

HEALTH & SAFETY REFORMS



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WHAT IS CHANGING AND WHAT DO THE CHANGES MEAN FOR SPORT?

OVERVIEW

The Government is looking to change New Zealand's workplace health and safety culture. A new Health and Safety at Work Act will come into force in 2015 (currently scheduled for 1 April). The aim is to substantially reduce work-related harm in New Zealand. The Bill is still at the Select Committee stage and this timing – and the content of the Bill – may therefore change.

The expectation is that leaders of individual organisations will drive this change. As a result, board members, chief executives and some other senior managers will have direct responsibility under the new Act for ensuring that the organisation's facilities and activities are safe. If these duties are breached, these individuals – the organisation's leaders – can be held personally liable. The new penalties for individuals and organisations are potentially very significant.

Other changes will be made to address gaps and inconsistencies in the current legislation. The aim is to ensure that all modern workplaces, work activities and working relationships are covered.

In practice, organisations with strong health and safety practices will not need to make significant changes. However, it is important that organisations, and their leaders, take this opportunity to review their practices to ensure that they have good systems and structures in place, and that these are followed in practice, documented appropriately and reviewed regularly. There will also be changes in some of the detail (e.g. accident reporting), which organisations will need to understand and comply with.

As well as legislative change, the Government has established a new regulator, WorkSafe New Zealand, and published two new sets of best practice guidelines, one for boards on governance and one on workplace bullying. Further new regulations will be drafted to cover specific matters and a discussion document has been released.

The following information summarises the reforms briefly, and directs you to other places where you can find more detailed information.

As with all health and safety matters, the precise steps you need to take very much depend on your organisation's specific circumstances. There is no 'one template'. It is important that all organisations take note of the changes. While organisations that undertake inherently or especially dangerous activities, such as adventure tourism, will need to take particular care and seek specialist advice, there are risks in all sports and organisations that can cause serious harm and that need to be managed.

Disclaimer: This guide is intended to provide practical and general advice. It is not intended to provide comprehensive advice that can be applied in all scenarios. It should be noted in particular that the new legislation is not yet in its final form. The information in this guide should not be used as a substitute for professional or legal advice where that is appropriate. Sport New Zealand cannot guarantee the absolute accuracy of the information in this guide and therefore cannot and does not accept responsibility or liability to any person for any errors or omissions in that information.

What will stay the same?

While the wording in the final legislation will change, fundamentally the obligation on organisations to do everything they reasonably can to keep people safe will not change.

In 2008, a 21-year-old English tourist drowned in the Kowarau River.

She was riding a body board in the Kowarau rapids with a river boarding company. She was trapped underwater for 20 minutes by a rock until another operator's boat carrying ropes arrived and freed her body.

The Court found that the company failed to take all practicable steps by:

- not moving to another part of the river when the water level dropped
- failing to ensure the river guides carried and were trained to industry standards in the use of throw bags, ropes, knives and other safety equipment
- failing to have available and use a guide or equipment to block the hazard, provide safety cover and assist in the rescue of a trapped person.

Issues were also raised about the safety briefing. Initially, the director was charged personally, but the charges were dropped when the company pleaded guilty. The company was fined \$66,000 (\$33,000 for each charge) and ordered to pay \$80,000 in reparation to the family.

The obligation currently is to 'take all reasonably practicable steps' to prevent people from being harmed in the workplace or as a result of the organisation's activity. There are also more specific duties to employees (e.g. to eliminate, isolate and minimise hazards), and to other people.

Under the new Act, there will be a duty to 'ensure health and safety' across all workplaces and activities.

This means that the organisation must:

- **eliminate** risks to health and safety so far as is reasonably practicable
- if this is not reasonably practicable, **minimise** those risks so far as is reasonably practicable.

The meaning of what is 'reasonably practicable' won't change for practical purposes. It will still be a case of balancing the nature and extent of the particular risk against the costs and practicalities of protecting against that risk.

The balance will continue to be weighted heavily in favour of health and safety. Remember that accidents are looked at in hindsight, and that, when serious harm has occurred, cost seldom justifies a decision not to do something that could have prevented the harm. For costs to be relevant, they will need to be 'grossly disproportionate' to the risk (this will be included expressly in the new Act).

What will change?

The new Act will be worded and structured differently. The aim is to ensure that all modern workplaces, work activities and working relationships are covered, and that some of the gaps and inconsistencies in the current legislation are addressed.

For instance:

- The primary duty holder will be a 'person conducting a business or undertaking' or 'PCBU'. The reference here to a 'person' means the entity conducting the business or undertaking, ranging from sole traders to large companies, and includes incorporated and unincorporated organisations. 'Business' and 'undertaking' aren't defined, but all sports organisations will almost certainly be PCBUs, including clubs, National Sport Organisations (NSOs), Regional Sport Organisations (RSOs), Regional Sports Trusts (RSTs) and other organisations that operate events or facilities.
- There are new and important obligations for 'officers' of PCBUs (see *Officers* on page 5).
- The definitions of 'work', 'worker' and 'workplace', and the duties that apply for each, will be amended so that the duty to ensure health and safety covers all work that is being or has been undertaken, and all areas where people work or are working. If you maintain a sports ground, that will be a workplace and you will be responsible for ensuring (to the extent reasonably practicable) that workers are not harmed while they are working at the ground, and that other people are not harmed by those workers, or by anything arising at the ground – regardless of whether people are working there at the time. The extent to which someone might be held responsible in practice for accidents that occur when no-one is working at the ground will depend on the extent of control that person has, and the extent to which they were responsible for the particular accident (e.g. the grass cutting contractor will not be responsible for structural issues in the stadium, but might be responsible for an accident that arises as a result of leaving equipment out).
- [The current exemptions for sports or recreation clubs who use volunteers to undertake work will cease to apply \(see *Volunteers* on page 6\).](#)
- Obligations to ensure health and safety will apply to PCBUs who design, supply, manufacture, install, construct or commission plant (equipment) or structures for use in a workplace.
- The obligations that apply currently to notify WorkSafe of serious harm accidents will change as a result of the new definition, 'notifiable event'. It is important to understand what must be notified, as it will be an offence not to immediately notify a notifiable event. The relevant definitions can be found in clauses 18 to 20 of the Bill at: <http://www.legislation.govt.nz/bill/government/2014/0192/latest/DLM5976660.html>.
- Where multiple duty holders have a duty in relation to the same matter, there will be a specific duty to consult, cooperate, and coordinate activities (e.g. multiple clubs competing at an event).
- The current obligations to involve workers in health and safety matters will be extended and made more prescriptive. There will be specific obligations for PCBUs to consult workers (including contractors and volunteers). PCBUs may, or may be required to, hold elections for health and safety representatives and establish health and safety committees. These obligations will apply to all PCBUs, not just those with 30 or more employees (which is the current law).
- Workers' rights to refuse to perform work likely to cause serious harm will be strengthened.

Officers

The new Act will impose a positive duty on officers to exercise 'due diligence' to ensure that the PCBU complies with its duties. This is a significant change from the current law. While there is scope currently for personal liability, it is relatively rare. The Government has sent a clear signal that this will change, and that individual officers will be prosecuted and held personally liable when the Act takes effect.

'Officer' is defined, and includes board members (of companies, incorporated societies, trusts etc), chief executives and other people who make decisions that 'affect the whole, or a substantial part of the business or undertaking'.

'Due diligence' is also defined and will require officers to take reasonable steps to:

- understand the PCBU's operations and associated hazards
- ensure that the PCBU has, and implements, appropriate health and safety processes
- ensure that these processes are sufficiently resourced and that their use is monitored and verified.

We recommend that all officers read the *Good Governance Practices Guideline for Managing Health and Safety Risks*¹ published by the Ministry of Business, Innovation and Employment and the Institute of Directors:

<https://www.iod.org.nz/Publications/Healthandsafety.aspx>.

These guidelines apply now and should be implemented. All boards should have, as part of the board charter, a policy setting out the board's role in leading health and safety, and appoint at least one person on the board or a sub-committee who takes the lead on health and safety.

Boards are responsible for determining high-level health and safety strategy and policy which managers are required to implement. This strategy and policy must take into consideration all those affected by the organisation's activities, not just workers. Board members' responsibility, however, does not stop with the issuing of strategy and policy, as they should also ensure that it is implemented effectively. They do this by holding management to account through processes of policy and planning, delivery, monitoring and review.

¹*Good Governance Practices Guideline for Managing Health and Safety Risks (May 2013), Ministry of Business, Innovation and Employment and the Institute of Directors.*

Volunteers

Individuals

Individual volunteers who are 'working' for a PCBU can be liable in the same way that employees can be liable for failing to ensure (to the extent reasonably practicable) that people aren't harmed as a result of their work.

Officers – voluntary and remunerated

Officers who are volunteers (i.e. who receive no payment or reward, other than out-of-pocket expenses) will still have a duty under the Act to exercise due diligence, but will not be held personally liable under the Act for breaching that duty because of an express exemption.

If the Chair receives a stipend that is not simply an allowance to cover expenses, and is the only person remunerated on the board, then the Chair will be personally liable, but the other board members will not.

Sports and recreation clubs

As noted above, the current exemptions for sports or recreation clubs who use volunteers to undertake work will cease to apply. So if you are a club running a cycling event and have volunteers working as marshals, you will be responsible for their safety as if they were your employees (as well as for the safety of the athletes and public out on the road). In this case, the need for an authorised traffic management plan becomes essential, together with appropriate briefings and the use of appropriate equipment.

Volunteer and unincorporated associations

This advice is intended primarily for Sport New Zealand partners who are legally constituted entities.

Volunteer and unincorporated associations will be in their own special categories under the new Act. Relatively few sports organisations will fall into these categories, and the precise scope of their legal obligations will depend on the particular circumstances. We will continue to monitor this area as further information becomes available. In the short term, volunteer or unincorporated associations may wish to do their own research or seek advice. As a starting point, relevant provisions in the Bill can be found at:

<http://www.legislation.govt.nz/bill/government/2014/0192/latest/DLM5976849.html> (volunteer associations) and:

<http://www.legislation.govt.nz/bill/government/2014/0192/latest/DLM5976933.html> (unincorporated associations).

Criminal liability

A breach of the new Act is a criminal offence (as is the case currently). A person or organisation does not need to act intentionally or recklessly to be liable. It is sufficient that the person or organisation failed to meet their obligations.

The penalties will increase substantially under the new Act. The most serious offending will have a maximum penalty of \$3m for a body corporate (a six-fold increase), and \$600,000 and five years' imprisonment for individuals (a three-year increase in the prison term and \$100,000 increase in the maximum fine).

Note that you cannot insure against fines, and it is illegal for an organisation to compensate individuals for any fine they have to pay. Insurance is available, however, to cover legal costs and reparation (effectively Court-ordered compensation).

Regulations and guidelines

New regulations and guidelines to cover specific activities and forms of business will be introduced over time – the reforms are intended as a 'package'. A discussion document has been released so that regulations can be brought in at the same time as the Act.

Sports organisations will probably only be affected by the proposed workplace management and worker participation regulations, which largely clarify current obligations. For example, the document signals that there will be obligations to make adequate provision for trained first-aiders, first aid facilities and equipment. What 'adequate' provision means for your organisation will depend on the particular circumstances. The document also covers areas such as:

- information, training, instruction and supervision
- general workplace facilities
- emergency plans
- personal protective equipment and clothing
- remote or isolated work
- the employment of young people.

You can access the document at:

<http://www.mbie.govt.nz/about-us/consultation/development-of-regulations-to-support-the-new-health-and-safety-at-work-act>.

New guidelines have been introduced already. We have referred above to the *Good Governance Practices Guideline for Managing Health and Safety Risks* published by the Ministry of Business, Innovation and Employment and the Institute of Directors:

<https://www.iod.org.nz/Publications/Healthandsafety.aspx>.

WorkSafe has also published *Best Practice Guidelines on Preventing and Responding to Workplace Bullying*:

www.business.govt.nz/worksafe/information-guidance/all-guidance-items/bullying-guidelines.

Someone in your organisation should review these and consider whether workers and members should be advised about them, what measures you have in place to address bullying and stress-related harm, and whether you should develop a policy consistent with the guidelines.

Practically, what should sports organisations do?

- Good documentation is critical. Health and safety should not be reduced to a box-ticking exercise, but clear policies, hazard and accident registers and task lists are important tools and helpful in avoiding prosecution. Make these documents part of normal and expected practice, which people have to use and complete.
- You may have good health and safety systems and policies, but they may not be called that or captured in one place. Bring these together and make them visible.
- Take the opportunity to review and identify hazards, and to review your health and safety practices across all of your premises, facilities and operations. Document the reviews and the improvements made.
- You cannot contract out of your duties, but it is important still to assign responsibilities clearly. For instance, if you are running a swimming event and engaging the local surf lifesaving club to be responsible for the safety of swimmers in the water, agree the areas of the responsibility with the club and document those. Ensure responsibilities are assigned and recorded in documents such as policies, job descriptions, employee performance agreements, event plans, race briefings etc.
- Ensure that health and safety is a regular and important agenda item at meetings, and that the discussion and outcomes are minuted and then followed up at the next meeting.
- Seek and take advice. Look to other organisations in the sector, in New Zealand and elsewhere. (Australian law is very similar, as the New Zealand reforms are based on Australian law.)
- Ensure that someone in the organisation is responsible for going through the detail in the new Act, regulations and guidelines to ensure that you comply.
- Undertake proper inductions for employees, contractors, members, volunteers, athletes and participants, and document those.
- Ensure that within the board charter is a policy setting out the board's role in leading health and safety, and that at least one person on the board or a sub-committee takes the lead on health and safety.
- Every officer should ask about and know the induction, information and assurance processes that the organisation has in place to ensure the officer is discharging his or her responsibilities.
- Investigate your insurance options.

Find out more

Risk management at events

<http://www.sportnz.org.nz/managing-sport/guides/risk-management-for-events>

Adventure activities

<http://www.business.govt.nz/worksafe/about/what-we-do/adventure-activities/updates/worksafe-nz-adventure-activities-update-5-may-2014>

Community and voluntary groups

<http://www.business.govt.nz/worksafe/information-guidance/all-guidance-items/directors-guidelines-on-their-responsibilities>

WorkSafe website

<http://www.business.govt.nz/worksafe/>

Health and Safety Reform Bill

<http://www.legislation.govt.nz/bill/government/2014/0192/latest/DLM5976660.html>

Good Governance Practices Guideline for Managing Health and Safety Risks

<https://www.iod.org.nz/Publications/Healthandsafety.aspx>

Preventing and Responding to Workplace Bullying

<http://goo.gl/mpNFGg>

Proposed new Regulations discussion document

<http://www.mbie.govt.nz/about-us/consultation/development-of-regulations-to-support-the-new-health-and-safety-at-work-act>



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