR

REVIEW OF THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992: EMPLOYEE PARTICIPATION

Introduction

1. This paper makes recommendations regarding the options available to increase employee participation in health and safety in the workplace. This initiative is being undertaken as part of the Health and Safety in Employment Act (HSE Act) Review Project (refer 99/004522).
2. Employee participation in managing workplace risks leads to better health and safety outcomes. This is because in employment, employees and employers have generally different information that they need to convey to each other if optimal health and safety outcomes are to be achieved. The statutory duty for addressing health and safety is with the employer or person in control of the place of work. However, employees are often the most likely to be aware of the immediate hazards they encounter. Addressing and resolving health and safety issues is most effective when there is an established problem solving process between employers and employees. Research has shown that awareness of the reasoning behind health and safety policies, and a genuine opportunity to participate in their development, can increase employee commitment to health and safety programmes.¹

Background

3. The HSE Act places ownership of health and safety firmly with employers. Section 5(2) states the object of the Act as 'the promotion of excellence in health and safety management by employers.' It prescribes and imposes on employers and others, duties in relation to the prevention of harm to employees.
4. Although there is currently no specific duty placed on employees to report hazards in New Zealand, it is implicit in an employee's duty under section 19² of the HSE Act that they should notify employers of hazards in the workplace. In the following discussion no option would alter these statutory responsibilities.

¹ Hopkins, A., 'Making Safety Work', 1995, Allen & Unwin Pty Ltd, Australia.

² Under section 19 "Every employee shall take all practicable steps to ensure (a) The employee's safety while at work; and (b) That no action or inaction of the employee while at work causes harm to any other person."

5. In Australia, research shows that employee participation contributes to improving workplace health and safety. The majority of health and safety issues are resolved satisfactorily by representatives and committees.
6. There are a number of legislative tools used overseas that empower employee participation in the workforce that are currently not used in New Zealand. These include enabling nominated health and safety representatives to issue notices to the employer, recommending hazards are addressed (provisional improvement notices) and notices that prohibit further work until a fault is remedied (provisional prohibition notices). These are discussed later in this paper.
7. Section 14 of the HSE Act requires employers to give employees the ‘opportunity’ to participate in the development of procedures for complying with the health and safety management provisions of the Act. There are no ongoing requirements for employees to be involved. Few employers seem to comply with this provision and the incentives to do so are low, as section 14 is not directly enforceable. Section 50 omits section 14 from the breaches of Part II that can be prosecuted; however, section 52 declares employee involvement a matter to be taken into account in awarding penalties. The role of employees in the management of risks is clearly both indicated and constrained by the provisions of the HSE Act. Ways of increasing employee participation are discussed below.

Discussion of the Employment Relationship

8. In the relationship between employers and employees:
 - Employers need to know as soon as possible about any hazards that exist in the workplace – employees are likely to hold this knowledge before employers on most occasions. In some cases employees are able to observe the obvious hazard first (poorly constructed scaffolding). On other occasions there may be hazards (the onset of OOS) that are readily apparent only to the employee.
 - Employees need help to handle any hazards that arise. Employers often have the solution either in the form of information or the ability to eliminate the hazard.
9. Both parties have knowledge that the other needs in order for a safe working environment to be speedily provided. A relationship between the parties is necessary to ensure that knowledge about the existence and management of hazards is readily communicated. Employment relationships of this type are characterised by mutual trust and confidence. Without co-operative relationships, employment relationships quickly break down. Co-operation can, however, be hard to maintain in circumstances of stress – for instance if there are severe time pressures to meet a production demand. Also, co-operation in circumstances of stress can sometimes lead to bad outcomes where employees and employers may take risks that are unacceptable. Statutory criminal sanctions requiring reasonable safety of employers and employees are one mechanism to prevent unreasonable risks. Co-operative relationships between employers and employees are likely to enhance workplace health and safety beyond this statutory minimum.
10. There is no formal quantitative information as to the extent of employee participation in health and safety management in New Zealand’s workplaces. The best source of

information available is from OSH branch managers and inspectors 'impressions' of dynamics in the workplace. The limited evidence indicates that there are few workplaces with formal employee representation.

11. When employees ring OSH to report concerns, the majority specify that their employers not be told that they contacted OSH. Several reasons are given for this. First, the fear that employers may take retribution by dismissing the employee. Second, employees want to avoid being labelled 'stirrers' by employers. Many employers (especially in small business) treat anonymous complaints to OSH from employees as an act of betrayal. An OSH branch manager has commented that 'in situations where an employee wants to remain anonymous it is often a symptom of a greater communication dysfunction in the organisation.' OSH inspectors report that:
 - employees in some industries are often encouraged either overtly or covertly to undertake dangerous practices;
 - there are cases where employees advise each other of hazards but do not inform the employer. This may be due to accepting the hazard as part of the job or a lack of confidence in informing the employer; and
 - in small business, (farming, construction, forestry and small businesses), where employers work alongside employees, there is an expectation that employees should subject themselves to the same level of risk-taking as the employer.
12. There are a number of options that could enhance employee participation in workplace health and safety. These are discussed below.
13. These health and safety issues need to be considered in the context of the employment relationship as a whole, in particular, the requirement that HSRs would need to act in good faith in exercising their duties. Without this context of good faith, employee initiated enforcement tools may be interpreted as contrary to the intent of establishing co-operative relationships to achieve positive health and safety outcomes, and to agreed government policy as reflected in the Framework for the Accredited Employer Programme.

Provision for Health and Safety Representatives in the workplace:

Option 1 – Mandatory requirement to select employee representatives

Option 2 – Explicit right to select employee representatives

Tools available to Health and Safety Representatives:

Option 3 – Provisional Improvement Notices (PINs)

Option 4 - Cease-Work Directives (CWDs)

Option 5 – Health and Safety Committees

Discussion of options for facilitating Employee participation in the workplace

Provision for Health and Safety Representatives

14. The Health and Safety Representative (HSR) role, proposed in the following options, would act as the link between employers and employees. They would not be

responsible for solving safety and health problems in the workplace. That remains the duty of the employer. Employees are likely to feel more comfortable raising safety and health matters and ideas with their HSR than with their employer or his/her representatives. HSRs would raise and discuss issues with employers or their representatives in order to arrive at a solution to make the workplace safe. The role of the safety representative would be to provide 'first-hand' knowledge and ideas from the employees and to increase the general awareness of health and safety in the workplace.

15. HSRs could have explicit legislative protection and authority to act on other employees' behalf and be given powers, which allow them to act when they believe that there is a non-compliance with the HSE Act. These issues are discussed under the following options.

Option 1 – Requirement to select employee representatives

16. Employee representatives would be mandatory in some or all workplaces. This would require elected employee representatives to be present in all workplaces meeting prescribed criteria in terms of size or perceived risk. The HSE Act or its regulations would set out the functions for HSRs and give them the necessary powers to carry them out.³
17. The disadvantage of this option is it that it is likely to be little more than a nominal position where employees have no desire to participate actively in workplace health and safety. It could be argued that once required, a HSR would be seen to be beneficial by employees and that the role would grow in each workplace. This approach would be open to criticism if employers were required to go to the expense of arranging for the selection of a HSR and the position was not utilised.

Option 2 – Explicit right to select a Health and Safety Representative

18. Under this option the HSE Act would be amended to explicitly include the right of employees to select an employee representative if they chose to, i.e., employers would be required to provide the mechanisms for employees to collectively choose an employee representative. Employers would then be required to work and consult with that person. Employee participation would be required to occur in the spirit of the existing good faith obligations under the Employment Relations Act. It would not be compulsory for a workplace to have a safety representative, but employers would be required to act to have an employee selected by employees when employees request a health and safety representative.
19. This is the recommended option. Its strength is that a HSR will be established in workplaces where the employees have an interest in health and safety. In itself, commitment by employees to a healthy and safe workplace will not gain optimal health and safety outcomes but it is a necessary precondition if the role of a HSR is to be effective.
20. To ensure that the role of a HSR has maximum effect, skill and knowledge in workplace health and safety, legislative duties, communication and negotiation skills

³ E.g. the functions of a HSR prescribed in Western Australian legislation include: regularly inspecting the workplace areas that the HSR was elected to represent, reporting hazards in the workplace to the employer and consulting and co-operating with the employer on safety and health matters.

would be useful. Assistance in the form of information and support from HSE inspectors would also enhance the role. A Code of Practice that provides guidance on how this duty could be met may be necessary. These issues are discussed later in the paper.

Health and safety representative initiated enforcement tools

21. Sections 39-46 of the HSE Act deal with prohibition and improvement notices. A certified HSE inspector may issue an improvement notice when a failure to comply with the HSE Act, or any regulation, is detected that requires correction but which may not be regarded as presenting an immediate danger needing urgent attention. Prohibition notices are intended for use where there is an immediate threat of danger where a particular process or action continues. Section 39 provides that an inspector must have reasonable grounds for believing that the employer is failing to comply before issuing an improvement notice. However section 41 does not explicitly impose such a restriction on inspectors issuing prohibition notices, although the issue of a prohibition notice can be appealed against on the grounds it is unreasonable. It would be possible to give HSRs powers under the HSE Act to issue a provisional improvement or prohibition notice.

Relationship with the Employment Relations Act

22. HSR initiated enforcement tools need to be seen in terms of the Government's policy, as represented in the Employment Relations Act 2000 (ERA), to improve communication and strengthen the collective dimension between employers and employees. As noted above, the concept of good faith embodied in the ERA also applies in relation to any health and safety issues that arise within an employment relationship. The general obligation on the parties to an employment relationship to deal with each other in good faith requires that parties respond to any health and safety issues raised in good faith, and also that the raising of health and safety issues itself occurs in good faith.
23. HSR initiated enforcement tools could be introduced as a means to encourage employers and employees to discuss workplace health and safety concerns and to address these themselves rather than having to involve OSH in an enforcement role. This could be done so that prior to HSRs issuing improvement or prohibition notices, there would be a requirement that the employer and HSR had discussed the suspected non-compliance and possible remedies. This process will also give employers the opportunity to correct problems before being subject to an employee initiated enforcement tool, and would be consistent with the ERA focus on problem solving at a low level in the workplace.

24. Option 3 - Provisional Improvement Notices [PINS]

In terms of the discussion between parties a Provisional Improvement Notice could be used to both:

- Formally acknowledge an agreement that a hazardous situation exists and that it will be resolved within a nominated timeframe; and
- Formally acknowledge that agreement couldn't be reached and that the issue is still of concern to employees and that they wish the employer either to:

- address their concerns by eliminating the suspected non-compliance; or
- request a HSE inspector to resolve the issue by ruling on the suspected non-compliance.

25. Prior to issuing a PIN, the HSR would seek resolution of the issue with the employer. When a PIN was issued, an employer would have a period of time within which to appeal to an HSE Inspector to revoke or confirm the PIN. Any PIN not appealed and varied or withdrawn would be deemed to become an improvement notice for the purposes of the HSE Act. It is recommended that HSRs be able to issue PINs.

Option 4 – Cease-work directive

26. The cease-work mechanism is similar in function to the right to strike under section 81(1)(a)(i) of the ERA. There are some key differences between the two mechanisms, however, which are outlined below.

Right to strike by employees under the ERA

27. The ERA provides coverage where employees believe there is an immediate threat of danger if a particular process or action continues. Section 84 of the ERA provides that strikes are lawful if the striking employees have reasonable grounds for believing that the strike is justified on the grounds of safety and health. Section 81(1)(a)(i) defines a strike as an act of discontinuing employment, ‘whether wholly or partially, or in reducing the normal performance of it’. Refusal by employees to work, for example on a particular piece of machinery would therefore be covered by this provision. In situations of immediate threat or danger, it would not be appropriate for a HSR to issue a PIN because during the time period allowed to the employer to rectify the problem, employees would continue to work with the machinery or process in question.

Cease-work Directive issued by a Health and Safety Representative under the HSE Act

28. There are two key advantages in having a stop-work provision for an immediate threat of danger under the HSE Act rather than the ERA:

- 1) Under the HSE Act, collective agreement need not be required. For example, in a hazardous situation, a HSR may be able to initiate a Cease-work directive without the agreement of employees who may be motivated to work in hazardous situations. HSRs would have the power to assess the situation themselves, and on the basis that serious harm could occur, *directs* that the employees cease work.
- 2) A response to the validity of a HSR issuing a disputed cease-work directive would be faster under the HSE Act. A CWD would operate within the specific HSE enforcement framework with ‘back-up’ provided by OSH health and safety inspectors. In contrast, if questions of the validity of a strike arise under the ERA, they would be considered in the Employment Court. While these matters are heard as urgently as is possible, and are generally resolved very quickly, this is likely to be a longer process than confirmation by a HSE inspector that the CWD issued was for a valid breach of the HSE Act. For these reasons, officials recommend that a cease-work mechanism issued by HSRs would be a valuable tool for improving health and safety in the workplace.

Safeguards against potential abuse of the role

29. There are risks that the HSR role could be abused by employees seeking to advance unrelated industrial relations issues through putting pressure on employers in the guise of health and safety issues. Safeguards should ensure that such cases are very rare.
30. It is recommended that the HSR be only able to issue a PIN or CWD after prior consultation with the person to whom it is issued. This gives the employer the chance to rectify any hazards without OSH becoming involved.
31. Second, an employer would be able to appeal to OSH against a PIN or CWD within a 7-day period. An OSH inspector would then be required to attend the workplace. If the PIN or CWD has been incorrectly issued, it can be rescinded at this stage by the inspector and the reasons for this discussed with all parties in order to inform future actions.
32. There may also be a need to specify in the HSE Act that a HSR may be disqualified, either temporarily or permanently, for inappropriate use of their power to issue PINs and CWDs. Grounds for disqualification could include:
 - the representative's actions were intended to cause harm to the employer's business; or
 - that a number of PINs/CWDs have been served unreasonably.
33. It may also be necessary to include a provision in legislation to ensure that no HSR may be discriminated against in terms of his or her employment as a result of exercising the functions of a representative. As a comparison, section 104 of the ERA separately recognises involvement in the activities of a union as a prohibited ground of discrimination.

Training of Health and Safety Representatives

34. HSRs will require a good understanding of the HSE Act and its regulations. If HSRs have little or erroneous knowledge of the HSE legislation, the system may be devalued if they frequently issue PINs or CWDs that incorrectly apply the legislation.
35. The recommended PIN/CWD system contains some safeguards that suggest they could be issued without the need for training of HSRs. First, the representative may only issue a PIN or CWD after prior consultation with the person to whom it is issued. This gives the employer the chance to discuss why they believe that the situation complies with the HSE Act. Second, an employer may appeal to OSH within a 7-day period. An OSH inspector attending the workplace will confirm or correct any incorrect assumptions made by either party, which will in itself provide an element of training to both parties.
36. Despite these safeguards, it is recommended that training in employee initiated enforcement tools be compulsory prior to them being issued, particularly as CWDs are likely to have a direct financial impact on the employer. Training should cover when it is appropriate to issue a PIN or CWD, what steps must be taken prior to

issuing a PIN or CWD, implications of inappropriately issuing a PIN or CWD, and a basic level of training around the provisions of the HSE and associated employee/employer responsibilities. Regardless of the level of training provided, these processes should be underpinned by clearly presented information (e.g. pamphlets) readily available to employers and employees.

37. Two options for training to be considered are:

- Mirror Part 7 (Employment Relations Education leave) of the ERA in the HSE Act. This provides paid leave for union members covered by collective agreements or bargaining to obtain the skill and knowledge necessary to work within the new employment environment. To this end leave entitlements are accumulated and can be utilised by unions on approved training. The HSE Act could provide a filtering mechanism similar to that in Part 7 of the ERA. Such a mechanism would limit the costs imposed on employers for the paid leave entitlements of employees by limiting the number of employees whom could receive training in the use of PINs and CWDs. This option would be administratively expensive, as unlike the ERA situation the training would apply to non-unionised workforces. The ERA relies heavily on unions administering access to the training entitlement.
- Alternatively, a training fund could be administered by a government department or crown agency (Skill NZ) with courses run on an 'as needs' basis. There are risks associated with relying on the private provision of training. First, the risk that no private provider may choose to offer such training. Second, there is also the risk that private trainers (assuming they exist) may have different interpretations over when it is appropriate to issue a notice and the practicable steps for an employer to take to rectify the hazard. These differences in interpretation may lead to variable applications of the system across the country and potentially across workplaces. Therefore the provision of unit standards in the National Qualifications Framework and accredited training providers are the preferred option. This would also enable a more flexible response to the variable demands for training that are likely to result as new HSRs are elected.

OSH resources

38. Inspectors would be required to respond to requests to arbitrate disputed notices issued by employees' health and safety representatives. This may place additional pressure on OSH resources.

39. However, on the basis of the Australian experience, PINs may not involve the enforcing authorities in significantly more work because the majority of complaints are likely to be resolved within the workplace. Currently, concerned employees complain directly to OSH because that is the only mechanism available to them to resolve an issue. If PINs were introduced, any increase in work resulting from appeals by employers may be offset by a reduction in complaints.⁴

⁴ There may be an initial increase in complaints to OSH following the issuing of a PIN due to employers 'testing' the new mechanism.

Option 5 – Health and Safety Committees

40. A further option to consider is whether health and safety committees should be encouraged or mandated. Legislation provides for health and safety committees to be formed in workplaces with 20 or more employees in New South Wales, the Northern Territory and Tasmania. In Western Australia, health and safety committees are required when there are ten or more employees, while in the Commonwealth jurisdiction, only workplaces with 50 or more employees can form committees.
41. In Ontario, Canada, joint health and safety committees are mandatory for workplaces of more than 20 employees. A Health and Safety Committee must have at least two members where a workplace has fewer than 50 employees and at least four members where a workplace has more than 50 employees. Half the members must represent the management/employer and the other half represent employees. At least one management and one employee member must have completed a health and safety training course administered by the Workplace Safety and Insurance Board. For workplaces with 6-19 employees, a health and safety representative is required whose functions and rights are similar to those of a health and safety committee.
42. A number of businesses in New Zealand have already established joint safety committees. Although quantitative results are not available, larger workplaces are more likely to have such committees in place. Initiatives such as the ACC accredited employers scheme are likely to result in the establishment of health and safety committees. This scheme rewards employers who ensure that employees have the opportunity to be fully involved in the development of safe workplace practices through lower insurance premiums. It requires a forum to enable employees to communicate to management issues of interest and concern related to health and safety.
43. As with the previous discussion about mandatory health and safety representatives, there is an argument that committees are more effective when companies establish them voluntarily. The risk is that when they are mandated, companies comply simply because there is a legal requirement to do so. For this reason making health and safety committees mandatory is not recommended. There are however, benefits to this approach and it is recommended that information on the benefits and construct of committees be included in an information resource on employee participation.

Comment by The Treasury

44. ‘Treasury does not support the recommendations in this paper. Further work is required on determining the exact nature of the problem the proposal aims to address. If the HSE Act creates the right incentives for firms to invest in the appropriate level of health and safety, and if employee participation improves health and safety outcomes, then firms will involve employees.’
45. The proposals have the potential to impose significant and unnecessary compliance costs on employers if the employee representative does not have the necessary skills and expertise to identify and manage hazards or if the tools are misused. In addition further work is required to identify the fiscal implications of the recommendation.’

Summary

46. This paper makes recommendations regarding options for increasing employee participation in workplace health and safety. Recommendations are made for including provisions in the HSE Act for the election of an employee Health and Safety Representative where employees wish to exercise that right. An exercisable right is recommended because there is little point in making companies comply with a legal requirement if employees are not sufficiently interested in having a representative.
47. Giving Health and Safety Representatives the power to issue notices (Provisional Improvement Notices and Cease-work directives), informing their employer that they believe there is non-compliance with the HSE Act and stopping the dangerous action if required, is recommended.
48. Training of Health and Safety Representatives is advocated and a training fund administered by a Department or Crown entity is recommended.
49. Health and Safety Committees are a valuable tool to be encouraged and it is recommended that this be done through the provision of information rather than a legislative requirement.

Recommendations

I recommend that you:

- (a) **note** that employee participation mechanisms will improve communication between employees and employees and may lead to improved outcomes in health and safety.
- (b) **agree** to amend the Health and Safety in Employment Act 1992 to include an explicit right for employees to select health and safety representatives (option 2).
- (c) **agree** to amend the Health and Safety in Employment Act 1992 to allow health and safety representatives to issue Provisional Improvement Notices.
- (d) **agree** to amend the Health and Safety in Employment Act 1992 to allow health and safety representatives to issue Cease-work directives.
- (e) **note** that Health and Safety representatives require training in the use of issuing Provisional Improvement Notices and Cease-work directives.

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For Secretary of Labour