

Worker Engagement, Participation and Representation (WEPR)

OPERATIONAL POLICY

August 2016

Background

Achieving good health and safety outcomes are about having effective ways to deal with issues that can cause harm to workers and other persons. Workers have the detailed knowledge and experience of how work is done and how it affects them. This means worker engagement, participation and representation are key pillars of any well-functioning workplace health and safety system.

The Health and Safety at Work Act (HSWA) 2015 places duties on all PCBUs of any size or risk-profile to:

- engage with their workers on matters which relate to health and safety (including specific issues which must be engaged on)
- have effective, on-going ways for their workers to participate in improving health and safety in that workplace.

HSWA also provides for WorkSafe to assist where work health and safety issues cannot be resolved despite reasonable efforts between affected parties.

This document captures the operational policy for the worker engagement, participation and representation provisions in the HSWA and Worker Engagement, Participation and Representation Regulations 2016 (the regulations) and details the corresponding roles and responsibilities delegated to inspectors and their managers.

The following provisions in the HSWA and the regulations are covered:

- Reviewing a Provisional Improvement Notice (PIN) issued by a Health and Safety Representative (HSR) – sections 79-81 of HSWA
- Assisting to resolve issues relating to the cessation of work – section 87 of the HSWA
- Assisting to resolve work health and safety issues – section 98 and 99 of HSWA and section 30 of the regulations
- Removal of a Health and Safety Representative – schedule 2, clause 17 and schedule 3, clause 21 of HSWA.

Objectives

The operational policy within this document will help inspectors and their managers understand WorkSafe's expectations of them when carrying out their powers and functions in relation to the provisions stated above.

Inspectors and managers will understand:

- what their role and responsibilities are
- when mandatory standards are to be applied
- when they can use their discretion.

Operational policy

Reviewing a Provisional Improvement Notice (PIN)

A HSR may issue a PIN if they reasonably believe that a person is contravening, or is likely to contravene, a provision in HSWA or the regulations.

WorkSafe may be asked by an eligible person to appoint an inspector to review the HSRs decision to issue a PIN. The PIN is stayed until an inspector makes a decision on the review.

A manager will appoint an inspector to review the notice.

Before reviewing the notice, the inspector must confirm the following:

- the review request was received within 7 days of the PIN being issued
- the applicant is either the person to whom the notice was issued or if the person is a worker, the PCBU at the workplace at which the worker carries out the work.

If the PIN does not meet the criteria above then the inspector must advise the person in writing that the review cannot be completed and explain why. The inspector should consider whether it is necessary to provide guidance material to the HSR and PCBU. The manager may decide an assessment is necessary at a later date.

If the PIN meets the criteria above then the inspector must complete the review as soon as practicable, but no longer than 7 working days following receipt of the applicant's request to review the PIN.

Factors to consider when responding to the review request and the timing of the response:

- The potential severity of harm and immediacy of the risk.
- Compliance history of the parties.
- Impacts on workplace outcomes or operations.

The inspector may conduct the review from their office. However, there may be situations where the inspector believes they need to visit the workplace in order to:

- conduct a fair and balanced review
- establish whether the HSR had a reasonable belief that a person was or is contravening a provision in HSWA or the regulations.

The review aims to test the merits of the HSRs decision. This means that the inspector must 'stand in the shoes of the HSR' and consider whether there were grounds for the HSR to form a reasonable belief that a person was contravening, or is likely to contravene, a provision in HSWA or the regulations.

In determining what was reasonable, the inspector should consider the information available to the HSR at the time the belief was formed. The inspector must then decide whether in light of all the available information, the decision to issue the PIN was appropriate and whether the content of the PIN is legally correct.

The inspector may:

- confirm the provisional improvement notice
- confirm the provisional improvement notice with changes
- cancel the provisional improvement notice.

If the issuing of a PIN was determined to be unreasonable in the circumstances, then the Inspector must cancel the PIN. The cancellation of a PIN does not prevent an inspector from using enforcement in order to manage a health and safety risk.

If an inspector determines that the issuing of a PIN was reasonable in the circumstances but there is also a serious risk to the health and safety of a person, then the inspector should issue a prohibition notice. The issuing of a prohibition notice in this situation does not constitute the cancellation of the PIN.

Potential scenarios

IF	THEN
a PIN is confirmed (with or without changes)	<p>the PIN must be treated as an improvement notice issued by an inspector under HSWA.</p> <p>The inspector may extend the compliance date if reasonable for the PCBU to achieve compliance otherwise the compliance period in the PIN remains. Factors to think about when considering whether the compliance period should be extended, and the length of any extension are:</p> <ul style="list-style-type: none"> - genuine effort made by the PCBU to comply prior to the review request - the complexity and cost of measures to achieve compliance - the time taken by the inspector to make the review decision (which equals to time lost by the PCBU to achieve compliance). <p>The inspector should consult the HSR when determining any extension to the compliance period.</p>
a PIN is cancelled (not confirmed)	<p>no further action is required unless the inspector believes there was a potential abuse of power by the HSR. If a potential abuse of power is considered to have occurred then the inspector must raise this with his or her manager to determine the next steps.</p>

The inspector must give a written copy of their decision, including the reasons for their decision, to the applicant who requested the review and the HSR who issued the notice. The inspector must use the standard letter. If a PIN has been confirmed and a new compliance date has been determined, then this must also be recorded in the letter. A copy of the letter must be retained on the file.

Resolution of work health and safety issues

Anyone can raise a work health and safety issue: a worker, a PCBU or another person. However, the parties to the issue must make reasonable efforts to resolve the work health and safety issue in a timely, final and effective way before asking WorkSafe to appoint an inspector to assist them in resolving the issue.

Before WorkSafe agrees to assist, the following criteria must be met:

- The requestor is actually asking WorkSafe to assist in resolving the issue as opposed to just passing on information about a concern or incident.
- It is within WorkSafe's jurisdiction.
- It is a work health and safety related issue. An inspector must not engage in any employee relations matter and must refer the affected parties (by providing contact details) to other agencies such as MBIE Mediation Services, if this appears to be the issue that requires resolution.
- The reasonable efforts threshold can be evidenced.

Reasonable efforts are:

- they have tried to access, read and understand relevant guidance and other published information
- the affected party has made reasonable attempts on at least one occasion to progress and work through the issue. Reasonable attempts will be influenced by locations, roles and work patterns of the affected parties. A party's unwillingness to resolve the issue does not prevent an inspector from assisting to resolve the work health and safety issue.

Other factors to then consider are:

- The potential severity of harm and immediacy of the risk.
- Compliance history of the parties.
- Impacts on workplace outcomes or operations.

If WorkSafe decides not to assist in resolving the issue then the parties must be notified of this decision, including the reasons for the decision, and referred to any guidance material, information or to other agencies as necessary.

An assessment may be considered appropriate at a later date.

Any response inspector appointed by a manager to assist in resolving a work health and safety issue must provide the assistance as soon as practicable, but no longer than two working days after being appointed.

The response inspector will usually provide information; guidance and other educational material to encourage positive discussion, enabling the parties to resolve the issue and manage the risk themselves. If the workplace has an HSR, then the response inspector must involve the HSR in the resolution process if they are not already involved.

Where the response inspector believes the issue is particularly complex; or WorkSafe may need to consider enforcement in order to manage a health and safety risk; or the issue relates to the membership of a health and safety committee, then they will refer the matter to the relevant assessment office to assist with resolving the issue.

If referred to an assessment office then the assessment manager will appoint an assessment inspector to assist. The assessment inspector will try to assist the parties to resolve the issue as soon as practicable, but no longer than two working days after being appointed, by providing guidance material and other relevant information. The assessment inspector must involve the HSR in the resolution process if they are not already involved.

The assessment inspector will also gather information about any actual or potential risks at the workplace and decide whether they need to consider enforcement.

If the work health and safety issue relates to membership of a health and safety committee, then an assessment inspector may make a decision in order to resolve the issue.

In making a decision, the assessment inspector should consider:

- the time available to a member to carry out the functions of a health and safety committee set out in schedule 2 of HSWA
- the membership requirements set out in regulation 28 of the Worker Engagement; Participation and Representation regulations 2016
- the ability of any member to comply with the meeting requirements of regulation 29.

Response and Assessment inspectors must record in the file the details of the parties involved and any decisions they have made or actions taken to try and assist in resolving the work health and safety issue.

Right to cease or direct cessation of unsafe work

A worker may cease, or refuse to carry out work, if they believe that the work would expose them or others to a serious health and safety risk arising from an immediate or imminent exposure to a hazard. The worker may decide to cease work themselves or upon the direction of a trained HSR. The HSR, PCBU or worker may ask WorkSafe to assist in resolving a cessation of work issue.

WorkSafe will always assist with issues confirmed as relating to the cessation of unsafe work as they potentially involve serious health and safety risks.

A manager must confirm the following criteria have been met:

- The issue is within WorkSafe's jurisdiction.
- The matter relates to the cessation of unsafe work.
- It is a work health and safety related issue. An inspector must not engage in any employee relations matter and must refer the affected parties (by providing contact details) to other agencies such as MBIE Mediation Services, if this appears to be the issue that requires resolution.

If the manager determines that the criteria have not been met then they should refer parties to relevant guidance material, information or to other agencies as appropriate. The manager may decide an assessment is necessary at a later date.

If the criteria are met then the manager may assist themselves or refer the matter to an assessment inspector. Due to the potential or perceived serious risk to the health and safety of a worker or other persons, managers must prioritise this work above other planned assessments. Assistance must be provided as soon as practicable, and should commence within 24 hours of agreeing to assist, unless there are extenuating circumstances. Factors to consider will be the potential severity of harm, the immediacy of risk and the impact upon workplace operations.

As part of assisting to resolve the cessation of unsafe work issue, the manager or inspector should seek to understand why the work has ceased. In doing so they will determine whether the belief that carrying out the work would expose the worker or any other person to a serious risk is well founded and if so address the risk. The assessment inspector must involve the HSR in the process if they are not already involved.

EDM may need to be applied to ensure health and safety risks are managed.

Information, guidance and other educational material may be provided to assist the parties to resolve and manage issues or risks for themselves.

Any action or decision by the manager or inspector does not affect the right of the worker to cease work. A manager or inspector has no authority to direct a worker to work again.

The details of the parties involved and any decisions made or actions taken must be recorded in the file.

TERM	DEFINITION
Engagement	This is how a PCBU involves workers in work health and safety matters and decisions. The PCBU has to engage with its workers when doing or planning anything that will affect worker's health and safety.
Health and Safety Representative	Is a worker elected by the members of their work group to represent them.
PCBU	PCBU stands for 'Person Conducting a Business or Undertaking'. In most cases a PCBU will be a business entity, such as a company. However, an individual carrying out business as a sole trader or a self-employed person would also be a PCBU.
Participation practices	Are on-going ways for workers to raise health and safety concerns, be part of making decisions which affect work health and safety, and offer suggestions for improving health and safety. Workers may participate directly or via representation.
Person	Person refers to who can apply to the regulator for a review of a PIN. A person is either the person to whom the PIN was issued or the PCBU at the workplace at which the worker carries out work.
Representative	A person, such as a Health and Safety Representative, who workers can approach about health and safety issues who will in turn raise them with the PCBU on the workers' behalf.
Worker	A worker carries out paid or unpaid work for a PCBU. A worker may be an employee, a contractor or sub-contractor, an employee of a contractor or sub-contractor, an employee of a labour hire company, an outworker, an apprentice or a trainee, a person gaining work experience or on a work trial, or a volunteer worker.

Removal of a Health and Safety Representative (HSR) from Office

Introduction

This policy explains WorkSafe's approach to removing an HSR from office.

Purpose

The document will help Chief Inspectors, Deputy Chief Inspectors and their managers understand:

- what their role and responsibilities are and
- the factors and principles to consider when applying discretion.

Scope of the Document

This policy covers:

- when Worksafe may apply its discretion to remove an HSR and
- when a PCBU requests WorkSafe to apply its discretion to remove an HSR.

WorkSafe may use its discretion to remove an HSR from office indefinitely or for a specified period if there is evidence that they have not performed or exercised their functions or powers satisfactorily. This includes if the HSR has:

- performed a function or exercised a power as a HSR for an improper purpose or
- used or disclosed any information he or she has acquired as a HSR other than for health and safety purposes or, if the information is about a person, it is used or disclosed without their consent.

Related legislation, policies and procedures

This policy is related to:

- [Schedule 2 of the Health and Safety at Work Act 2015 - Health and Safety Representatives](#)
- [Schedule 3, clause 21 of the Health and Safety at Work Act 2015 - Industry Health and Safety Representatives](#)
- The Worker Engagement, Participation and Representation Operational Guidance.

Objectives

This policy aims to enable WorkSafe to:

- apply its discretion fairly, consistently and proportionately
- uphold the integrity of the position of the HSR and
- support the principles of effective worker engagement, participation and representation.

Policy Statements

APPROACH

WorkSafe will not proactively assess the performance of HSRs. However, WorkSafe may consider the removal of an HSR from office if it becomes apparent, while carrying out its functions, that there may be an alleged improper use of power by an HSR.

DELEGATION

The decision to remove or suspend an HSR from office must be made by either a Deputy Chief Inspector; Chief Inspector; the Deputy General Manager Assessments, the General Manager Operations and Specialist Services; or the General Manager High Hazards and Energy Safety.

EVIDENCE

Credible evidence is needed to support allegations or concerns that the HSR has not performed or exercised their functions or powers satisfactorily. This means any evidence used in the process must be verified.

An HSR's failure to perform a function or power satisfactorily is a direct result of an action or inaction by the HSR. If the unsatisfactory performance is due to the behaviour, actions or influence of a third party, this could potentially amount to adverse conduct, coercion, inducement or misrepresentation. In these situations WorkSafe may decide to prosecute the third party.

SUSPENSION OR REMOVAL

The suspension or removal of an HSR should only be considered if the allegations or concerns are verified and other options are insufficient to address the issue.

While not an exhaustive list, some factors to consider are:

- whether the allegation or concern is an isolated incident or a repeated pattern of behaviour
- the seriousness of the alleged abuse of power, including whether it is intentional or not
- the impact on workers, the PCBU and the workplace and
- the views of the workers the HSR represents.

RECORDING DECISIONS

Any decision made regarding the removal of an HSR from office must be communicated in writing and given to the HSR affected by the decision and the PCBU of the HSR. The reasons

for the decision and whether the removal is for a specified period or indefinitely must be stated.

Decisions must be in accordance with the Review and Appeals policy.

GOVERNANCE ARRANGEMENTS

Any review of this policy is to ensure it is fit for purpose, address any inefficiency within the policy and reflect relevant legislative amendments.

Disclaimer

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