

# **Submission to Independent Task Force on Workplace Health and Safety in response to Questions 9 and 10**

**By Ian Paterson, Health & Safety Representative Trainer**

## **Introduction**

Three directors of former directors of Pike River coal -

- recently criticised the Pike River Royal Commission's findings. The directors say safety was always their highest priority and the commission's finding conflicts with the evidence.

In fact, the extensive evidence from many witnesses painted a damning picture to the contrary. And this very act of denial on their part is a compelling reason why changes are needed. Pike River was a direct consequence of multiple failures at many levels, but on a smaller scale people die from or are hurt or get sick from their work every day.

I have been a trainer on the NZ Council of Trade Union's health and safety representative training programme since 2003, the year the employee participation provisions came into effect. I have trained an estimated 2,500 reps during this time from a wide range of industries and occupations. I spent the first part of my working life in blue collar occupations such as freezing works, shearing shed work and truck driving before attending Otago University, graduating with a BA in psychology. For the next two decades I worked as union organiser, before becoming a trainer. I have also done some health and safety advisory work in the engineering sector. I was the NZCTU's appointee to the Nelson Marlborough Institute of Technology's Council from 1997 to 2010, being deputy chairperson for most of that time.

The Occupational Safety and Health Bill introduced in 1989 contained worker participation provisions. It was a result of a major review of health and safety involving all stakeholders. But the change of government in 1990 marked a new phase where workers and their representatives were all but shut out. The OSH bill was withdrawn and replaced with what became the Health and Safety in Employment Act 1992 (HSE Act 1992) with no worker participation provisions. It was not until 2002, and a change of government, that these provisions were finally introduced.

The introduction of employee participation and the establishment of health and safety representatives were opposed on ideological grounds by employer groups, in both the late 1980s and in 2002. It would, they said, undermine their right to manage their businesses. Their opposition did result in a weakening of the 2002 bill to some extent, in that some of the prescriptive measures were replaced with 'suggestions' (eg the functions of the rep in sch1A pt 2).

My work as a trainer has given me a unique opportunity to hear firsthand from many representatives about their roles and the difficulties and challenges they face. My submission is in response to questions 9 and 10 in the Safer Workplaces Discussion Document.

Abbreviations used in this submission are:

ACC	Accident Compensation Corporation
Act	Health and Safety in Employment Act 1992
CTU	NZ Council of Trade Unions
CTU PTE	NZ Council of Trade Unions Private Training Establishment
DoL	Department of Labour (now part of Ministry of Business, Innovation and Employment)
MBIE	Ministry of Building, Innovation and Employment)
Rep	Health and safety representative as defined in s2 of the Act
SMEs	Small to Medium Enterprises

### **Election of Health & Safety Representatives and Employee Participation Systems**

The HSE Act describes a health and safety representative as:

*'-- an employee elected, as an individual or as a member of a health and safety committee or both, to represent the views of employees in relation to health and safety at work. (s2 HSE Act 1992)'.*

S19C of Act requires employers with 30 or more employees to seek to establish an agreed employee participation system with employees and their union(s). (This also applies where there are less than 30 employees, if a system is requested by one or more employees or a union on their part.)

Part 1 of Schedule 1A of the Act sets out matters that may be included in an agreed system. Clause 1(a) proposes that a system includes processes for:

*'Electing health and safety representatives, whether to act independently or as members of a health and safety committee'.*

And Part 3 sets out a mandatory process to be followed, if there is no agreement on a system.

This would appear to unequivocal – representatives are elected by their fellow workers. But some employer groups argue that representatives can be appointed by employers and this was one of the unresolved stumbling blocks that meant a Code of Practice was never completed (see below).

I submit this is alien to the concept of representation and the unalienable democratic right to be able to choose who represents you.

The CTU recently conducted a survey of health and safety representatives. 37% said they were appointed by their employer or management representative.<sup>1</sup> This reflects what representatives say at training courses in response to the question 'Why did you become a health and safety rep?'

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<sup>1</sup> NZ Council of Trade Unions: Health and Safety Task Force Survey, Nov 2012

This issue has remained unresolved. A working group attempting to develop the envisaged Employee Participation Code of Practice was not able to agree and the then Department of Labour took no action to resolve it.

To the writer's knowledge the issue of election vs appointment has not been tested in court.

Employee Participation Systems, or agreements, were intended to be the 'living' documents that brought life to employee participation in workplaces. If no agreement is reached, the provisions of schedule 1A are meant to apply. My observation is that, while many larger organisations now have such agreements, the knowledge about them, even amongst health and safety reps, is low. It is common, if not usual, for reps to report no knowledge of such a system, even though one does in fact exist.

In one case I was doing some in-house training in the health sector. None of the reps present knew anything of an agreement, but neither did the relatively new health and safety manager. However, the manager subsequently discovered one had been developed and was able to produce it. This was a Partnership Programme workplace where having an agreed system is one of the requirements to gain entry to this programme!

It is possible that larger employers are more likely to have agreed systems, but there is no mechanism for registering or recording these, so the true uptake is unknown. The CTU survey suggests a reasonably high level but this may be distorted by the fact that 70% of the sample come from management, professional and administrative personnel. Additionally, I often encounter a lack of understanding about what an employee participation system actually is. The answer to the question 'Do you have one?' is often 'Yes' but further enquiry reveals they are talking about their organisation's policy manual. In about 2005, the then DoL conducted a telephone survey of larger employers which seemed to indicate a good uptake, but as I recall the responses were not explored in any depth nor verified.

There is more likely to be an agreed system in place in unionised workplaces as unions have the right [s19C(2)] to initiate the process. Again, however, there is no data to indicate the extent of this.

Another concern is that where they do exist they may not be dynamic documents that everyone is fully aware of and may not be reviewed regularly, certainly not annually as required by s19C(3) of the Act.

OSH, DoL and now MBIE have not attached any priority or allocated resources to ensuring the requirements of 19C and sch 1A are met. The failure to produce a Code of Practice is a clear example of this. Such a code would have provided guidance, supported by the law, to all parties and helped to ensure the law was complied with in a consistent manner. Resources need to be available to help employers, workers and their unions comply with these requirements. The laissez-faire approach has led to a range of practices, which are often not able to be measured and are only scrutinised when things go wrong.

There also needs to be a method of finding out how many agreed systems there are, and to be able to test these against the requirements of the Act. To do this on a large scale would

be a big, resource expensive undertaking but it may be possible and feasible to examine and report on a sample each year.

**Recommendation 1**

That the Health and Safety in Employment Act 1992 be amended to:

- a. Strengthen the requirements regarding Employee Participation Systems, and
- b. Ensure that health and safety representatives are elected, not appointed.

**Recommendation 2**

As a matter of urgency, develop and promulgate a code of practice covering all aspects of employee participation as provided for in part 2 of the Health and Safety in Employment Act 1992.

**Recommendation 3**

That MBIE (or its successor) establish procedures for ascertaining the level of compliance with s19C and sch1A, and procedures for assessing whether or not they comply with the law.

**Challenges for Health and Safety Representatives**

Workers become representatives for a variety of reasons. Some have an innate or acquired interest in health and safety; others succumb to persuasion by their fellows and accept nomination/election; some say they were away the day it was discussed and when they arrived back at work they found they were the rep; others, as discussed above, are shoulder tapped or appointed by management.

Most of them, when they take on the role, have little experience or knowledge about what it entails and look to the opportunity to attend training such as the CTU courses to equip them with the skills, knowledge and competency to do their job as reps effectively.

The level of support they receive from employers varies from excellent top-down led policies, practices and procedures that demonstrate real commitment to excellence in health and safety, through to those whose focus is on 'compliance' – for example being able to comply with the HSE Act, or to tick the box in ACC's Workplace Safety Management Practices audits or similar.

For reps whose employers are at the less committed end of the spectrum, the task is harder. I frequently hear their stories such as:

- We are meant to have a health and safety committee meeting every month but we haven't had one for months because we are too busy.
- We have committee meetings but most of the managers rarely turn up.
- I have been raising some issues but nothing happens, they don't get addressed.
- I don't get to see any information about health and safety including the outcome of investigations. I am told that I am not entitled to this.
- Most of the people I represent work in the field and are never in the office at the same time so I can never meet with them.

- We had what I thought was a serious harm accident, but when I asked if Department of Labour had been informed I was told that was not my business and felt threatened.
- My employer talks a lot about health and safety but a lot of it is just that – talk without the action
- Since becoming a rep, I am often asked to do jobs that I feel are not my responsibility such as training new workers. Am I liable if there is an accident?

In the CTU survey<sup>2</sup> respondents were asked what they believed had contributed to illness or injury in their workplaces. Over 20% gave the following responses:

Taking short cuts to complete a job	58%
Fatigue or people working long hours	49%
Deadlines	26%
Lack of training in health and safety	25%
Unrealistic expectations	25%
Lack of senior management commitment to health and safety	22%
Inadequate identification and management of hazards	22%

The responses are cause for considerable concern. If these figures are representative of the wider workforce, there is a serious problem and it will not escape the readers' notice that factors like these received considerable attention in the Pike River enquiry. Given that 70% of respondents in the CTU survey were from managerial, professional and administrative occupations, the reality for many workers may be much worse.

For many reps, unions are a source of support/assistance. But many workplaces are not unionised and/or the rep is not a union member. Therefore they do not have this avenue of support. Many employers are antipathetic towards unions and do not encourage their employees to join. Fortunately, not all employers behave this way and there are some solid examples of how pro-active employers and effective unions have been able to cooperate on health and safety for the benefit of all, regardless of union membership.

However, providing support for reps in many workplaces is a challenge. They can consult with inspectors (from MBIE, CAA and Maritime NZ) but mostly they do not. 38% in the CTU survey said they would go to an inspector for help with an issue or dispute, but few report at courses that they have actually done so and often people say they would be concerned about the reaction from their employer should they do so. The Pike River report records the comments of DoL inspector on this point (vol2, p276, paras 51-53).

So, the issue is how to provide support for reps, particularly those who are not union members. The Pike River report said

*'Unions should support workers and health and safety reps regardless of union membership. In terms of training representatives, the NZCTU said it 'has accepted responsibility to act on behalf of all workers not just union members. It does so because it regards workplace health and safety as a crucially important issue ...'*

<sup>2</sup> ibid

I have addressed training issues in the next section. There has been funding available for training from ACC, although this has steadily declined since 2003. This does not extend to providing workplace support to reps. The CTU itself is primarily funded by levies paid by member unions, and the CTU receives no funding to provide post-course or workplace support.

But there is a great need. Reps leave the courses buoyed up by what they have learned and from the opportunity to spend time with and share experiences with other reps from other workplaces. However, they often express frustration that they will return to a workplace where the commitment to health and safety is not that well developed, and to managers who have not had the benefit of the training they have completed. (The CTU does have a one day non-funded course for supervisors and managers but the uptake has been low).

In 2004, ACC funded and the CTU arranged a couple of pilot post course fora for reps to get together receive updates and share their experiences (one facilitated by myself in Nelson). While these were successful, for cost reasons it did not proceed beyond these two pilots.

So while unions may be able to offer support in workplaces where they have members, there are many industries and workplaces where there is little union coverage. Agriculture and forestry are examples of high-risk industries that have little coverage. There are many, many workers in SME's who have no union coverage and little capability to apply the provisions of part 2A. There are large numbers of contractors and labour hire workers who are not union members (with the latter group being denied the provisions of part 2A when they are 'on loan' - see s3F of the Act).

The CTU, in its submission, is recommending the establishment of independent Health and Safety Centres that would report directly to a new Workplace Health and Safety Council. The centres would employ safety advisors, who would act as roving reps. The safety advisors would be available to advise and mediate on health and safety issues in any workplace. They would work with inspectors referring any matters to them that need regulatory intervention.

I strongly support this. As stated above, there is a very great need for this support. The CTU is arguably the logical organisation to run these centres. For the last decade it has run a very successful health and safety training programme, delivering courses to union and non-union members from Kaitaia to Invercargill, and it has the capability to co-ordinate these centres. For this to work, reps will need to know they will be listened to and their concerns taken seriously. The CTU is worker oriented, which will be crucial if the centres are to be successful.

In the CTU survey<sup>3</sup>, 57% of respondents were union members and 43% were non-members. Yet in question 44, the last in the survey, 92% of those who responded said they would like to receive more information from the CTU.

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<sup>3</sup> ibid

**Recommendation 4**

That fully funded Workplace Health and Safety Centres be established to provide advice and support through safety advisors to health and safety representatives and workplaces. The centres would report directly to a new Workplace Health and Safety Council.

**Recommendation 5**

That such Workplace Health and Safety Centres be run by the NZ Council of Trade Unions.

**Health and Safety Rep Training**

The CTU has, since 2003, provided training for health and safety representatives. It delivers three stages which are progressive. Since 2003, it has trained 27,500 reps, with 11,500 going on to stage 2 and 4,500 taking stage 3. These are approved courses under s19G of the Act. After completing stage 1 they are deemed to be trained health and safety reps and can deliver hazard notices. The CTU is by far and away the largest provider of training.

This training has received funding from ACC. In the early years there was no limit on the numbers but the funding has steadily reduced and is mostly now targeted at high risk occupations and industries. Until 2009, the CTU was in partnership with ACC but is now a provider. The future of this funding is uncertain and for the last year has been for three or six month periods. There is no commitment to funding beyond 31 March 2013 as things stand at the time of writing this submission. With the decline in funding some employers have been willing to pay for the training and the CTU offers training on a commercial basis.

As the funding has declined, many representatives from non-high risk industries have been precluded from participating in the funded training. And the ability to offer training in provincial centres has been seriously reduced. A funding structure that restores more equitable access for worker representatives across the country, including provincial areas, is urgently needed.

The education programme provides 2-day workshops for elected Health and Safety Representatives to gain skills and knowledge related to their workplace role, including their rights and responsibilities, under the Health and Safety in Employment Act 2001. Elected Health and Safety Representatives are able to access 2 days' paid leave per year to attend approved training (Section 19 E HS&E Act). As stated above, the CTU provides three levels of training. Stage 1 gives the rep knowledge of the role, legislation and practice; stage 2 focuses on investigations; stage 3 offers advanced training that includes post-injury rehabilitation, linking workplace productivity with good health and safety practice and measuring the effect of improvements. Each course builds upon the last and all higher levels enable the reps the opportunity to refresh their prior learning and knowledge.

Goals of the CTU PTE, with regard to the Worksafe Reps Training Project, taken from 2005 NZCTU conference resolutions, include:

- The provision of high quality health and safety training is essential support for workers' quality of life
- The creation of safe and healthy workplaces in New Zealand

- The encouragement of workplace participation and representation as fundamental to collective activity and responsibility
- The growth of understanding of and provision of active support for the legislated system of worker participation, which includes a right for workers to elect health and safety representatives.

The training style employed is interactive, using the principles of adult education, with minimal use of technology such as power point. There has been a consistently positive response from participants over the years. Consistently, around 90% of participants are very positive about the training, and it is rare that someone did not fully or mostly appreciate the learning experience. Here are some examples of comments from participants on courses I have delivered:

- Really enjoyed the course. Trainer was easy to understand and made the two days enjoyable
- Getting to know more about role – so I can be more confident in my dept. when it comes to H&S. Also the booklets & hand outs are going to be very helpful
- Applying what was learned by doing the exercises/activities
- Very good facilitator, well heard and understood. I didn't go to sleep!
- General raising of my awareness of the range of responsibilities and issues that an H&S rep should be aware of and can take meaningful action + involvement in.
- Great course – thanks for a fine, well-paced delivery!
- Having and gaining a lot more knowledge on the role of the H&S rep, the H&SE Act, what I can do for employees at work and how I can make it a safer place of work
- Being interactive with the mine workers - very interesting
- A very organised presenter who kept on task and was well prepared. He knew the subject inside out, spoke clearly and was mindful of keeping good timeframes. Very interesting and informative.
- Easy to understand, not drawn out and well organised
- Going through the investigation process as this clarifies what has happened & what needs to be recommended to ensure a safe environment
- Good mixture of group work/discussions. Meant we got to work with different people and get different points of view
- We were made to feel comfortable so it was easy to ask questions no matter how trivial

The CTU trainers and administrators are an experienced and very effective group of people committed to improving health and safety in the workplace. The training we deliver is very well received and highly regarded, as per the comments above. It is delivered on a cost effective not for profit basis and the overriding goal is to reach as many reps as possible.

As mentioned earlier, the training methods used are interactive. This helps overcome literacy and numeracy barriers. The courses are learner focused, use real stories as case studies and draw on participants' experiences. Using real-life case studies and examples can change the minds, motives and capacities of participants. As training methods become more

engaging (that is requiring trainees' active participation) workers demonstrate greater knowledge and skill acquisition, leading to reductions in accidents, illnesses and injuries.<sup>4</sup>

The CTU PTE currently delivers three stages and our training reflects existing legislation. Our training is currently fit for purpose but any changes to the framework of the H & S system will require development of new training resources and delivery. We anticipate the following changes may follow the taskforce report:

- the ability for H & S reps to carry out inspections and issue improvement notices
- the ability for H & S reps to stop unsafe work
- the ability for worksafe advisors (roving reps) to enter workplaces and engage with health and safety reps
- greater engagement between the Inspectorate and H & S reps

All of these changes would require some re-development of the existing courses and possibly the development of further stages. Indeed, there is already a demand for further training from those who have completed stages 1, 2 and 3.

In a revitalised health and safety environment, workers and their representatives are more likely to be involved in standard setting; the development of regulations; and the development of industry specific codes of practice and guidelines. Reps would need additional training and paid release to participate in this process. Work on a stage 4 had begun before funding was discontinued (see below) and further opportunities may be needed.

The existing ACC funding ceased to provide for the re-development of course materials in 2007. Since that date, the NZ CTU has been constrained financially and unable to fund the development of further courses and to provide resources in other languages. For example the report 'In harm's Way', recommends culturally relevant learning materials and delivery.<sup>5</sup> Additionally, there is a need for funding for the design of industry-specific training materials which would form part of our overall programme.

There is further unrealised potential in that stage one is a recognised unit standard but there has not been sufficient funding to extend this to our other stages and future courses. Ultimately, H & S rep training needs to lead to a NZQA qualification. This would allow capability and capacity to be built and help contribute to the development of a national specialist H & S workforce.

There has been talk of developing a new kind of training such as on-line modules delivered over the internet. Whilst there may be a place for some specific training to be delivered this way, it would be a huge mistake to remove the face-to-face training that the CTU offers. Our interactive style of training without the reliance on technology goes down very well, and a key advantage of the current approach is that it enables reps to meet and share

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<sup>4</sup> Relative effectiveness of worker safety and health training methods. Burke et al Am J Public Health 2006 Feb 96

<sup>5</sup> In Harm's Way: DoL 2012

experiences, in itself an important part of their learning. It would be a retrograde step to remove this opportunity.

**Recommendation 6**

That sufficient funding is made available to:

- a. continue the worksafe representative training
- b. enable it to be delivered to all reps, regardless of occupation or industry
- c. enable access to training for reps in provincial and regional locations, to be reinstated
- d. redevelop course materials to reflect any changes to legislation and practice
- e. develop further levels and other training materials in the future
- f. facilitate culturally appropriate learning
- g. develop industry specific course materials
- h. enable follow up to occur subsequent to training.

Thank you for the opportunity to present this submission. If possible, I would like to be heard in person.

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