

ZOE RODGERS

**SHE'LL BE WRONG:
RETHINKING CORPORATE AND
OFFICER RESPONSIBILITY UNDER
THE HEALTH AND SAFETY REFORM
BILL**

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Abstract

New Zealand has a poor health and safety record with alarming rates of workplace injuries and fatalities. The current health and safety regime fails to promote corporate and director responsibility and leaves New Zealand open to potentially catastrophic harm. This was demonstrated in 2010 with the Pike River disaster which revealed an urgent need for reform. This paper analyses the Health and Safety Reform Bill. The Bill represents the most comprehensive overhaul of New Zealand's health and safety regime in 22 years. The focus in the Bill is no longer on the status of the employment relationship meaning better protection for workers. This paper argues that corporate and officer responsibility is crucial to turning things around. The Bill drives responsibility through the introduction of a proactive due diligence duty on officers and stronger deterrence mechanisms. Placing obligations on officers means those in the best position to monitor and reduce risks have a legal obligation to do so. The Bill targets those who have the ability to initiate change and requires these people to take a proactive approach to managing health and safety. This paper concludes that the Bill represents a positive step forward in New Zealand's health and safety regime.

Key words: Health and Safety, Bill, Corporate Responsibility, Employment Law, Officer Liability.

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I Introduction

New Zealand has a poor health and safety record with high levels of workplace injuries and fatalities. Every year approximately one in ten workers will be harmed while at work in New Zealand,¹ whilst every week approximately one or two workers will lose their lives in traumatic accidents at work.² New Zealand has a risk tolerant culture full of negative perceptions about workplace health and safety. This culture has meant that too many New Zealander's are at risk of injuries at work, whilst too little is done to prevent harm from occurring.³ The costs of this "she'll be right" attitude are vast. Ministry of Business, Innovation and Employment (MBIE) figures show an estimated \$3.5 billion per year as the total social and economic cost to the New Zealand economy of work-related injury and occupational disease.⁴ The current attitude and health and safety regime leaves New Zealand open to potentially catastrophic harm. This potential was demonstrated in 2010 with the Pike River disaster. New Zealand's poor health and safety record was thrust into the spotlight and the spark for change was ignited.⁵

This paper analyses the Health and Safety Reform Bill (the Bill). Introduced into Parliament on 10 March 2014,⁶ the Bill represents the most comprehensive overhaul of New Zealand's health and safety regime in 22 years.⁷ Following the recommendations of the Independent Taskforce on Workplace Health and Safety (the Taskforce), the Bill is based on the Australian Model Work Health and Safety Law (Model Law).⁸ Throughout this paper the Bill will be compared with the report of the Taskforce, the Model Law and the current Health and Safety in Employment (HSE) Act 1992.

¹ Independent Taskforce on Workplace Health and Safety *The Report of the Independent Taskforce on Workplace Health and Safety: Executive Report* (April 2013) at 10.

² MBIE *Regulatory Impact Statement – Improving New Zealand's Workplace Health and Safety System* (16 January 2014) at [6].

³ Independent Taskforce on Workplace Health and Safety, above n 1, at 12.

⁴ MBIE *The State of Workplace Health and Safety in New Zealand* (September 2012).

⁵ Independent Taskforce on Workplace Health and Safety, above n 1, at 10.

⁶ Mazengarb's Employment Law (looseleaf ed, LexisNexis).

⁷ (13 March 2014) 697 NZPD 16705.

⁸ The Model Law is enacted through the Australian Model Work Health and Safety Act 2011 (Cth) and corresponding legislation in a majority of the states and territories. Western Australia has yet to adopt the Model law and Victoria has indicated that it will not do so.

The first part of the paper explores the motivations for the Bill and introduces the primary duty of care on a Person Conducting a Business or Undertaking (PCBU). Unlike the HSE Act, the focus in the Bill is no longer on the status of the employment relationship. This means better protection for workers, from a wider range of duty holders. Following this the ways in which the Bill seeks to impact corporate behaviour will be analysed. The Government has set a target of a 25 percent reduction in workplace injury and fatality rates by 2020.⁹ Central to achieving this is creating organisational cultures which value health and safety. Corporate and officer responsibility for health and safety is weak under the current regime. This has been identified as a flaw in the system and promoting responsibility at these levels is crucial to turning things around.

The Bill drives responsibility through the introduction of a proactive due diligence duty on officers and stronger deterrence mechanisms. These will be discussed to reveal the drivers of the duties, what they mean for organisations and how they will encourage positive health and safety cultures. Placing obligations on officers means those in the best position to monitor and reduce risks have a legal obligation to do so. The alignment of this duty with personal liability means those with the ability to initiate organisational change have a strong incentive to do so. This is supported by stronger deterrence mechanisms including increased penalties for non-compliance and enhanced worker participation. The final part of the paper assesses the lack of provision for corporate manslaughter. For persistent health and safety offenders this would be the ultimate deterrent, driving organisations to rethink their health and safety attitudes.

The Bill represents a significant shift from the HSE Act. It will require businesses to adopt a greater focus on health and safety. The status quo, “she’ll be right” attitude will need to change.

⁹ MBIE, above n 2, at 1.

II Background to the Bill

A Current Law

Prior to 1992 occupational health and safety in New Zealand was controlled by a plethora of prescriptive, sector-specific acts. This regulatory system was seen as complex and overly reliant on external inspection.¹⁰ The HSE Act was enacted to overcome these issues. The Act, based on the model proposed in the Robens Report,¹¹ is the principal statute regulating workplace health and safety in New Zealand.¹² Originating in the United Kingdom, the Robens approach places an emphasis on a performance-based rather than compliance-based approach to health and safety.¹³ The Act is supported by regulations and Approved Codes of Practice (ACoPs).¹⁴ These clarify what duties exist and how they are to be complied with in practice.

The object of the Act is to “promote the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work.”¹⁵ Employers have a general duty to “take all practicable steps to ensure the safety of employees while at work.”¹⁶ All practicable steps is defined as taking “all steps to achieve the result that is reasonably practicable in the circumstances.”¹⁷ What is reasonably practicable is a matter of fact. Regard must be had to the harm that might occur, the likelihood of the harm occurring, what can be done to eliminate or reduce the harm and the costs associated with such options.¹⁸ Requirements of this duty include taking steps to: maintain a safe working environment, ensure employees are not exposed to hazards at work and develop procedures for dealing with

¹⁰ Independent Taskforce on Workplace Health and Safety, above n 1, at 11.

¹¹ Great Britain Committee on Safety and Health at Work, Alfred Robens “Safety and Health at Work: Report of the Committee 1970–1972.” (HMSO, London, 1972).

¹² MBIE, above n 2, at [24].

¹³ MBIE *Working safer: A blueprint for health and safety at work* (August 2013) at 14.

¹⁴ Richard Rudman *New Zealand Employment Law Guide* (2013 ed, CCH New Zealand Limited) at 316 - 317.

¹⁵ Section 5.

¹⁶ Section 6.

¹⁷ Section 2A(1).

¹⁸ Section 2A(1)(a)-(e); Office of the Chief Coroner of New Zealand “Case Study from Recommendations Recap: A summary of coronial recommendations and comments made between 1 July – 20 September 2012. Forestry Deaths from Issue 4” (Ministry of Justice, 2012) at 3.

emergencies.¹⁹ Employees too have a general duty to take all practicable steps to ensure their own safety at work and also that harm is not caused to any other person through their actions or inaction.²⁰

The performance-based system in the HSE Act provides standardisation. It covers most places of work and work hazards, whilst also allowing for flexibility in how workplaces meet their obligations.²¹ However as will be highlighted in this paper the current regime is fraught with problems.

B Motivations for Change

A major problem with the Act is that it has failed to remain relevant amidst the changing nature of workplaces, working arrangements and increasingly complex supply chains.²² Precarious work including shift-work, self-employment, casual and temporary employment, along with increasing working hours and work intensity has become much more prevalent. The flexibility provided by the HSE Act has led to dire consequences in high risk industries where prescription is warranted. This along with gaps in, and outdated, ACoPs has put the health and safety of many workers at risk.²³ However workplace health and safety issues rarely become topical and have traditionally received little government, media or business attention.²⁴ This is so even given New Zealand's alarming workplace injury and illness statistics. There are approximately 30,000 non-fatal cases of work related disease and illness,²⁵ 500-800 cases of premature deaths from occupational related ill-health²⁶ and approximately 180,000 ACC claims for work related injuries and illnesses each year.²⁷

¹⁹ Section 6(a) – (e).

²⁰ Section 19.

²¹ Independent Taskforce on Workplace Health and Safety, above n 1, at 11.

²² MBIE, above n 2, at [29].

²³ At [28].

²⁴ Independent Taskforce on Workplace Health and Safety, above n 1, at 12.

²⁵ MBIE, above n 2, at [6].

²⁶ Independent Taskforce on Workplace Health and Safety, above n 1, at 12.

²⁷ Statistics New Zealand “Injury Statistic – Work Related Claims: 2012” (15 October 2013) <www.stats.govt.nz>.

1 *Pike River disaster*

On Friday 19 November 2010 New Zealand was shocked by the news of an underground explosion at the Pike River coal mine near Greymouth.²⁸ Twenty nine men lost their lives, shattering a community and alerting the nation to New Zealand's health and safety issues.²⁹ Following the disaster a Royal Commission was established to report on what happened at Pike River and make recommendations as to how future tragedies could be prevented.³⁰

The Commission identified a number of underlying causes of the tragedy involving leadership, operational and cultural problems.³¹ Overall it found directors and executive managers had pushed for coal production at the expense of workplace health and safety and exposed the workers to unacceptable risks.³² The directors had little involvement in health and safety management, and had inadequate knowledge of the relevant risks. Sixteen recommendations for change were proposed.³³ One recommendation was that the health and safety responsibilities of directors should be reviewed.³⁴

2 *Independent Task Force*

The Taskforce was established by the Minister of Labour with the purpose of reporting on whether the current health and safety system is fit to meet the government's target of reducing workplace injuries and fatalities.³⁵ The Taskforce identified a number of systematic problems with New Zealand's workplace health and safety.³⁶ Many of the weaknesses identified stem from the light version of the Robens model represented in the HSE Act.³⁷ These problems called for "an urgent, sustainable step-change in harm

²⁸ At 14.

²⁹ At 14.

³⁰ Royal Commission on the Pike River Coal Mine Tragedy – Volume One (October 2012) at 3-14.

³¹ At 15.

³² At 12.

³³ At 36 – 39.

³⁴ At 36 – 39.

³⁵ Independent Taskforce on Workplace Health and Safety, above n 1, at [1].

³⁶ MBIE, above n 2, at 1.

³⁷ Independent Taskforce on Workplace Health and Safety *The report of the Independent Taskforce on Workplace Health and Safety* (April 2013) at [66].

prevention activity and a dramatic improvement in outcomes”.³⁸ Major changes to the system were proposed under three broad levers government can pull to influence workplace health and safety.³⁹

(a) Accountability levers

Effective workplace health and safety systems must ensure that those who create, manage and are to be protected from risks, are clear about their rights and obligations.⁴⁰ Three key system participants are recognised in the report. Those who have a duty to protect others from harm, workers who have a right to be protected from harm and an agency with a sole focus on workplace health and safety.⁴¹ Broadly, accountability mechanisms proposed include: the creation of a new agency, new legislation based on the Australian Model Law, increased worker participation, strengthened regulation of occupational health and a stronger regulatory regime for managing major hazard facility risks.⁴²

(b) Motivating levers

Recommendations in this section include government taking leadership as the exemplar of good health and safety, stronger incentives to reward and penalties to punish businesses based on their health and safety records and the extension of the manslaughter offence to corporations.⁴³ These changes are proposed to cater to the all of the varying attitudes to health and safety.⁴⁴ These attitudes range from those who aim to do “the right thing,” to those who are driven by self-interest and those who will intentionally follow poor health and safety practices if they are likely to get away with it.⁴⁵

³⁸ Independent Taskforce on Workplace Health and Safety, above n 1, at 3.

³⁹ At 19.

⁴⁰ Independent Taskforce on Workplace Health and Safety “The Report”, above n 37, at [193].

⁴¹ At [194] – [195].

⁴² At [196].

⁴³ At [328].

⁴⁴ At [327].

⁴⁵ At [326].

(c) Knowledge levers

New Zealand lacks a comprehensive and reliable data set for measuring workplace injuries and fatalities.⁴⁶ Often there are gaps in information, issues with consistency in collecting data and also difficulties in collating data to form national reports and statistics.⁴⁷ This is a significant flaw in the current system as effective systems are founded upon good information being used to ensure all participants are aware of health and safety issues and what areas to target.⁴⁸ To overcome these issues, the Taskforce recommended more comprehensive ACoPs and guidelines to ensure all businesses have fit-for-purpose health and safety management systems.⁴⁹ Improving data and data quality was also advocated in order to provide greater information and support good preventative practice.⁵⁰

C Working Safer: A Blueprint for Health and Safety at Work

In response to the report of the Taskforce the Government created a package of measures to reform health and safety law and achieve their goal of a 25 per cent reduction in injuries. As part of the package WorkSafe New Zealand was created in February 2013.⁵¹ The workplace health and safety functions previously sitting with MBIE were transferred to WorkSafe New Zealand. It is a standalone agency responsible for regulating workplace health and safety.⁵² Its objective is “to promote and contribute to securing the health and safety of workers and workplaces”.⁵³ This is achieved through functions such as advising on the operation of the workplace health and safety system, recommending improvement and collecting and analysing statistics relating to health and safety.⁵⁴ The Bill was introduced as part of this package. Following the recommendation of the Taskforce, it is modelled on the Australian Model Law.

⁴⁶ Independent Taskforce on Workplace Health and Safety *Safer Workplaces – Consultation Paper* (September 2012) at [277].

⁴⁷ At [277]; Independent Taskforce on Workplace Health and Safety, above n 1, at 9.

⁴⁸ Independent Taskforce on Workplace Health and Safety “The Report”, above n 37, at [409] - [410].

⁴⁹ At [414].

⁵⁰ At [437].

⁵¹ MBIE “Working Safer”, above n 13, at 22.

⁵² Established as a State agent under the Crown Entities Act 2004.

⁵³ WorkSafe New Zealand Act 2013, s 9 (1).

⁵⁴ Section 10.

D The Model Law

The Model Law harmonises workplace health and safety laws in Australia.⁵⁵ It was created with the objects of: protecting the health and safety of workers, improving safety outcomes in workplaces, reducing compliance costs and improving efficiency for regulators.⁵⁶ The Model Law reflects a changing attitude towards workplace health and safety; protecting persons involved in work rather than being predicated on the employment relationship.⁵⁷ It is the most recent approach to the Robens model of performance based legislation, allocating duties to those best placed to manage them.⁵⁸

The object of the Act is to “secure the health and safety of workers.”⁵⁹ This is achieved through various key elements including the imposition of duties of care on PCBUs, the extension of duties towards workers rather than employees only and positive duties on officers of PCBUs.⁶⁰ It also includes broad union provisions, regulator enforcement powers and consultation requirements,⁶¹ along with extensive protection against victimisation for those who seek to exercise rights under the Act.⁶² The Model Law demands immediate action from employers and promotes high degrees of workplace health and safety.⁶³ These provisions represent large shifts in the Australian occupational health and safety system.⁶⁴

⁵⁵ Richard Johnstone and Michael Tooma *Work Health & Safety Regulation in Australia – The Model Act* (The Federation Press, Sydney, 2012) at 1.

⁵⁶ Safe Work Australia *Explanatory Memorandum – Model Work Health and Safety Bill* (2 December 2010) at 1.

⁵⁷ Johnstone and Tooma, above n 55, at 3.

⁵⁸ Independent Taskforce on Workplace Health and Safety “The Report”, above n 37, at 14.

⁵⁹ Section 3(1).

⁶⁰ Johnstone and Tooma, above n 55, at 2.

⁶¹ At 2.

⁶² At 3.

⁶³ Michael Tooma “What the Model Work Health and Safety Act means for Employers” (2010) 40 MHD Supply Chain Solutions 12 at 12.

⁶⁴ At 12.

III The Health and Safety Reform Bill

The Bill will create the new Health and Safety at Work Act, replacing the current HSE Act. It is expected to be passed in 2015, with the new Act coming into force in 2016.⁶⁵ Although the Bill is based on the Australian Model Law Act, it does differ in some respects.⁶⁶ The benefits of adopting and adapting the Model Law are said to be twofold. It allows New Zealand to capitalise on the extensive work Australia has put into modernising their health and safety systems and it also brings New Zealand law into alignment with the majority of Australian Law.⁶⁷

The Bill is based on the premise that a well-functioning health and safety system relies on “participation, leadership and accountability by government, business, and workers”.⁶⁸ Following from the Model Law the purpose of the Bill is to “secure the health and safety of workers and workplaces”.⁶⁹ When contrasted with the object of the HSE Act, a stronger statutory imperative to ensure proactive workplace health and safety environments is revealed. The Bill increases duties on employers, who will be expected to take more responsibility than under the current HSE Act. An important element of the Bill is that obligations are placed on all persons involved in the supply chain, including those in governance roles. The Bill also increases penalties for non-compliance and improves worker participation,⁷⁰ with obligations on PCBU's to consult and engage workers.⁷¹

IV Widening of Duties

The Bill imposes health and safety duties on a wider range of persons than under the HSE Act. All those in the best position to manage health and safety risks will have a responsibility to do so. The Bill also expands the group to whom the duties are owed. The

⁶⁵ Health and Safety Reform Bill 2013 (192 - 1), (explanatory note).

⁶⁶ Health and Safety Reform Bill 2013 (192 - 1), (explanatory note).

⁶⁷ Independent Taskforce on Workplace Health and Safety “The Report”, above n 37, at 14.

⁶⁸ Departmental Disclosure Statement *Health and Safety Reform Bill* (10 March 2014) at 3.

⁶⁹ Clause 3.

⁷⁰ Simon Bridges “Health and Safety Reform Bill introduced” (10 March 2014) <www.beehive.govt.nz>.

⁷¹ Part 3.

principal duty holder in the Bill is a PCBU. Clause 30 of the Bill sets out the primary duty of care:⁷²

(1) A PCBU must ensure, so far as is reasonably practicable, the health and safety of—

- (a) workers employed or engaged, or caused to be employed or engaged, by the PCBU while the workers are at work in the business or undertaking; and
- (b) workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.

This duty extends to ensuring that the health and safety of others generally, is not put at risk by the work being done.⁷³ The duty introduces three key terms which are discussed below.

A Persons Conducting a Business or Undertaking

Primary duties within the Bill fall on PCBU's. The term was adopted from the Model Law and is designed to be a broad concept.⁷⁴ The intention is that duties will be allocated to those who are in the position to control health and safety risks in the workplace.⁷⁵ A person can be a PCBU regardless of whether the business or undertaking is conducted alone or with others, or for profit or gain.⁷⁶ The concept reflects a substantial change from the HSE Act. It is intentionally broad, designed to capture all types of modern working arrangements.⁷⁷ Today many workers perform work under the direction or guidance of someone other than the person employing them under the employment contract.⁷⁸ In practice it means all of those in a position to manage the health and safety of workers will be legally obliged to do so. PCBU includes employers, principals, partnerships, managers

⁷² Clause 30.

⁷³ Clause 30.2.

⁷⁴ Model Work Health and Safety Act 2011 (Cth), s 5.

⁷⁵ MBIE "Working Safer", above n 13, at 15.

⁷⁶ Clause 13(1).

⁷⁷ Safe Work Australia *Interpretive Guideline- Model Work Health and Safety Act. The Meaning of 'Persons Conducting a Business or Undertaking'* (26 September 2011).

⁷⁸ Safe Work Australia, above n 56, at [77].

and other controllers of a workplace. It does not include, among others, a volunteer association or an occupier of a home engaging a person to do residential work.⁷⁹

The duty clarifies obligations especially where there are multiple parties involved in the supply chain. If multiple PCBU's are involved in the same work or working at the same location the duty requires each member to consult with workers and other duty holders regarding health and safety matters.⁸⁰ This change is important for high risk, high injury industries such as forestry and construction. During the July 2007 to August 2013 period there were 31 work-related deaths in the forestry industry.⁸¹ Under the HSE Act those in the best position to manage safety issues in the forestry industry are able to, and often do, avoid responsibilities by structuring their workforce through a contracting model.⁸² Under the Bill principals will be under a legal duty, as PCBUs, to ensure health and safety. This duty exists regardless of the status of the workforce.

B Worker vs Employee

A further key change in the Bill is the use of the term worker rather than employee, as used in the HSE Act. The definition of worker is broad, "...any person who carries out work in any capacity for a PCBU".⁸³ It includes, but is not limited to, work as an employee, contractor or subcontractor, an employee of a labour hire company, an outworker, apprentice or trainee and a volunteer.⁸⁴ There will be instances where a party will fall under the definition of both a worker and a PCBU. For example contractors may be a worker but also have duties as a PCBU in respect of other workers.

The motivation for the use of the term worker in the Model Law was to recognise the changing nature of work relationships and ensure all types of workers are afforded

⁷⁹ Clause 13.1(b).

⁸⁰ MBIE "Working safer", above n 13, at 16.

⁸¹ Office of the Chief Coroner of New Zealand *Case Study from Recommendations Recap: A summary of coronial recommendations and comments made between 1 July – 20 September 2012. Forestry Deaths from Issue 4* (Ministry of Justice, 2012) at 1.

⁸² New Zealand Council of Trade Unions "Submission to the Transport and Industrial Relations Committee on the Health and Safety Reform Bill 2013" at [3.2].

⁸³ Clause 14.

⁸⁴ Clause 14.

protection.⁸⁵ For New Zealand it means providing greater protection to parties who are not covered under the HSE Act, such as contractors. It also removes the ability to escape obligations and liability under the HSE Act by entering into non-employer–employee work arrangements. There is a clear shift in focus in the Bill, from an emphasis on the nature of the employment contract towards a focus on the practical working relationship between the parties involved.

C Reasonably Practicable

The “reasonably practicable” qualification on PCBU duties is another change in the Bill. The term is derived from the Model Law and replaces the HSE Act requirement to take “all practicable steps”.⁸⁶ The determination of what is reasonably practicable in the Model Law is an objective assessment in individual cases. The test is whether the duty-holder met the standard of behaviour expected of a reasonable person in the position of the duty-holder. It is defined in s 17 of the Bill as:

... *reasonably practicable*, in relation to a duty to ensure health and safety, means that which is, or was, at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all relevant matters, including—

- (a) the likelihood of the hazard or the risk concerned occurring; and
- (b) the degree of harm that might result from the hazard or risk; and
- (c) what the person concerned knows, or ought reasonably to know, about—
 - (i) the hazard or risk; and
 - (ii) ways of eliminating or minimising the risk; and
- (d) the availability and suitability of ways to eliminate or minimise the risk; and
- (e) after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

⁸⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 July 2011, 7699 (Simon Crean, Minister for Regional Australia).

⁸⁶ Section 6.

In practice the change in terminology is unlikely to result in any significant changes. The duty in s 6 of the HSE Act to take all practicable steps has been interpreted as requiring employers to take proactive steps to ensure the safety of employees.⁸⁷ However the change does make it clear that risk-based decision making is required over the cost of measures, creating a presumption in favour of health and safety. For PCBU's the inclusion of "grossly disproportionate" means that unless the cost of a health and safety measure is excessive to the risk of harm, the measure will be reasonably practicable and must be taken.

D Impact of the Duty

The duty means PCBU's will have to be responsible for the health and safety of a greater number of workers. This means they will have to be vigilant in ensuring they are aware of what duties they owe and to whom. There have been criticisms regarding the primary duty of care and the adoption of the term worker.⁸⁸ Although it does provide much needed protection and a focus on health and safety, there is also the potential for confusion and an unnecessary overlap of obligations. Under the definition of workers all volunteers, contractors, subcontractors and their employees need to be treated and consulted by PCBU's like any other worker. There is the potential that the nature of the relationship means that the PCBU has no real control over such workers and this could be unjustly burdensome on some businesses.

On the other hand, the ability of employers to avoid or reduce duties through the use of precarious work arrangements has been described as resulting in a "race to the bottom" of standards.⁸⁹ Studies have revealed that outsourcing and subcontracting have an adverse effect on health and safety.⁹⁰ Research has also revealed an array of negative health and safety effects through the use of supply chains.⁹¹ The changes in the Bill should induce

⁸⁷ See generally *Ministry of Business, Innovation and Employment v Canadian Pacific Limited* DC Auckland CIV: 11004505011, 9 December 2013; *Taylor Preston Limited v Ministry Of Business, Innovation and Employment* [2013] NZCA 537 at [17] – [18].

⁸⁸ OceanaGold "Submission to the Transport and Industrial Relations Select Committee on Health and Safety Reform Bill 2013."

⁸⁹ New Zealand Council of Trade Unions, above n 82, at [7.2].

⁹⁰ Johnstone and Tooma, above n 55, at 11.

⁹¹ At 11.

those in decision making positions to place a greater emphasis on health and safety. Targeting those PCBU's who have direct control over workers is also not the aim of the Bill, rather it focuses on the ability to manage health and safety risks. In the construction industry, a head contractor may not have direct influence over all workers present at a site. However they do have the ability to minimise the risk of harm through regular maintenance of scaffolding or ensuring pedestrians and vehicles are kept apart. In this way the Bill removes an incentive to enter into the forms of working arrangements that would currently minimise or avoid legal liability under the HSE Act. Industries that use multiple contractors will no longer be able to offload responsibilities as their duty requires them to “consult, co-operate with and co-ordinate activities with all other persons who have a duty in relation to the same matter”.⁹²

V Rethinking Corporate Responsibility

Corporate behaviour is influenced by a number of factors including the nature of the industry, workers and those who are in governance roles.⁹³ Increasing productivity and profitability are key concerns and these shareholder rights are at the forefront of decision making. The current legislative framework is weak on corporate responsibility and accountability for health and safety at work. There is a major hole in the HSE Act which has meant that those at the upper echelons of organisations are able to shy away from health and safety matters. As such organisations often have a “she’ll be right” attitude towards health and safety matters, with complacent health and safety cultures. Moreover structures in the current regime, including ACC, mean that when accidents do occur at the workplace, the majority of the costs are not borne by those who benefit from and are in the best position to regulate the risks, but by society. Applying this to Pigou’s externalities theory, there are insufficient incentives for businesses to improve health and safety conditions.⁹⁴ Legislation is therefore needed to achieve “deterrence efficiency” whereby businesses are incentivised to reduce the damage flowing from the workplace.⁹⁵

⁹² Clause 27.

⁹³ The behaviour of an organisation when considered as a single entity.

⁹⁴ Nicholas Ashford *Crisis in the workplace: Occupational Disease and Injury* (M.I.T Press, Cambridge, 1976) at 18.

⁹⁵ Neil Gunningham *Safeguarding the Worker* (The Law Book Company, Sydney, 1984) at 284.

The lack of corporate responsibility in the current system has been identified as a major flaw.⁹⁶ The Bill seeks to rectify this by altering the levers which influence corporate behaviour in such a way that positive health and safety is prioritised.⁹⁷ Compelling organisations to take an active role in ensuring compliance and creating workplace cultures which foster and value health and safety, is central to turning things around. The Bill influences corporate and director responsibility in a number of ways. A vital change is the extension of liability to officers. This is complemented by stronger deterrence mechanisms including increased penalties for non-compliance. These changes and the impact they have on corporate behaviour are discussed below.

VI Extension of Liability to Officers

A fundamental change in the Bill is the introduction of a health and safety duty on officers. Under the current regime there is no specific duty on individual directors to ensure the safety of workers.⁹⁸ If a company has committed an offence under the HSE Act directors may only be prosecuted if they have directed, authorised, assented to, acquiesced in or participated in the company's failure.⁹⁹ They may also be liable where there is strong evidence that they had clear knowledge that something was unsafe or contrary to the law.¹⁰⁰

Such prosecutions have been rare. This is primarily due to the knowledge requirement in the HSE Act which, other than in smaller organisations, is often difficult to satisfy. Directors are generally more concerned with the governance of the organisation and often lack knowledge of the day-to-day operations.¹⁰¹ This provision has led to absurd results. Following the Pike River disaster the charges against the CEO were dropped.¹⁰² This was because it was unlikely the prosecution would meet the knowledge requirement. In contrast

⁹⁶ Royal Commission on the Pike River Coal Mine Tragedy - Volume Two (October 2012); Independent Taskforce on Workplace Health and Safety, above n 37.

⁹⁷ Secretariat to the Independent Taskforce on Workplace Health and Safety *Workplace Health and Safety Culture Change* (April 2013) at 11.

⁹⁸ Royal Commission on the Pike River Coal Mine Tragedy - Volume Two (October 2012) at [5].

⁹⁹ Section 56.

¹⁰⁰ Department of Labour *Keeping Work Safe* (April 2009) at 15.

¹⁰¹ Garth Gallaway and Heather McKenzie "New positive duty for directors in health and safety" (2013) 829 Law Talk 30 at 30.

¹⁰² *Department of Labour v Whittall* [2013] DCR 430 at 430.

in the case of *Maritime New Zealand v AZI Enterprises Limited* the sole-director was found to have acquiesced or participated in the failure of the company and was held liable.¹⁰³ In that case the Easy Rider vessel sank causing the loss of eight lives.¹⁰⁴ The sole-director alone had sign-off on decisions and therefore could not disclaim responsibility. The company was very small and she played much more of an active part in the day-to-day operations than the CEO of Pike River. These results are troubling given, in the former case, the CEO appears no less morally culpable than the sole-director.

The Bill imposes a positive duty on officers to exercise due diligence to achieve workplace health and safety compliance. This represents a significant change from the status quo.¹⁰⁵ Officers will be required to take a far more hands-on approach to health and safety in order to meet this obligation. The intention is that those in governance roles will proactively manage health and safety in the workplace. This continuous obligation on officers, provides much needed accountability in New Zealand's health and safety regime. Liability at this level is important because research has shown that the decisions and leadership of senior management directly impacts upon the health and safety culture of an organisation.¹⁰⁶ This link between officers and achieving desired health and safety outcomes is recognised in the Bill through the imposition of personal duties and liability on officers to effectively manage workplace health and safety.

A Definition of Officer

Officer is defined in cl 12 of the Bill. It encompasses those in governance roles and any person who makes decisions affecting the whole or a substantial part of the business of the PCBU.¹⁰⁷ The definition differs from that in the Model Law where part of the definition is derived from s 9 of the Australian Corporations Act 2001.¹⁰⁸ There, an officer of a

¹⁰³ *Maritime New Zealand v AZI Enterprises Limited DC Invercargill*, CRI-2012-025-002422 18 March 2014.

¹⁰⁴ At [1] – [2].

¹⁰⁵ Gallaway and McKenzie, above n 101, at 30.

¹⁰⁶ Johnstone and Tooma, above n 55, at 98; Emmanuel Ogbonna and Llyod Harris "Leadership style, organizational culture and performance: empirical evidence from UK companies" (2000) 11:4 International Journal of Human Resource Management 766 at 766 - 788.

¹⁰⁷ Clause 12.

¹⁰⁸ Section 4.

corporation includes “a person who has the capacity to affect significantly the corporation’s financial standing” and a person in accordance with whose instructions or wishes the directors of the corporation are accustomed to act (excluding professional advisors).¹⁰⁹

Officer as the Bill defines does not include the above persons. This departure from the Model Law has been described by the New Zealand Council of Trade Unions (CTU) as a “watering down” of the duty.¹¹⁰ Although decision making may technically be the domain of senior management, in reality participation in decisions occurs across a number of levels before reaching the ultimate decision makers. This is particularly true in larger organisations.¹¹¹ The exclusion may lead to those who in reality have a significant impact on decisions, escaping responsibility for any health and safety issues that arise as a result of a decision. This seems to significantly undermine the theme of the Bill which is to ensure that all those in a position to manage risks have a responsibility to do so. By excluding those who advise on corporate decisions generally, such persons are under no obligation to consider the health and safety risks when advising on decisions.

On the other hand, support for the departure is found in the New Zealand Forest Owners Association’s submission. They assert that such a wide definition of officer may lead to confusion.¹¹² Although it is conceivable that there will be parties, especially in large companies, who do influence or participate in decision making, it is possibly casting the net too widely to include these persons in the definition. This could create situations where obligations overlap or lead to misunderstandings about who has obligations.¹¹³ Furthermore, extending the definition in the Model Law may be unduly onerous on those who provide advice to senior management such as human resources but who may have no actual sway on matters relevant to health and safety. Ultimately it is the primary officers, such as directors, who have the power to make decisions and ensure health and safety

¹⁰⁹ Corporations Act (Aust) 2001, s 9.

¹¹⁰ New Zealand Council of Trade Unions, above n 82, at [21.3].

¹¹¹ Johnstone and Tooma, above n 55, at 128.

¹¹² New Zealand Forest Owners Association Inc “Submission to the Transport and Industrial Relations Committee on the Health and Safety Reform Bill 2013” at 1.

¹¹³ At 1.

practices are being followed. It follows from this that they should bear the burden of responsibility.

Although the CTU makes a compelling argument, the focus on the Bill seems to be targeting those who have a significant ability to make health and safety a priority. Extending the definition to include those who participate or influence is unlikely to have a genuine impact on health and safety if such people have no real ability to make changes. It is undesirable to cast the net too widely if doing so would not necessarily result in better health and safety practices or rates of workplace injuries. This is a legitimate concern as demonstrated in Australia where difficulties have arisen when identifying who is considered an officer in organisations.¹¹⁴ This is a potential rationale for the departure from the definition found in the Model Law.

B Due Diligence

Officers are required to exercise due diligence to ensure PCBUs comply with their duties or obligations.¹¹⁵ Due diligence is described in cl 39 of the Bill and is made up of six components:

- (2) In this section, *due diligence* includes taking reasonable steps—
 - (a) to acquire, and keep up-to-date, knowledge of work health and safety matters; and
 - (b) to gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations; and
 - (c) to ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking; and
 - (d) to ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information; and

¹¹⁴ Safe Work Australia *Improving the model Work Health and Safety laws Issues Paper and Consultation Regulation Impact Statement* (4 July 2014) at 10.

¹¹⁵ Clause 39(1).

- (e) to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act; and
- (f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).

These six components are directly derived from the Model Law. The rationale for these components is that officers lead the way to driving a good health and safety culture. Officers, as the decision makers, must therefore be informed.¹¹⁶ To meet the knowledge requirement officers must keep up to date with health and safety matters, including recent developments in law. This extends to gaining an understanding of the risks and hazards involved in a PCBUs business or undertaking. Furthermore, in order for an organisation's health and safety system to be effective it must be well designed.¹¹⁷ Having first-hand knowledge about the potential hazards involved will pave the way for more effective leadership and an improved focus on health and safety in decision making. Under the current regime, directors are able to ignore or over-look health and safety matters. To comply with the changes officers will have to shift this attitude and health and safety governance will have to be taken as seriously as the other aspects of governance.¹¹⁸ The due diligence duty requires officers take an active role in the day-to-day operations of an organisation, a significant change from the current regime.

C Impact of the Duty

The imposition of a positive directors' duty supports a change in the health and safety culture of organisations from the top down. The narrowing of the definition means that all those at the upper echelons of organisations will be officers, whereas those who do not have the same ability to initiate change such as middle managers or HR are unlikely to come under the definition. It is a much more onerous duty than in the current HSE Act. Officers will have to take more of an active approach to awareness of health and safety matters and the responsibilities of PCBUs. Officers should ensure they are keep a record

¹¹⁶ At 112.

¹¹⁷ Johnstone and Tooma, above n 55, at 116.

¹¹⁸ Institute of Directors in New Zealand and MBIE *Good Governance Practices Guideline for Managing Health and Safety Risks* (May 2013) at 1.

of their actions in fulfilment of due diligence in order to verify their compliance with the duty if the need arises. This is particularly important as the focus is on whether the particular officer exercised due diligence. An officer cannot discharge their duty by pointing towards another officer who has exercised due diligence.¹¹⁹ Moreover an officer's liability is not relieved by virtue of a PCBU following their obligations.¹²⁰

Due diligence requires officers to personally engage in ensuring the other provisions are made out. It will not be enough to merely provide access to resources nor will relying on verification by others. It also requires officers to maintain a state of chronic unease, especially during long periods without health and safety risks.¹²¹ It is these times where PCBUs may become complacent and the risks inherent in the business or undertaking forgotten. Under the Bill officers must ensure this does not happen.

Overall the duty requires proper corporate governance of organisations by officers.¹²² Failure to comply with the duty may have costly repercussions as the Bill imposes significant penalties if found guilty of an offence.¹²³ Ignorance will no longer be bliss for officers as under the HSE Act. A high level of consideration of significant issues arising on a day-to-day basis is needed.

VII Stronger Deterrence Mechanisms

In the introductory speech it was said that “good health and safety is good for business”.¹²⁴ Having a good health and safety culture is valued by workers, investors and stakeholders.¹²⁵ The failure to manage health and safety risks has business costs including direct financial costs, damaged reputations and the risk of legal prosecution.¹²⁶ Furthermore studies have revealed a link between good health and safety practices and increased productivity in the

¹¹⁹ At 109.

¹²⁰ Clause 45.

¹²¹ At 126.

¹²² Barry Sherriff *Promoting Effective Health and Safety Leadership: Using the platform in the Model Work Health and Safety Act* (Safe work Australia, March 2011).

¹²³ Part 2, subpart 3.

¹²⁴ Simon Bridges, above n 70.

¹²⁵ Institute of Directors in New Zealand (Inc) and MBIE, above n 118, at 1.

¹²⁶ At 1.

workplace.¹²⁷ Further positives include reduced absenteeism, reduced turnover, greater job satisfaction, employee engagement and ultimately increased profits.¹²⁸ It is clear that health and safety is an investment in driving high business performance and increasing shareholder value.

Given the benefits to an organisation of good health and safety practices, it is difficult to discern why it has not been a priority in many organisations. One explanation is the tendency of organisations to prioritise the short term gain over long time gains. Many top decision makers have little appreciation of the risks involved in the work and thus view the anticipation costs associated with health and safety as too great of an expense. This is especially so for high risk industries which, as described above, often have large supply chains with unclear lines of responsibility for health and safety. Increased competition has also been cited as a reason for waning attention to health and safety in some organisations.¹²⁹

The Bill seeks to secure the health and safety of all workers. Strong deterrence mechanisms are necessary to change behaviours in industries and workplaces where health and safety is regularly put at risk. The Bill increases corporate and officer responsibility through increased penalties for non-compliance and strengthened enforcement provisions. Worker participation is also necessary to drive corporate responsibility and steer positive health and safety cultures.

A Penalties

The Taskforce found the low likelihood of inspector visits and risk of prosecution means non-compliance with health and safety is effectively rewarded in New Zealand.¹³⁰ The current health and safety framework lacks positive incentives and deterrents to drive compliance with health and safety.¹³¹ Penalties in the HSE Act and those applied in the courts, are often inadequate motivators of improving workplace health and safety

¹²⁷ Health and Productivity Institute of New Zealand *Best Practice Guidelines* (June 2013) at 4.

¹²⁸ At 4.

¹²⁹ Department of Labour *How Health and Safety makes good Business Sense* (August 2007) at 13.

¹³⁰ Independent Taskforce on Workplace Health and Safety, above n 1, at 12.

¹³¹ MBIE “Regulatory Impact Statement”, above n 2, at [31].

systems.¹³² The theory of the “least cost avoider” can be applied to describe the reasons for imposing penalties on organisations for poor health and safety. This asserts that accident costs should be allocated to the party in the best position to reduce the risk.¹³³ In relation to workplace health and safety, those at the top of organisations are in the best position to impose and create safe working conditions. As their prime concern is with productivity and profit, they are strongly influenced by costs.¹³⁴ The imposition of penalties for unsafe working conditions means positive workplace health and safety practices are incentivised and directed at those most capable of implementing change.¹³⁵

1 New liability structure

The Bill contains a tiered penalty regime. Three categories of offences are introduced in respect of health and safety duties; category one: reckless conduct, category two: failure to comply with a duty that exposes individual to risk of death or serious injury or illness and category three: failure to comply with a duty.¹³⁶ The maximum penalty levels for non-compliance are increased from the HSE Act. Category one offences can result in fine of up to \$600,000 or a term of imprisonment not exceeding five years on a PCBU or officer, or in the case of body corporates a fine not exceeding \$3 million. In comparison under the HSE Act a broadly similar category of offence would result in a fine of up to \$500,000 and/ or two years imprisonment.¹³⁷ There is also no requirement for any serious injury or fatality in order to prosecute under the Bill. The focus is on whether the duty was complied with or not.

This provides a far greater incentive for officers and PCBUs to ensure health and safety practices. For most organisations, corporate behaviour will be steered towards positive health and safety practices. This is due to the changed duties of officers and PCBUs who have a personal incentive to create a positive health and safety culture. However in the case of defensive organisations it is conceivable that the potential for a few directors to be fined

¹³² At [47].

¹³³ Gunningham, above n 95, at 285.

¹³⁴ At 286.

¹³⁵ At 286.

¹³⁶ Clauses 42 – 44.

¹³⁷ Section 49(3).

may not be enough of a driver to impact on health and safety practices. In addition to penalties, the Bill contains broad powers for the Court to make orders.¹³⁸ Of particular relevance are adverse publicity orders.¹³⁹ These require the offender to publicise its contravention. Negative health and safety compliance is bad for organisational image. This is particularly relevant in today's society where social media can have sweeping effects on business reputations. The potential for unwanted attention and the stigma attached to health and safety failures mean even the least health and safety conscious organisations should be motivated to engage with health and safety. This creates cultures where, at the very least, minimum compliance is valued.

2 Enforcement

Alternatives to prosecution are also present in the Bill. There is a greater focus on enforcement than under the HSE Act.¹⁴⁰ Regulators (WorkSafe or the relevant designated agency) have broader powers to issue infringement notices than under the HSE Act.¹⁴¹ Currently they can only be issued if a prior formal warning of the infringement offence has been given to the person.¹⁴² This requirement has resulted in few notices being issued.¹⁴³ Under the Bill they can be issued if the regulator believes on reasonable grounds the person has committed an infringement offence.¹⁴⁴

For organisations this means more opportunities for such notices to be given. This is supplemented by the officer's duty. Under the current law there is no positive duty on directors to engage in health and safety matters and therefore this cannot be included in inspectors. Under the Bill inspectors will have broader powers to check the status of health and safety practices, including an analysis of what steps officers are taking in compliance with their due diligence obligations.

¹³⁸ Part 4, subpart 8.

¹³⁹ Clause 171.

¹⁴⁰ Part 4.

¹⁴¹ MBIE "Questions and Answers – Workplace Health and Safety Reform" < www.mbie.govt.nz >.

¹⁴² Health and Safety in Employment Act (1992), s 56B (1) (b).

¹⁴³ MBIE "Questions and Answers", above n 141.

¹⁴⁴ Clause 159.

B Worker Participation

Worker participation is vital to successfully managing health and safety issues in the workplace.¹⁴⁵ Workers have practical experience of daily hazards and are responsible for the hands-on management of health and safety.¹⁴⁶ The Royal Commission identified worker voice and participation as being crucial to creating positive health and safety cultures.¹⁴⁷ With an effective voice, workers have the ability to deter organisations from adopting bad health and safety practices. However this voice is heavily dependent on workers being aware of their rights, meaning effective worker participation is in reality at the discretion of the employer.¹⁴⁸ Often in highly unitary, non-unionised, decentralised, high-turnover industries worker participation in health and safety is neglected; with employers disliking any form of worker voice. This was epitomised in the case of the Pike River disaster. Gaining participation is a major challenge in the organisations described above, small to medium businesses and where insecure employment is prominent.

Under the HSE Act there is a general duty on all employers to give employees reasonable opportunities to participate in improving health and safety.¹⁴⁹ Commonly this is given effect through elected health and safety representatives and joint health and safety committees.¹⁵⁰ However often these mechanisms are missing or poorly implemented.¹⁵¹ The Taskforce also found that workers often view health and safety as a set of paper-based rules relevant only to protect management from liability and stopping them from getting on with their jobs.¹⁵² Consequently poor worker engagement is regarded as a weakness of New Zealand's regime.¹⁵³

¹⁴⁵ Independent Taskforce on Workplace Health and Safety, "The Report", above n 37, at [93].

¹⁴⁶ Royal Commission on the Pike River Coal Mine Tragedy - Volume Two chapter 30 at [2].

¹⁴⁷ At 194.

¹⁴⁸ Gordon Anderson and Pam Nuttall "The Good-Fatih Obligation: An effective Model for Promoting Voice?" in *Voices at Work: Alan Bogg and Tonia Novitz Continuity and Change in the Common Law World* (Oxford University Press, New York, 2014) 194 at 212.

¹⁴⁹ Section 19B.

¹⁵⁰ Royal Commission on the Pike River Coal Mine Tragedy - Volume Two chapter 30 at [6].

¹⁵¹ Independent Taskforce on Workplace Health and Safety, "The Report", above n37, at [96].

¹⁵² Independent Taskforce on Workplace Health and Safety *Summary report on analyses of written submissions and consultation meetings* (January 2013) at [16].

¹⁵³ Independent Taskforce on Workplace Health and Safety, above n 1, at 11.

The Bill imposes an overarching duty on PCBU's to consult and involve workers.¹⁵⁴ All duty holders are required to implement worker participation practices.¹⁵⁵ Currently only workplaces with more than thirty employees or when requested by an employee or union are required to have formal worker participation systems.¹⁵⁶ This change reflects a stronger focus on the importance of inputs from workers as the “eyes and ears” on the ground of the workplace.¹⁵⁷ This participation is supported by a duty on workers to comply and co-operate with any reasonable policy or instruction.¹⁵⁸ No such requirement is made in the HSE Act. Having an engaged workforce also makes sense economically. When workers view health and safety positively, the costs associated with enforcement are reduced.

Worker participation steers positive health and safety practices which should in turn be reflected in corporate behaviour. Similarly an engaged workforce, informed about their rights and the potential risks, will put pressure on the organisation to take responsibility for implementing positive health and safety practices. To support a culture change and drive corporate responsibility, worker behaviour must also change.

VIII Corporate Manslaughter

A critique of the Bill in its current form is the lack of provision for corporate manslaughter. This has been described as a “gap in the law”.¹⁵⁹ There is a strong argument that in cases of workplace death caused by serious systematic failures, holding senior management to account through fines is inadequate. As discussed above, positive health and safety practices are strongly incentivised in the Bill and it is unlikely that a corporate manslaughter provision would have any effect on low-risk businesses. However in the case of persistent health and safety offenders it is arguable whether the Bill will be strong enough to change behaviours. This is especially so in high risk industries where participants have actively sought to avoid from the provisions in the HSE Act.¹⁶⁰

¹⁵⁴ Clause 61.

¹⁵⁵ Clause 64.

¹⁵⁶ Section 19C.

¹⁵⁷ MBIE “Working safer”, above n 13, at 34.

¹⁵⁸ Clause 40.

¹⁵⁹ (13 March 2014) 697 NZPD 16705.

¹⁶⁰ (13 March 2014) 697 NZPD 16705.

The Taskforce recommended extending the existing manslaughter offence¹⁶¹ to corporations.¹⁶² This would maximise the “deterrent effect of the criminal law in influencing the behaviour of corporations”.¹⁶³ It would also better reflect the moral outrage felt by society when a workplace fatality occurs as a result of the employer’s gross negligence.¹⁶⁴ However an overhaul of the current law relating to attribution of criminal liability to a corporation would need to occur for any such provision to be effective. Currently to give rise to liability an offence must be committed by a single individual who is acting on behalf of the company and is its “directing mind and will”.¹⁶⁵ Meeting this requirement can be troublesome, especially in larger organisations where decision making is dispersed between various individuals. This requirement would have to change to allow the conduct of various officers to be combined in order to attribute corporate liability.

As it stands the overall exclusion from the Bill will arguably have little effect on corporate behaviour. The provisions mentioned above and overall spirit of the Bill should have a very persuasive effect on organisations; encouraging and driving good health and safety practices. However for high-risk industries corporate manslaughter would be the ultimate deterrent. It is concerning that organisations with poor attitudes towards health and safety are able to escape accountability for worker fatalities. However the Bill does go a long way towards targeting these industries through focusing on those in the best position to manage risks. The increased levels of fines and penalties in the Bill strongly incentivises directors in high risk industries to act safely themselves and also watch out for signs that others are doing the same.¹⁶⁶ Even still corporate manslaughter may be necessary to drive a culture change in some organisations. In the case of persistent health and safety offenders, only time will tell if the Bill goes far enough to impact on corporate behaviour.

¹⁶¹ Crimes Act 1961.

¹⁶² Independent Taskforce on Workplace Health and Safety “The Report”, above n 37, at [381].

¹⁶³ At [381].

¹⁶⁴ Johnathon Wong “Corporate Manslaughter: A proposed Corporate Killing Offence for New Zealand” (2006) 12 *Canta LR* 157 at 167.

¹⁶⁵ Independent Taskforce on Workplace Health and Safety “The Report”, above n 37, at [379].

¹⁶⁶ Sarah-Lee Stead and Nura Taefi “Should New Zealand Introduce Corporate Manslaughter” *ISN Magazine* (New Zealand, 16 July 2012) at 22.

IX Conclusion

The Health and Safety Reform Bill represents a significant move in New Zealand's health and safety regime. The primary duty of care on PCBU's and extension of duties towards all workers represents a positive step forward from the HSE Act. The shift in focus from traditional employer-employee relationships towards a system which recognises the changing nature of work arrangements and the existence of duties at every link in the supply chain, ensures all workers are protected by duty holders. These changes will have a significant effect in high risk industries such as forestry, where the current regime has failed to provide an incentive to take responsibility for ensuring safe practices. The Bill demands a much needed change in how these industries view and manage health and safety.

The Bill encourages positive workplace health and safety cultures through the extension of liability to officers and stronger deterrence mechanisms. This paper asserted that corporate and officer responsibility is essential to turning things around in New Zealand. Officers, as the key decision makers, have the ability to create positive health and safety cultures and initiate change. The Bill targets those at the top of organisations, ensuring all those in the best position to manage risks are legally obligated to do so. The alignment of personal liability for health and safety with officers governance role means effectively managing workplace health and safety is prioritised. This is supported by stronger deterrence mechanisms including higher penalties for non-compliance, strengthened enforcement powers and worker participation. Although the lack of provision for corporate manslaughter does represent a gap in the law, for the majority of organisations and industries the Bill in its current form is comprehensive enough to drive proactive health and safety practices.

Overall the Bill should have a significant impact on corporate behaviour and New Zealand's health and safety culture. It requires all those in the best position to manage risks to take responsibility for health and safety and "stop and think" about risks; putting health and safety issues at the front of decision making. The Bill challenges the "she'll be right" attitude and paves the way for a regime where all New Zealander's go to work free from the risk of injuries or death.

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