

A new regulator

Introduction

1. A new regulator concerned solely with health and safety is required if New Zealand's poor health and safety record, including in underground coal mining, is to be improved. This chapter discusses the functions, form, strategy and resources of a new regulator.

Functions

2. The purpose of the health and safety regulator is to promote the prevention of harm to everyone in or near a workplace. The regulator should promote excellence in management, including systematic management, of health and safety. As part of that, it needs to ensure that inspectors carry out their functions properly. These functions include providing advice and information to employers, employees and other people, ascertaining compliance with the Health and Safety in Employment Act 1992 (HSE Act) and taking action to ensure compliance.
3. The regulator should:
 - advise the minister on workplace health and safety policy and operations;
 - administer and review the legislation and regulations, including promulgating codes of practice and guidance material;
 - provide workplace health and safety information to industry, employers, unions and workers;
 - promote and co-ordinate research, training and education;
 - carry out monitoring activities, including inspections and system audits; and
 - work with a wide range of other bodies, including industry, unions and safety organisations both in New Zealand and overseas.¹
4. To credibly perform these functions, the regulator should have:
 - a sole focus on health and safety;
 - effective leadership;
 - a flat structure with minimum levels of management;
 - expertise in health and safety at all levels;
 - access to a broad range of external expertise;
 - well-qualified and trained inspectors;
 - a strong connection between its policy advice and compliance functions; and
 - effective relationships with government agencies and other stakeholders.

Form of a new regulator

5. There are three options:
 - the status quo, integrated into the Ministry of Business, Innovation and Employment

- an autonomous function, within the ministry; or
- a Crown entity, with its own executive board.

First option – the status quo

6. The Department of Labour (DOL) lost public and industry confidence. Because it had multiple functions, it was unable to maintain sufficient focus on health and safety policy, strategy and operations. Health and safety expertise was lacking. The people with that expertise were mainly at the lower levels of the department. DOL is now part of the new Ministry of Business, Innovation and Employment, which is also responsible for many functions.
7. The commission has been briefed on the high-level design of the new ministry.² The proposal separates policy and regulatory administration. Health and safety administration is to be part of a regulatory practice group responsible for administering a range of laws and regulations.
8. The minister has announced major initiatives to improve health and safety, including a fundamental review of the health and safety system to ensure it is fit for purpose. The commission agrees with those initiatives but considers it will be difficult to achieve necessary change if responsibility for health and safety administration remains essentially as it was – in a ministry mixed with other functions. Senior officials are likely to continue facing the same difficulty in maintaining focus on health and safety, a difficulty predicted by Robens.

Second option – an ‘autonomous’ function within the ministry

9. The commission has considered whether an ‘autonomous’ health and safety function should be established within the new ministry. There are two possibilities: a dedicated health and safety group with a statutorily independent function, or establishing the health and safety regulator as a ‘departmental agency’, in line with the recent government proposals for ‘better public services’.³
10. A dedicated health and safety group within the ministry would be an improvement on the current proposal, but would it provide the right platform to drive the major reforms required? The group head would be subject to ministry priorities, would be bidding internally for the group’s budget and is likely to be drawn into more general departmental management issues.
11. In Queensland, the administration of health and safety laws for the extractive industries is performed as part of an autonomous function within a department. The regulator operates through a division of the Department of Natural Resources and Mines and administers health and safety laws only in respect of the mining, petroleum and gas industries. The division is headed by the deputy director-general, safety and health, who is also the commissioner for mine safety and health.⁴ The division is well regarded internationally, as is Queensland’s mine safety record.
12. The departmental agency model envisaged by the government’s recent proposals offers more hope of success than the status quo. Departmental agencies are an adaptation of the executive agencies structure used in the United Kingdom. If health and safety is to be administered through a departmental agency the agency would form part of the ‘host’ ministry but would be headed by its own chief executive, who would be employed (and subject to performance reviews) by the state services commissioner.
13. The chief executive of the departmental agency would be directly accountable to the minister for the agency’s operational performance. People working for the agency would be employed by the host department, but employer responsibilities would be delegated to the chief executive of the departmental agency.
14. The chief executive of the ministry would be responsible for administering the departmental agency’s funds. The agency would work according to the policy and funding of the ministry. The ministry’s chief executive, in consultation with the chief executive of the departmental agency, Treasury and the State Services Commission, would be responsible for agreeing on the agency’s strategy, policy and resources. The ministry would advise the minister on the agency’s strategy, policy and funding. It follows that the departmental agency will be essentially concerned with operational delivery in line with externally determined strategy, policy and funding.

The government introduced an omnibus bill, including the departmental agency proposal, into Parliament on 30 August 2012.

15. A regulator constituted as a departmental agency has some attractions in setting the right focus on health and safety. But its role would not be wide enough to drive the much-needed major reform, which will require policy, legislation, regulation and operational changes. Another concern is that the departmental agency concept is unproven in New Zealand, and health and safety may not be an appropriate area in which to pioneer the new approach.
16. The United Kingdom has recently considered reducing its number of public bodies, including making some of them executive agencies. Importantly, it decided not to change the status of the regulator, the Health and Safety Executive, which will remain the equivalent of a New Zealand Crown entity.⁵

Third option – a Crown entity

17. The minister's proposals recognise that in international best practice responsibility is shared between employers, workers and regulators.⁶ This approach is at the heart of the 1972 Robens report, which identified that:

the 'user interests' in this field – that is to say the organisations of employers and workpeople, the professional bodies, the local authorities and so on – must be fully involved and able to play an effective part in the management of the new institution. A principal theme . . . is the need for greater acceptance of shared responsibility, for more reliance on self-inspection and self-regulation and less on state regulation. This calls for a greater degree of real participation in the process of decision-making at all levels. . . . It is essential, therefore, that the principles of shared responsibility and shared commitment should be reflected in the management structure of the new institution.⁷

18. Lord Robens recommended governance by a board comprising a chairman, regarded by the public as authoritative about health and safety, an executive director and a number of non-executive directors. Their expertise would encompass the industrial management, trade union, medical, educational and local authority spheres. All members would be involved in policy and decision-making and implicated in the decisions made.⁸ An executive, not advisory, board was needed:

The distinction is vital. It is no secret that the main representative advisory committees which currently provide advice to government in this field . . . have not been altogether successful. They have met infrequently. They have no executive function. The fact of their existence has apparently done little to reduce the pressures which lead to protracted consultation on new or revised statutory regulations . . . Representative advisory bodies of this kind have no way of ensuring that their advice really affects what the Government actually does . . . What is needed is participation in the actual making of decisions, both at technical level . . . and also in the overall management of the system, at the level where policy is determined.⁹

These principles are reflected in the current structures of the UK Health and Safety Executive.

19. If the health and safety regulator were established as a Crown entity, it would be directed by a focused executive board appointed according to the general criteria set out in the Crown Entities Act 2004. These require board members to have appropriate knowledge, skills and experience which, in this case, would include recognised health and safety expertise. Unlike the other two options, the Crown entity option would enable that expertise to be directly involved in setting policy and strategies. The board would oversee the reform programme, set strategy and performance measures and appoint the chief executive.
20. The minister would appoint board members for fixed terms. The board would have independent statutory responsibilities, for example in the audit and inspection programmes, which would be delegated to the chief executive.
21. The minister would approve the regulator's strategic statement of intent and the regulator would report regularly

to the minister. It would provide an annual report to Parliament. It would be monitored by the ministry on behalf of the minister. The ministry would give the regulator advice and support. On policy advice and legislative reform, the regulator would work closely with the ministry and would bring direct experience from its operations.

22. The commission has considered which form of Crown entity would be most appropriate. Two other health and safety regulators, Maritime New Zealand and the Civil Aviation Authority, are classified as Crown agents, a form of Crown entity with the least independence from ministerial direction. The new regulator could be classified in the same way. As a Crown agent, the regulator would be required by the minister to give effect to government policy and follow 'whole of government' directions.

Preferred option – a new Crown agent

23. On balance, the commission prefers the creation of a new Crown agent with an exclusive focus on workplace health and safety because:
- the health and safety regulator will have its own identity and could start to rebuild public confidence;
 - an executive board would give the chief executive strategic direction and support as well as directly appraising performance;
 - the appointment of an executive board would ensure that a broad range of expertise, including health and safety expertise, is available at the highest level;
 - the remuneration structure would be aligned more directly to the marketplace for specialists such as mining inspectors;
 - policy advice to the minister would be improved by drawing on the expertise of the new Crown agent, which would have a small policy division;
 - the regulator would be on the same footing as the Civil Aviation Authority and Maritime New Zealand; and
 - a Crown agent would provide the right platform to drive the required major improvements to New Zealand's poor health and safety performance, identified in recent government proposals for reform.

Compliance strategy

Introduction

24. The new regulator will need a modern and effective compliance strategy superior to that used by DOL.¹⁰ The strategy will need time to become fully effective.
25. A compliance strategy typically involves a wide range of interventions; enforcement is only one element. Other interventions include providing advice and education, issuing guidance and approved codes of practice, and recommending changes to laws and regulations. Compliance strategies should promote and maintain public confidence that health and safety legislation is being administered fairly and consistently. An effective strategy will reduce costs for businesses which have not previously received the help they need to comply with the HSE Act.

Best practice compliance strategy

26. The compliance strategy should include clear policies on the use of enforcement tools and penalties. The strategy should be communicated to employers, who need to know exactly what to expect from the regulator and how it will respond to breaches of the law.
27. A best practice strategy takes an evidence and risk-based approach to deciding which compliance tools are appropriate for individual cases or for groups within an industry. That typically involves identifying specific risks,

assessing the likelihood that they will happen and what impact they will have, and then managing the most significant risks. Assessing the type and level of risk helps with making decisions about how closely and when to monitor an entity's compliance. The level of intervention should be proportionate to the level of risk and the likely seriousness of the non-compliance. The regulator needs to address the causes, and not just the symptoms, of non-compliance.

28. To implement an effective risk-based strategy, the new regulator needs a clear picture of the risks and drivers of compliance within an industry. That requires gathering and analysing reliable and relevant information about operators, the industry and the regulatory environment. The information should include comprehensive data, which indicate the preventative measures being taken to avoid harm to workers and the effectiveness of those measures.

Field inspection programme

29. The field inspection programme should define the types of activities to be carried out, by whom, how often and how they will be reported. The frequency of activities will depend on the potential consequences of non-compliance, the operating environment of the industry, technological complexity and the compliance profile of the particular workplace. Visits by inspectors to a workplace should be a mixture of announced and unannounced visits.
30. The Queensland Mine Inspectorate's compliance activities are guided by the Mine Inspection Planning System (MIPS),¹¹ an electronic tool that assists inspectors to schedule their activities and allocate resources. Resources are initially allocated based on the mine's inherent hazard profile, but are then based on the performance of the mine. So a high-risk mine might be initially subject to a high level of monitoring, but that would decrease if the mine shows it is managing health and safety well. The opposite is also true. This dynamic process allows the mines inspectorate to respond to changing circumstances at a mine, such as a change in management, and allocate resources accordingly.

Implementation by inspectors

31. Inspectors need clear guidance and training to ensure that their actions follow the regulator's strategy. The compliance strategy needs to feed into policies and procedures. Inspectors need training in conducting inspections and audits, and in the use of the enforcement tools. Inspectors specialising in an industry need specific, industry-focused training as well as generic health and safety training. Inspectors need to collaborate with their counterparts overseas and stay up to date with international best practice.
32. The inspectors' activities should be regularly reviewed by their manager, who needs to have relevant expertise. Such reviews should include checking that decisions are consistent and in line with policy. Inspectors need quick access to legal support in complex situations.

Review of the strategy

33. The new regulator should regularly monitor the effects of its strategy on compliance behaviour. Only by doing so can the regulator check whether progress is being made. This requires designing qualitative and quantitative performance measures that can demonstrate progress. Lessons learnt should be used to improve strategy, policies and procedures. Appropriate benchmarks should be developed against other agencies in New Zealand and overseas.

Resourcing

34. The budget will need to be assessed by the new board when it has determined the regulator's strategy and programmes.

Health and safety levy

35. Currently, all businesses pay the same flat rate for the health and safety levy. That requires review because some businesses receive a far greater level of service than others. The amount spent administering health and safety in the mining and petroleum sectors, for example, may exceed the levies collected.

36. The levies have not traditionally been fully allocated to the regulator. In principle the levies should be spent on health and safety administration and be fully allocated to the regulator.¹² The new Crown agent should be able to transfer funds between years as needed.

Recommendation 1:

To improve New Zealand's poor record in health and safety, a new Crown agent focusing solely on health and safety should be established.

- The Crown agent should have an executive board accountable to a minister.
- The chief executive of the Crown agent should be employed by and be accountable to the board.
- The Crown agent should be responsible for administering health and safety in line with strategies agreed with the responsible minister, and should provide policy advice to the minister in consultation with the Ministry of Business, Innovation and Employment.
- The ministry should monitor the Crown agency on behalf of the minister.
- The Crown agency should be funded by the current levies but the basis of the levies should be reviewed for high-hazard industries.

ENDNOTES

¹ These responsibilities are drawn from those identified in the Robens report and remain applicable to the health and safety regulator: Lord Robens (Chairman), Committee on Safety and Health at Work, *Safety and Health at Work: Report of the Committee 1970–72*, 1972, HMSO, 1972, p. 36.

² Ministry of Business, Innovation and Employment, Decision Document: High Level Design, 31 July 2012, MBIE300010006.

³ For the proposed departmental agency model, see Bill English (Deputy Prime Minister) and Jonathan Coleman (Minister of State Services), Better Public Services Paper 3: Departmental Agencies, 4 May 2012, <http://www.ssc.govt.nz/sites/all/files/bps-2306543.pdf>

⁴ For more information, see Queensland Government, Mining and Safety, Safety and Health, 16 July 2012, <http://mines.industry.qld.gov.au/safety-and-health/default.htm>

⁵ United Kingdom Cabinet Office, Public Bodies Reform – Proposals for Change, 14 December 2011, p. 24, http://www.cabinetoffice.gov.uk/sites/default/files/resources/Public_Bodies_Reform_proposals_for_change.pdf

⁶ Kate Wilkinson, (Minister of Labour) Proposal to Increase Investment in Safe and Skilled Workplaces Using Unallocated Revenue from the Health and Safety in Employment Act Levy, 4 April 2012, DOL7770060003/8, paras 37–38.

⁷ Lord Robens (Chairman), *Safety and Health at Work*, p. 36, para. 114.

⁸ *Ibid.*, p. 37, para. 118.

⁹ *Ibid.*, para. 117.

¹⁰ The best-practice approach for government agencies in New Zealand is set out in *Achieving Compliance: A Guide for Compliance Agencies in New Zealand*, published in June 2011. It was produced by the central government's Compliance Common Capability Programme Steering Group and sponsored by the Department of Internal Affairs.

¹¹ Queensland, Department of Employment, Economic Development and Innovation, Mine Inspection Planning System (MIPS), April 2011, CAC0109.

¹² There are other organisations with valid claims to the HSE levy, such as Maritime New Zealand and the Civil Aviation Authority. They should continue to receive funds from the levy required for the purposes of administering the HSE Act in their specialist areas.