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Committee Secretariat
Transport and Industrial Relations Committee
Parliament Buildings
Wellington

HEALTH AND SAFETY REFORM BILL: SUBMISSION OF THE INSTITUTE OF DIRECTORS

Thank you for the opportunity to provide comment on the Health and Safety Reform Bill (the Bill). We strongly support the proposed legislation and are committed to safer workplaces in New Zealand. We would also welcome the opportunity to appear before the Committee to speak to our submission.

About the Institute of Directors

The Institute of Directors in New Zealand (IoD) is a non-partisan voluntary membership organisation committed to raising governance standards In New Zealand. We aim to help businesses understand governance and concurrently assist skilled and experienced directors with vision and independence of thought to work with management to achieve better business performance.

We represent a diverse membership of over 6,000 members drawn from NZX-listed corporations, unlisted companies, private, closely held companies, small to medium enterprises, public sector organisations, not-for-profits and charities.

The IoD has a demonstrable existing commitment to health and safety that pre-dates the proposed legislation. We collaborated with the Ministry of Business, Innovation and Employment (MBIE) on the guidance document for directors, '*Good Governance Practices Guideline for Managing Health and Safety Risks,*' which was launched by the Minister of Labour at an IoD event in Wellington on 20 May 2013. We also produced a summary version of the guideline for all members and ran a series of events around the country on health and safety governance.

Commentary on the Bill

This submission focuses largely on the responsibilities of directors and governance in respect of the Bill.

We set out some general comments, and outline the implications for directors and areas we suggest should be changed or clarified.

1. General comments

We support the Bill and are committed to safer workplaces in New Zealand. Legislation that aims to ensure safer outcomes for all workers in New Zealand is an important and worthwhile priority for government, employers and workers alike.
The IoD welcomes the aim to reform the culture and responsibilities in the workplace from the 'top down' and supports directors being appropriately held responsible for health and safety outcomes. The key to successful implementation is to ensure the legislation delivers the clarity that directors need to carry out their responsibilities and fulfil the duties of the health and safety regime.

Responsibility on all parties to make the regime work

Legislation promoting health and safety should avoid perverse effects or holding individuals and companies to onerous or unrealistic standards. The legislation and consequent jurisprudence must acknowledge the central importance of health and safety but balance this against the reality that accidents happen in the best ordered workplaces. Legislation that clearly lays out the parameters and penalties for wrongdoing is vital.

In our view proportionality should be a key principle underlying the legislation and the role of the regulator. By this we mean there is a need to focus regulator concentration on areas in which major health and safety problems are identified and not to put disproportionate pressure on small and medium enterprises or to disproportionately target one class of person or office. The 'chain of responsibility' created by the person conducting a business or undertaking (PCBU) system should be a real one and not simply impose liabilities on directors by virtue of their position of ultimate liability. If all individuals are responsible for their respective role in health and safety in the workplace (and we agree this is correct) it would be unfair and prejudicial to approach sanctions and penalties in a way that only targets those with ultimate responsibility.

Trans-Tasman alignment

We note that the Bill and the establishment of the WorkSafe New Zealand regulator (WorkSafe) have a close degree of alignment with existing health and safety regimes in Australian jurisdictions, including with the Model Work Health and Safety Act (the Australian Model Act). In our view this is an appropriate and sensible approach, particularly from a governance perspective where New Zealand has a considerable number of Trans-Tasman directors and businesses. This alignment will help with the understanding, implementation and operation of the legislation.

WorkSafe New Zealand

We recognise and support WorkSafe's intention to take an approach based on education and support for businesses. This includes significant effort in consultation on Codes of Practice. We support WorkSafe's approach that 'good health and safety makes good business sense.' We will continue to work with WorkSafe as opportunities arise.

Partnership is the key to success

We recognise and congratulate the Government for its clear position that health and safety in New Zealand is a partnership model between employers, workers and government. While appropriate standards and enforcement mechanisms are a vital aspect of the system there is no doubt that a model in which employers, workers and regulators work together towards the desired standards is the best way to achieve consensus and participation.

Willingness on the part of all parties is central to this and this is about changing the culture of the New Zealand workplace as much as the letter of the law. A punitive focus or one that is only about onerous compliance will reduce willingness and achieve little real and lasting change. We recommend that the Government continues to take this realistic approach.

We accept that scrutiny of health and safety process is not adequate in many industries and the challenge of the legislation is to embed improved practices.

Education

Concurrent with partnership is the need to embed health and safety earlier into the learning process in education and training in New Zealand. In our view this should include WorkSafe and MBIE giving significant thought to the balance between personal and entity responsibility. Education is vital, particularly tertiary training on health and safety in the trades with personal responsibility and culture taken seriously.

2. Impact on directors

We support directors being appropriately held responsible for health and safety outcomes. The concept of the *person conducting a business or undertaking* (PCBU) mirrors provisions in the Australian Model Law.

2.1 Due diligence

The Bill creates a positive "due diligence" duty on directors, as officers under clause 39. This represents a significant change to the existing law and directors will have a more stringent duty in relation to health and safety. The definition is reasonably consistent with the concept of due diligence in the cases dealing with the obligations of directors under current law.

We support the use of 'so far as is reasonably practicable' in reference to the primary duty of care of a PCBU (clause 30). This is an appropriate standard and has equivalents in Australian health and safety legislation. The reasonably practicable requirement may allay some concern about the onerousness of the legislation and we think the legislation would be unworkable without it.

The Bill holds a director responsible as a PCBU where there are multiple businesses or undertakings and therefore multiple PCBU's involved in the process. The IoD has concerns about practical implementation where multiple parties have multiple legal obligations. We will watch the application of the Bill's proposed 'reasonably practicable' approach with interest.

2.2 Liability

Approach to liability

The Bill largely avoids previous well intentioned trends in legislative reform that have impacted negatively on directors. Officials have at times proposed concepts that are not sustainable for New Zealand business in the long term, such as:

- Strict liability – where intention is not relevant in establishing the offence;
- Culpability arising merely because of the office of director;
- Reverse onus of proof – where the director has the burden to "prove" innocence by establishing all the elements of the available defence and
- Severe penalties – financial or career-terminal banning orders, under the guise of a lesser civil standard of proof (balance of probabilities) rather than the more onerous criminal standard (beyond reasonable doubt).

We wish to avoid the return of such notions and are pleased to see little evidence of this in the Bill.

The Bill includes specific provisions (clauses 45 to 48) relating to the liability of certain persons and whether an offence is committed for a failure to comply with duties under the Act. We think the coverage of these exemptions needs to be clearer. We also question the rationale behind why certain office holders are exempt and others are not.

We also have particular concerns about the status and liability of voluntary directors under the Bill.

Voluntary directors

Voluntary directors are an integral part of the governance structure of many organisations in New Zealand. However it is not clear what the status and liability of a voluntary director is under the Bill. The Bill needs to be clearer about volunteers and whether this includes voluntary directors.
We acknowledge that voluntary directors can have a high degree of control and influence over the organisations they are a directors of, including over health and safety. However we are also of the view that being liable to prosecution and penalties under the Bill could be a significant deterrent to directors taking on voluntary roles.

On balance, and in the interests of maintaining and supporting the culture of voluntary governance in New Zealand we think that the Bill should clearly and explicitly recognise voluntary directors as a particular category of officers.

The interpretations and meanings in the Bill need to be clearer. For example:

- Under clause 12 a volunteer means a person who is acting on a voluntary basis (whether or not the person receives out-of-pocket expenses).
- Under clause 12 the meaning of an officer in relation to a PCBU is set out and it does not mention volunteers.
- Clause 13 sets out the meaning of a PCBU and excludes a volunteer association. However it does not mention volunteers.
- Clause 14 sets out the meaning of a worker which includes volunteers.

In summary, we consider there is a legislative gap where it could be clearer about which regime volunteer directors are governed.

The meaning of a voluntary director:

In our view directors in unpaid roles, e.g. of not-for-profit organisations, should be classified as voluntary directors.

However directors in paid roles that waive their fee, or the fee is paid to another organisation, e.g. company or trust, should not be classified as a voluntary director. We think that all directors on a board should have the same duties and responsibilities, including as officers of a PCBU under the Bill. If one (or more) directors on a board are unpaid this should not exempt them from the responsibilities and liabilities of their fellow directors, and collective responsibility.

Exemption from committing an offence

We understand from MBIE guidance[1], that unpaid directors of a company are regarded as volunteers and will be exempt from penalties and prosecution for a breach of duty.

However, the clauses covering this are not clear and are open to misinterpretation, particularly given the lack of clarity discussed above about voluntary directors being a category of officers. For example:

- Clause 45 sets out liability of officers of a PCBU for offences against section 39 (duty of officers). It does not refer to volunteers, for example as an exception.

- Clause 46 sets out liability of volunteers and excludes offence under sections 42, 43 or 44 *except* for duties as workers (section 40) or duties of other persons (section 41). It does not mention duties of officers (section 39) so it is not clear whether volunteers includes voluntary officers (such as directors).

- Clause 47 sets out that certain office holders do not commit an offence for failure to comply with the duties of officers (section 39). These office holders are members of community boards, elected members of local authorities and boards and trustees of school boards.
    - The rationale for including certain office holders in clause 47 is not clear to us. For example exempting local authorities does not seem consistent with the recognised need to improve governance and accountability within local authorities.

In our view clause 47 could include voluntary directors as another category of office holders that are exempt.

- Clause 48 states that unincorporated associations do not commit an offence under the Act for failure to comply with a duty. However an officer of an unincorporated association (other than a volunteer) may be liable for a failure to comply under section 39 (duties of officers). This clause implies officers can be volunteers and are exempt. We reiterate the need to clarify clauses 45, 46 and 47.

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[1] MBIE, *Questions and Answers – Health and Safety Reform Bill* (MBIE-MAKO-14888295). Available at http://www.mbie.govt.nz/pdf-library/what-we-do/workplace-health-and-safety-reform/qas-health-safety-reform-bill.pdf

2.3 Other areas requiring clarification

We consider further clarification of the definition and meaning is needed in the following areas:

Workplace
The definition of workplace in clause 15(1)(b) "includes any place where a worker goes, or is likely to be, while at work". It is not clear whether this refers to workers working off-site though this may be the intent. The explanatory note (page 7) includes further explanation by adding "(for example, areas like corridors, lifts, lunchrooms or bathrooms)." This tends to suggest a tight construing of the definition of off-site. We think this should be added to clause 15 to be clear about the intended meaning.

Duty to consult other duty holders
Clause 27 requires that if more than 1 person has a duty in relation to the same matter under the Act, that each person must, so far as is reasonably practicable, consult, co-operate and co-ordinate activities with all other persons who have a duty in relation to the same matter.

We think the requirements in this clause need to be made clearer in respect of directors, particularly because the board is jointly and severally liable regardless. It would seem reasonable to us that a single point of contact is enough to effect the legislation. Otherwise the onerousness of the compliance is easy to imagine:

For example:

- how does collective responsibility of a board of directors fit with these requirements?
- is each director, or the board as a whole, required to consult, co-operate and co-ordinate activities with other organisations (e.g. for a joint work project) or can this be delegated to the CEO as a duty holder?

Conclusion

A successful health and safety system in New Zealand with a true outcome of cultural change in workplaces will have strong elements of partnership and reasonableness.

While we note our reservations on some aspects of the Bill we are generally supportive. We consider the partnership and education approach, and the role of WorkSafe and MBIE, will play a critical role in ensuring the legislation is a success and improving the health and safety culture of New Zealand businesses. We look forward to working with WorkSafe to help support directors to carry out their responsibilities as opportunities arise.

We would welcome the opportunity to appear before the Committee to discuss our submission.

Yours sincerely,

Dr William Whittaker
Chief Executive
Institute of Directors in New Zealand