



## BRIEFING

### Work Health and Safety Reform: Detailed policy decisions for your Health and Safety at Work Reform Bill

<b>Date:</b>	16 April 2025	<b>Priority:</b>	Urgent
<b>Security classification:</b>	In Confidence	<b>Tracking number:</b>	BRIEFING-REQ-0012039

Action sought		
	Action sought	Deadline
Hon Brooke van Velden <b>Minister for Workplace Relations and Safety</b>	<b>Agree</b> to the small business notification requirements, and officer duties policy proposals for inclusion in your Health and Safety at Work Reform Bill	22 April 2025

Contact for telephone discussion (if required)				
Name	Position	Telephone		1st contact
Hayden Fenwick	Manager, Health and Safety Policy	04 896 5479	Privacy of natural persons	✓
Rachael Fleming	Principal Policy Advisor, Health and Safety Policy	04 897 6592	-	

The following departments/agencies have been consulted

Minister's office to complete:

Approved

Declined

Noted

Needs change

Seen

Overtaken by Events

See Minister's Notes

Withdrawn

Comments



# BRIEFING

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### Purpose

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To seek your decisions on three distinct policy proposals:

- Part One: Limiting the health and safety duties for small businesses.
- Part Two: Reducing notification requirements to the regulator to reduce compliance burdens.
- Part Three: Clarifying the Health and Safety at Work Act 2015 (the HSW Act), application to officers (e.g. directors).

These proposals represent the second tranche of amendments to HSW Act, to be included in your Health and Safety at Work Reform Bill.

Your decisions will inform your next Cabinet paper *Health and Safety Reform: Further legislative changes* (the third of five), scheduled for consideration by the Cabinet Economic Policy Committee on 21 May 2025.

### Executive Summary

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In March, Cabinet noted your intention to report back to Cabinet in May seeking detailed policy decisions for inclusion in your Health and Safety at Work Reform Bill on the following three distinct policy proposals [CBC-25-MIN-0004 refers]:

1) *Limiting the health and safety duties for small businesses*

We provided you with initial advice on this proposal and discussed it with you earlier this month. Based on our understanding of your objectives, we recommend that Persons Conducting Business or Undertakings (PCBUs) with fewer than 20 workers are required to meet their general duties as they apply to their critical risks only. We recommend that all businesses continue to be required to meet their specific duties under existing health and safety regulations – as they generally apply to critical risks, so align with the purpose of the reform which is to refocus the system on critical risks. Our recommended approach aligns with initial feedback received from the Employer and Manufacturers Association (EMA) and Retail NZ – to keep the proposal simple to ensure businesses know what to do to meet their duties, whilst mitigating the risk of making workplaces less safe.

2) *Reducing notification requirements to the regulator to reduce compliance burdens*

Some businesses are unclear on what constitutes a notifiable event and may be over-reporting as a result – likely driven by fear of the consequences of not notifying the regulator.

We recommend legislating existing operational guidance to provide more clarity in the HSW Act about the types of events that should be notified to the regulator. This approach aligns with the views of the regulators (WorkSafe, Civil Aviation NZ and Maritime NZ) who consider the notification requirements are set at the right level. We also heard from the EMA that the option to introduce a

threshold for serious events would add complexity to the system and seemed unnecessary given the existing operational guidance on notification requirements.

### 3) *Clarifying the HSW Act's application to officers (e.g. directors)*

Most of New Zealand's small businesses won't have a board of directors, with some officers wearing multiple hats in the businesses – as an officer and a worker. This results in confusion about who is an officer and the extent of their duties in specific situations leading to risk aversion and energy diverted into unproductive tasks, including some directors thinking they need to get involved in the day-to-day management decisions of the business to meet their governance duty.

We recommend a package of options to amend the HSW Act to clarify the distinction between officer and management duties supported by operational guidance.

We seek decisions by 22 April, to inform your next Cabinet paper on the health and safety reform.

## **Recommended action**

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The Ministry of Business, Innovation, and Employment recommends that you:

- a **Note** that on 24 March 2025, Cabinet agreed to your initial suite of proposals as part of your work health and safety reform and noted your report back to Cabinet in May to seek more detailed policy decisions in relation to the following proposals [CAB-25-MIN-0080 refers]:
- i. Limiting the health and safety duties of small, low-risk businesses,
  - ii. Reducing notification requirements to the regulator, and
  - iii. Clarifying the HSW Act's application to officers (e.g. directors);

*Noted*

- b **Note** that your decisions in this paper will inform your third Work Health and Safety System reform Cabinet paper, scheduled for consideration by the Cabinet Economic Policy Committee on 21 May 2025.

*Noted*

### ***Part One: Limiting the health and safety duties for small businesses***

- c **Note** that there are significant challenges in defining “small, low risk” businesses within the HSW Act, in a clear and consistent way; both because of the nature of business and the nature of risk.

*Noted*

- d **Agree** to create a new definition of “small PCBU” to capture PCBUs with fewer than 20 workers.

*Agree / Disagree*

- e **Note** that stakeholders are concerned about how this threshold will accommodate flexible business models (e.g. seasonal demands, part-time workers).

*Noted*

- f **Note** that there is no way to effectively define “low risk” businesses in primary legislation.

*Noted*

- g **Agree** that a “small PCBU” only needs to meet the General Duties in sections 36, 37, and 38 of the HSW Act as they apply to “critical risks”.

*Agree / Disagree*

- h **Note** that the definition of “critical risk” is a crucial decision that underpins all the reforms not just the limitation on duties for small business, and we will provide further advice on this.

*Noted*

- i **Note** that specific duties in the HSW Act and in regulations continue to apply to ‘small PCBUs’.

*Noted*

### ***Part Two: Reducing notification requirements to the regulator to reduce compliance burdens***

- j **Note** that limited anecdotal evidence suggests that some businesses are unclear on what constitutes a notifiable event and may be over-reporting as a result – likely driven by fear of the consequences of not notifying the regulator.

*Noted*

- k **Note** that on 24 March 2025, Cabinet agreed to “reduce the notification requirements to the regulator to only significant workplace events (deaths, serious injury, illness and incidents)” [CBC-25-MIN-0004 refers].

*Noted*

- l **Agree** to define key concepts in the HSW Act and add examples where appropriate to provide clarity for duty-holders about the types of events to notify to the regulator.

*Agree / Disagree*

### **AND/OR**

- m **Agree** to amend the HSW Act to introduce a period of incapacity to perform normal duties at work of ten calendar days, to define ‘serious’ harm.

*Agree / Disagree*

### ***Part Three: Clarifying officers’ duties to distinguish operational detail from governance***

- n **Note** that there is a lack of clarity about the officers’ due diligence duty for work health and safety which causes confusion about who holds the duty and how far it extends.

*Noted*

- o **Note** that on 24 March 2025, Cabinet agreed “that the application of the HSW Act is clarified to more clearly distinguish between officers and management, enabling officers to focus on governance and not operational matters” [CBC-25-MIN-0004 refers].

*Noted*

- p **Agree** that the HSW Act be amended so that the officer duty does not expose an officer to any liability for management actions by:

- i. explicitly excluding management of the PCBU from the list of officers’ diligence reasonable steps;

### **AND**

- ii. clarifying that where an officer works in a PCBU, the HSW Act is not to be read to include their duties as a worker in the PCBU, in their officer duties.

*Agree / Disagree*

- q **Agree** the HSW Act be amended to clarify that the due diligence duty to “to acquire, and keep up to date, knowledge of work health and safety matters” is limited to the acquisition of knowledge focussed on risks relevant to the PCBU, rather than all health and safety.

*Agree / Disagree*

- r **Agree** the HSW Act be amended to organise the six officers’ due diligence steps in categories, according to their effect, to aid understanding, such as (subject to PCO’s drafting decisions) ‘understand’, ‘ensure’ and ‘verify’.

*Agree / Disagree*

- s **Agree** that ACOPs and/or guidance be produced, using examples, to increase certainty for businesses about who is an officer in different business structures, and the ‘reasonable steps’ required to meet the officers’ due diligence responsibilities.

*Agree / Disagree*

### **Next steps**

- t **Note** that we seek your decisions by 22 April 2025, following this we will provide a first draft of the Cabinet paper to you by 28 April 2025.

*Noted*

- u **Note** that “critical risk” is a key term for the overall reforms, not just limiting duties for small business and MBIE will provide further advice on whether “critical risk” should be defined in the Act, or left to guidance and interpretation by PCBUs.

*Noted*



Richard Davies  
**Director, Workplace Relations and Safety  
Policy, MBIE**

16/ 04 / 2025

Hon Brooke Van Velden  
**Minister for Workplace Relations and  
Safety**

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## **Your next Cabinet paper on Work Health and Safety Reform will seek detailed policy decisions for inclusion in your Health and Safety at Work Reform Bill**

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1. On 24 March 2025, Cabinet agreed to your suite of proposals to reform the health and safety system. Cabinet also noted your intention to report back to Cabinet in May 2025 seeking detailed policy decisions for inclusion in your Health and Safety at Work Reform Bill [CBC-25-MIN-0004 refers].
2. This paper provides you with advice on three distinct policy proposals:
  - a. Part One: Limiting the health and safety duties for small businesses.
  - b. Part Two: Reducing notification requirements to the regulator to reduce compliance burdens.
  - c. Part Three: Clarifying the HSW Act's application to officers (e.g. directors).
3. We seek your decisions by 22 April 2025. Following this, we will provide you with a draft Cabinet paper *Health and Safety Reform: Further legislative changes* (the third of five), scheduled for consideration by the Cabinet Economic Policy Committee on 21 May 2025.

### **Part One: Limiting the health and safety duties for small businesses**

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4. On 24 March 2025, Cabinet agreed to limit health and safety duties for small, low-risk businesses under the HSW Act [CBC-25-MIN-0004] to:
  - a. managing critical risks that could cause death or serious injury or illness;
  - b. providing worker training and personal protective equipment for those critical risks; and
  - c. providing first aid, emergency plans, and basic workplace facilities for worker welfare (for example, provision of drinking water).

#### **MBIE recommended option**

5. Based on our understanding of your objectives, we recommend that the definition of 'small PCBU' be set so that it captures PCBUs with fewer than 20 workers. This aligns with other employment legislation (albeit Health and Safety has wider concerns than just 'employees'). This covers around 97% of businesses in New Zealand. It is important to use 'small PCBU' not 'small business', in order to cover volunteer organisations, and to fit with the rest of the HSW Act.
6. There are a range of choices for when and how 20 is calculated (eg the first day of the financial year, the minimum number you have during the year, the maximum number you have during the year etc; and whether it is FTEs or just workers under control). It is likely that different sector groups will seek different definitions. We propose to engage further and include this in the Cabinet paper.
7. We do not recommend trying to define "low risk" in the HSW Act. As noted in *BRIEFING-REQ-0012036*, we considered using a set of sectors, industry

classifications, or activities to classify high versus low risk, but none of the options provided a consistent or coherent way to identify low risk sectors.

8. We do think that Cabinet's intent of separating 'low risk' PCBUs from others can be fulfilled by the way that the duties are limited.
9. Under the status quo, PCBUs face general duties (the primary duty of care), as well as some specific duties which may apply due to the nature of the work undertaken.
10. To achieve a separation of 'low risk' from other PCBUs, we recommend that specific duties under existing health and safety regulations continue to apply to all firms,<sup>1</sup> these do not apply to low-risk activities. These regulations will complement the government objective to focus on critical risks.
11. These specific duties include provision of basic workplace facilities which Cabinet agreed should continue to be a requirement.
12. For small PCBUs, the general duties in section 36, 37, and 38 will need to be met for 'critical risk' only:

Section	Duty
36	Primary duty of care
37	Duty of PCBU who manages or controls workplaces
38	Duty of PCBU who manages or controls fixtures, fittings, or plant at workplaces

13. This change removes the concern that small businesses have to do 'everything'.
14. "Critical risk" is a key term for the overall reforms, not just limiting duties for small business. MBIE will need to provide further advice on whether "critical risk" should be defined in the HSW Act, or left to guidance and interpretation by PCBUs.
15. These changes mean that every PCBU with fewer than 20 workers only needs to manage critical risks, and any specific regulatory requirements.

### Implications of this option

16. This option has the broadest coverage and sends the strongest signal about the need for PCBUs to prioritise critical risks not every risk.
17. This does create a boundary issue as PCBUs get towards 20 workers (e.g. seasonal demands or growth), and this may need to be clarified with guidance.
18. Ultimately, PCBUs in this situation will need to make their own judgment (as happens under the status quo). However, 20 is already a sizeable PCBU by New Zealand standards.

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<sup>1</sup> This means that any duties specified in secondary legislation under the HSW Act will continue to apply to PCBUs with fewer than 20 workers, e.g. obligations specified in the Health and Safety at Work (Asbestos) Regulations 2016, the Health and Safety at Work (Hazardous Substances) Regulations 2017, or the Health and Safety at Work (Adventure Activities) Regulations 2016, etc.

19. For many small businesses, this should immediately alleviate the need for specialist advice and 'off the shelf' health and safety systems. At the margins, there will be small businesses who have serious (but not always critical) risks and will no longer have a duty to manage these.
20. It will change regulator practice if and when there is an incident, as additional factual enquiries (e.g. size of PCBU) to determine whether duties were breached will be added. Scenarios are included in **Annex One**.

### **Other options considered but ruled out**

21. MBIE considered other thresholds, such as limiting it to sole traders, which would make it easy to identify and match the UK model. The recommended option prioritises coverage over certainty.
22. As noted above in paragraph 7, MBIE considered other ways to define "low risk" sectors, but none of the alternatives provided a consistent or coherent way to identify low risk sectors. The proposed approach prioritises administrative efficiency, and ease of identification for businesses.

### *What stakeholders told us about health and safety duties for small businesses*

23. The EMA was broadly supportive of MBIE's option. They noted that this will be difficult to implement and that some PCBUs will face difficult judgments. For example, a building contractor might be a PCBU with 10 workers on one job and 25 workers on the next job with contract labour fluctuating depending on the job. Confidential information entrusted to the Government
24. They noted that it is important that basic requirements such as training aren't carved out. As the proposal stands, training will only be required for critical risks.
25. Retail NZ are concerned about how different business models relate to the threshold of staff owing to the number of franchise and co-operative arrangements in the Retail sector, and seasonal demands (e.g. Christmas sales).
26. They noted that many retail stores have common ownership (so three separate bookshops with 10 staff each may actually be a single PCBU of 30 staff). They also noted that retail stores use casual, part time labour to 'surge' during sales. Given this, a main street retailer could have over 70 workers on a busy day (but far fewer on a FTE basis).

## **Part Two: Reducing notification requirements to the regulator to reduce compliance burdens**

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27. On 24 March 2025, Cabinet agreed to "reduce the notification requirements to the regulator to only significant workplace events (deaths, serious injury, illness and incidents)" [CBC-25-MIN-0004 refers].

### **Notification requirements are intended to capture events that cause the most serious harm**

28. The HSW Act requires duty-holders to notify the regulator of any notifiable events – these are deaths and serious illnesses, injuries and incidents.

29. Notification requirements are intended to capture the types of events that cause the most serious harm. These are the events that require the regulator to respond urgently/immediately. Notification requirements support the regulator to put out safety alerts to prevent wider harm from occurring, or near misses that could result in catastrophic failure.
30. The regulator has a range of response options available, including conducting an investigation or inviting the duty-holder to participate in an assisted review of their health and safety system. If no action is required, the regulator confirms this.
31. Operational guidance supports duty-holders to identify the types of events that require them to notify the regulator, e.g. what is (and what is not) a serious head injury. A notifiable event requires the duty-holder to:
  - a. not disturb the site until released by an inspector,
  - b. notify the regulator of the event, and
  - c. keep records of the event.
32. Notification requirements in the HSW Act are supplemented by additional requirements in regulations for specific high-risk sectors or activities (e.g. major hazard facilities).

### **What is the problem with the current notification requirements?**

33. Limited anecdotal evidence from submitters suggests that some businesses are unclear on what constitutes a notifiable event and may be over-reporting as a result – likely driven by fear of the consequences of not notifying the regulator.
34. This lack of clarity may be caused by the regulator not responding to some notifications or providing incorrect advice about what to notify as well as some outdated regulations that do not align with the HSW Act (e.g. the Geothermal Energy Regulations 1961).
35. This may be contributing to a perception among some businesses that the notification requirements are burdensome, adding to the compliance costs associated with meeting their health and safety duties.

### **Options and analysis**

36. Options are focused on providing clarity for duty-holders to help them identify what types of events they need to notify to the regulator. Options are not mutually exclusive, depending on your priorities, you could choose to progress both.
37. It is important to note that depending on the approach taken to define ‘critical risk’, changes to the notification requirements in the HSW Act may have flow-on implications to the wider suite of reforms<sup>2</sup>.

*Option One: Define key concepts in the HSW Act and add examples (recommended)*

38. The HSW Act does not define the concepts of ‘immediate treatment’, ‘medical treatment’ or ‘serious’. WorkSafe’s operational guidance provides clarity by defining

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<sup>2</sup> This would only be the case if the preferred approach is to link the definition of ‘critical risk’ to the notification requirements.

these concepts and providing examples of what is (and is not) a notifiable event. Using the example of a serious eye injury, WorkSafe's guidance explains:

*A serious eye injury that requires immediate treatment (other than first aid):*

- a. Injury that results in, or is likely to result in, the loss of an eye or vision (total or partial),*
- b. Injury caused by an object entering the eye for example, metal fragment, wood chip,*
- c. Contact with any substance that could cause serious eye damage.*

*Does not include:*

- d. Exposure to a substance or object that only causes discomfort to the eye.*

*'Medical treatment' is considered to be treatment by a registered medical practitioner such as a doctor.*

*'Immediate treatment' is urgent treatment, and includes treatment by a registered medical practitioner, registered nurse or paramedic.*

39. Option One proposes to legislate this operational guidance in the HSW Act and could be progressed by itself, or alongside Option Two.
40. We recommend progressing Option One. Despite making the legislation more prescriptive, it may increase certainty for duty-holders about what constitutes a 'serious' event which may in-turn result in a reduction of over-reporting.
41. As regulators, WorkSafe, Civil Aviation Authority of New Zealand and Maritime New Zealand all consider the notification requirements to be working well and do not recommend changing them.

*Option Two: Amend the HSW Act to introduce a period of incapacity to clarify 'serious' harm (not recommended)*

42. Option Two proposes to amend the HSW Act to introduce a period of incapacity to clarify 'serious' harm. For example, if an injury, illness, or incident results in the person being unable to perform their normal duties for a period of *ten or more calendar days*, then the duty-holder would be required to notify the regulator.<sup>3</sup>
43. We do not recommend progressing Option Two as the previous policy rationale for a ten-day period of incapacity is unclear and we have not had time to consult widely on this proposal. We consider that introducing an arguably arbitrary threshold will add complexity and ambiguity to the system. There is likely to be confusion around preserving the site and when to notify the regulator, with the risk that some wait to notify until after the ten-day period, defeating the purpose of the notification requirements.

### **Other option considered but ruled out**

44. We considered another option to introduce a period of incapacity *and* frequency to clarify 'serious harm'. For example, if an injury, illness, or incident results in the person being unable to perform their normal duties for a period of *up to ten calendar days*, and that same incident occurs *twice in a calendar year*, then the duty-holder would be required to notify the regulator.
45. We ruled out this option because it would be more complex in practice than Option Two. For example, duty-holders would be required to keep records of all notifiable events to determine whether they meet the frequency threshold to be notifiable – ultimately adding to the compliance burden.

### *What stakeholders told us about notification requirements*

46. The EMA considered options to introduce a period of incapacity would add unnecessary complexity for businesses. They considered the ten-day threshold to be relatively high and expressed a preference of either a five-day or seven-day threshold (to align with the ACC system). They questioned the need to legislate the operational guidance as it makes the legislation more prescriptive and difficult to keep updated.
47. Retail NZ pointed out that businesses' capability of interpreting health and safety legislation is variable, so it needs to be kept as simple as possible. They therefore considered that option one may add clarity for some businesses but not for others.

## **Part Three: Clarifying officers' duties to distinguish operational detail from governance**

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48. On 24 March 2025, Cabinet agreed that "the application of the HSW Act is clarified to more clearly distinguish between officers and management, enabling officers to focus on governance and not operational matters" [CBC-25-MIN-0004].

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<sup>3</sup> We note that previous policy work on the definition of 'serious' harm consulted a wide range of stakeholders who agreed that 7 calendar days would be too low and would likely result in an increase in reported events, ultimately a period of 10 calendar days was preferred.

## The officers' duty is a governance duty

49. Under the HSW Act, an officer of a PCBU is a director, partner, or anyone that can “*exercise significant influence over the management of the business or undertaking (for example, a chief executive)*”. The inclusion of this in the HSW Act was intended to signal that the only workers in a PCBU with an officer duty would be extremely senior managers.
50. Officers must exercise due diligence to ensure that the PCBU complies with its duties under the HSW Act. At a high-level, the due diligence duty is a governance duty that requires the officer to take reasonable steps to:
  - a. **understand** and keep up to date on the general health and safety risks of their business,
  - b. **ensure** their business has the resources, processes and information to manage its risks, and
  - c. **verify** that their business is using those resources, process and information.
51. Where a Chief Executive makes governance decisions alongside the Board, the intention is that they should be accountable for those decisions, in the same way a director is. Most PCBUs do not have a board of directors, in these cases the manager(s) step out of their management role to make governance decisions on health and safety. They should be held accountable for these governance due diligence decisions in the same way as a director.

## What is the problem with the current duty for officers?

52. Some officers are unclear about their duties, as they may ‘wear multiple hats’ in the PCBU as an officer and a worker (e.g. a CEO, partner or owner-operator) in the PCBU. The majority of New Zealand’s small businesses won’t have a board of directors, or even if there are directors or partners, these people also work for the PCBU. People in these roles are required to juggle their officers’ governance duties as well as their management roles in the PBCU, and their health and safety duties as a worker.
53. The officer duty in the HSW Act is intended to be flexible to deal with different business arrangements. In practice, this flexibility creates ambiguity about who is an officer and the extent of the duty in specific situations. **Free and frank opinions**
54. This ambiguity in the legislation, coupled with some duty-holders receiving overly cautious advice, and the need to refine the regulator’s operational guidance, can lead to risk aversion and energy diverted into unproductive tasks, including some directors thinking they need to get involved in the day-to-day management decisions of the company to meet their governance duty.

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Free and frank opinions

*The Institute of Directors recommended the HSW Act be amended to better distinguish between governance and management*

55. The Institute of Directors (IoD) submission stressed the role of governance in health and safety. The IoD supported retaining the duties of officers “*with any amendments focused on clarifying existing responsibilities rather than fundamentally altering them*” and “*better focused approved codes of practice, which provide “safe harbours”*”. Changes to the HSW Act were recommended to better distinguish between governance and management’s roles and duties.

## **Options and analysis**

56. The options are not mutually exclusive, except where noted. Depending on your priorities, you may choose to progress all or some of them. The options have been assessed against the following two objectives and considered within the context of the wider health and safety reforms:
- a. Strengthen the separation between the duties of officers and management. Officers should remain focused on strategic oversight, while management should be responsible for the operational implementation of health and safety systems.
  - b. Officers in smaller and simpler PCBUs should have clarity about how this affects their duties.
57. We recommend a package with Option One being supported by Options Two and Three:
- a. Option One – Amend the HSW Act so the officer duty does not expose an officer to any liability for management actions
  - b. Option Two – Amend the HSW Act to clarify the current six due diligence steps
  - c. Option Three – ACOPs and/or guidance clarifying who is an officer and their due diligence duties

*Option One – Amend the HSW Act so the officer duty does not expose an officer to any liability for management actions (recommended)*

58. This option is a relatively straightforward amendment to the HSW Act to clarify that the officer duty excludes liability for actions by management, including where an officer also has a management role. **Free and frank opinions**  
[REDACTED]  
[REDACTED]
59. Option One involves changes to:
- a. explicitly exclude management of the PCBU from the list of officers’ diligence reasonable steps, and
  - b. clarify that where an officer also works in a PCBU, the HSW Act is not to be read to include their operational work in their officer duties.
60. This change will clarify the officers’ role is to understand and direct management to design the health and safety system and verify that systems and resources have been put in place. For officers of PCBU’s which don’t have a board (e.g. owner operators) it

will clarify that in addition to management activities, they should also ensure they undertake due diligence (i.e. seek information, make governance decisions on resources and processes and check procedures are being complied with).

61. This option would give effect to the original policy intent of the HSW Act that officer duties are governance rather than management, for the widest range of PCBUs, from large businesses with formal governance structures down to owner-operators. Option One will contribute to the objective of the wider reform to reduce costs for business by helping officers to understand their duties. This will reduce anxiety and may help reduce a culture of excessive reliance on paperwork.
62. Note that clarifying officer duties do not include work as management, means that the officer duty for people who work in the PBCU would only cover the governance that they do as an officer. For their work in the PCBU they would still have the worker duty. However, this aligns with both the policy intent and makes the CEO's officer duty the same as for directors who do not work at the PCBU.

*Option Two – Amend the HSW Act to clarify the current six due diligence steps (recommended)*

63. This is a supplementary option to support other legislative change options. It is a relatively straightforward legislative change.
64. Option Two amends the HSW Act to clarify that the due diligence duty “(a) to acquire, and keep up to date, knowledge of work health and safety matters” is limited to the acquisition of knowledge focussed on risks relevant to the PCBU, rather than all health and safety. The current scope of the duty is arguably unreasonably wide and the rest of the current list is reasonable and does not require amendment.
65. However, the six steps could be made clearer. Option Two would categorise steps, according to their effect, to aid understanding. Subject to PCO's drafting decisions, these categories could be:
  - **understand** and keep up to date on the general health and safety risks of their business:
    - (a) to acquire, and keep up to date, knowledge of work health and safety matters relevant to the PCBU,*
    - (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.*
  - **ensure** that their business has the resources, processes and information to manage the risks:
    - (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,*
    - (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,*

*(e) to ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act.*

- **verify** that their business is using those resources, process and information:

*(f) to verify the provision and use of the resources and processes referred to in paragraphs (c) to (e).*

*Option Three – ACOPs and/or guidance clarifying who is an officer and their due diligence duties (recommended)*

66. This option would increase certainty for businesses through the production of ACOPs and/or guidance to address identified issues and supports legislative change options. In some cases, existing guidance or ACOPs could be updated to give effect to this.
67. ACOPs and guidance would need to be developed over time, perhaps starting with the many businesses without separate boards, which are often smaller business and owner-operated businesses. Use would be made of examples of different types of business models and duty-holders who wear multiple hats.<sup>5</sup> Subject to other policy changes in the current reform package, ACOPs would provide a safe harbour where conditions are met [CBC-25-MIN-0004 refers].
68. Option Three includes clarifying:
- a. who is an officer in different business structures,
  - b. the “reasonable steps” required to meet the officers’ due diligence duty, including the boundary with management responsibilities,
  - c. how “*the nature of the business or undertaking*” and “*the position of the officer and the nature of the responsibilities undertaken by the officer*” affect officer duties, including who has the officer duty and the scope and nature of that duty, and
  - d. how the requirement “to acquire, and keep up to date, knowledge of work health and safety matters” is proportionate to the circumstances and risk profile of smaller PCBUs.
69. Option Three addresses requests from submitters for guidance on officer duties, to help people understand practical ways to meet their officer duties. While ACOPs and guidance do not change the law, they can clarify important aspects of it. This includes the policy intention that officers’ duties are a governance duty. This option would also contribute to increasing business certainty and help reduce unnecessary costs for business.
70. This option is recommended regardless of the preferred legislative option, as it is desirable that the applicable legislative framework is translated into practical implications for real world situations.<sup>6</sup>

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<sup>5</sup> For example, small and large company, partnership, sole trader, and different officer situations such as, director not working at PCBU, officer who also works in the PCBU, partner, CEO, owner and manager.

<sup>6</sup> We note that the Business Leaders Health and Safety Forum is working with the IOD to develop more guidance on officers’ duties.

*Option Four - Amend the HSW Act to clarify that CEOs are not officers, if there is a board with most members not working in the PCBU (not recommended)*

71. This option amends the HSW Act to remove the CEO from the definition of an officer, if the PCBU has a board where most voting board members do not work in the PCBU. The intention is that only in situations where there is a governance function provided by a majority of directors who do not work in the PCBU, would the CEO not have officer duties.
72. This option would complement Option One by clarifying the “double hat” issue for the small group of CEOs with the officer role provided by a board that is separate from management. Although benefitting a small proportion of PCBUs, it is likely that these would include a number of large businesses employing many people. This option would rely on Option One to clarify the officer duty for officers who are not CEOs.
73. More work would be needed to target the definition of ‘chief executive’, and to decide whether it is appropriate to require a majority of board members to not work at the PCBU. Of concern is that this option introduces some potential tension between the incentives for directors who would retain the officer duty, and the CEO whose personal liability for health and safety (as a worker) would be considerably less than the personal liability of the other directors. In addition, if Option One is successfully implemented it would clarify the officer role of CEOs, without the complexity of treating them differently to other officers.

#### **Other options considered but ruled out**

74. We considered other ways to clarify who has an officer duty and the nature of the duty as governance. On balance, these alternative options are also not recommended:
75. *Amend the HSW Act to confine the officer duty to directors who do not also work for the PCBU* - The vast majority of businesses would not have anyone required to exercise the officer duty, or personally liable for health and safety governance, potentially enabling those responsible for health and safety failures to move on to other roles without consequences. Benefits are unclear and there could be unintended effects on business’ decisions on their form and structure, i.e. whether to have directors who don’t work at the PCBU. This option could also increase reluctance among people who do not work at the PCBU to take up director positions, given they will be among the relatively few individuals with significant individual liability for officer duties.
76. *Amend the HSW Act to establish an executive management duty that is different from the officers’ governance duty* – Aims to clarify the officer duty by creating a complementary management duty, but would add complexity with uncertain benefits. This would risk creating new incentives that could divert attention from health and safety decision-making. For example, a Chief Executive could use their greater access to information to steer boards towards decisions that lessen their exposure under the new duty at the expense of health and safety governance. It would be challenging to define the executive management duty, who it would apply to, and set out expectations in ways that are general enough to cover the full range of businesses and executive leadership roles, and yet provide sufficient clarity for a duty with personal liability. Clarifying the boundary between the PCBU duty and the executive management duty may be also challenging. Clarifying the boundary between the PCBU duty and the executive management duty may be also challenging.

### *What stakeholders told us about officers' duties*

77. The EMA was not in favour of changes that would introduce extra complexity that they would need to explain to their members. They were also concerned that extra complexity might inadvertently create loopholes. The EMA supported Options Two and Three, in part because they are focussed on clarifying rules rather than creating new rules. They also expressed some cautious support for Option One, which would clarify in law that the officers' duty is a governance duty. Retail NZ also expressed support for Options Two and Three as "sensible" options.

## **The next Cabinet paper is scheduled to be considered by ECO on 21 May 2025**

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78. Your decisions in this paper will inform your next Cabinet paper *Health and Safety Reform: Further legislative changes* (the third of five), scheduled for consideration by the Cabinet Economic Policy Committee on 21 May 2025.
79. We are also working to identify residual policy issues related to this briefing and will discuss anything substantive that is identified with your office, so you can raise them with your Cabinet colleagues if you wish.
80. We will be working to the following timeline:
- 22 April 2025 – your decisions in this paper.
  - 28 April 2025 – first draft of the Cabinet paper provided to you.
  - 5 May to 14 May 2025 – Ministerial consultation.
  - 15 May 2025 – Cabinet paper lodged.
  - 21 May 2025 – consideration by the Cabinet Economic Policy Committee.
  - 26 May 2025 – consideration by Cabinet.

## **Annexes**

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**Annex One:** Small business example scenarios

## **Annex One: Small Business example scenarios**

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### *A small accounting business*

- They are required to manage all critical risks in their business, a quick assessment reveals no critical risks in this office. Therefore, they only need to provide basic requirements for their workers (e.g. drinking water, toilet, first aid kit).

### *A small retail store with three workers, who sell some hazardous substances.*

- They are required to manage all critical risks in their business, which in this case includes the storage and display of the hazardous substances. The hazardous substances regulations will specify their duties relating to how to safely do this. They do not have a duty with regards to non-critical risks (e.g. tripping over the carpet).

### *A building contractor who does a range of jobs and uses labour hire to scale up and down (sometimes with fewer than 20 workers and sometimes more than 20).*

- They need to manage their critical risks, irrespective of how many workers are under their control.
- *If the definition of 20 is based on the job at hand*, then where they have more than 20 workers they also need to manage non-critical risks.
- *Under a different calculation of 20 (eg core staff)* then they could only face limited duties despite having many more workers on a site.
- They'll need to meet numerous specific regulations irrespective of how many workers are under their control (e.g. working at heights, falling objects, etc).
- If a non-critical harm is suffered by a worker (e.g. a broken leg), then there would be a factual question as to the size of the PCBU to determine whether a duty was breached.

### *A small firm of civil engineers, who design bridges and retaining walls*

- In their office they are the PCBU and only need to manage critical risks (likely to be none).
- They still have a duty under s39 with regard to their designs.
- The designer must, so far as is reasonably practicable, ensure that the plant, substance, or structure is designed to be without risks to the health and safety of persons.
- On a site visit they will need to co-ordinate with the PCBU on-site as there will be critical risks to manage.