

Submission on the draft amendments to the Health and Safety at Work (Adventure Activities) Regulations 2016

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Submitter details

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Submission

Introduction

1. Recreation Aotearoa is a registered charity and the organisation responsible for providing leadership, advocacy, and professional development opportunities for those involved in the broader recreation sector. We work at an agency, industry, and professional level to build capability, develop partnerships, and equip individuals and organisations with the skills they need to deliver high-quality recreation experiences that engage participants.
2. The Recreation Aotearoa membership includes recreation policy makers, territorial local authorities, voluntary organisations, regional sports trusts, outdoor recreation businesses, and others involved in the delivery of recreation throughout New Zealand.
3. Our mission is enhancing wellbeing through recreation.
4. In partnership with Tourism Industry Aotearoa (TIA), Recreation Aotearoa provides the SupportAdventure website, publishes the SupportAdventure newsletter and coordinates the production of Activity Safety Guidelines (ASGs). These are critical pieces of infrastructure for the Adventure Activity sector.
5. Two staff members of Recreation Aotearoa and their counterparts from TIA served, at the request of MBIE, on the Expert Reference Group at an earlier stage of the review process.
6. At any given time, dozens of registered Adventure Activity Operators (AAO's) are organisational members of Recreation Aotearoa. A similar amount of AAO's are members of TIA, however it is important to note that many registered AAO's, perhaps a small majority, are not members of either industry body. Regardless, numerous individuals employed at the Governance, Management, and operational levels of AAOs are members of Recreation Aotearoa, as well as many auditors and technical experts.

7. The perspectives conveyed in this submission are, in part, gleaned from the information Recreation Aotearoa gathered from a survey of outdoor professionals, conducted in April 2023.

General comments

8. Recreation Aotearoa submits, as has been noted by MBIE in at least two documents, not all adventure activities are the same. Each adventure activity has a unique and dynamic mixture of technical and environmental risks. Participants in different types of adventure activities have variable risk appetites. Recreation Aotearoa acknowledges the inherent difficulty of formulating a regulation regime that covers such a variety of contexts.
9. As has been acknowledged by MBIE, Recreation Aotearoa notes that the adventure activities regime has been working well, as the 2016 performance review found. Recreation Aotearoa submits that there is a risk of regulatory over reaction. Most operators adequately account for natural hazard risk. The Whaakari/White Island tragedy has highlighted the volcanic risk, which is quite specific, being present in only a few locations in New Zealand.
10. Recreation Aotearoa cautions against the assumption that accidents indicate that the audit process is inadequate. Most fatalities noted in the media or review documents couldn't be prevented through auditing, being outside the Adventure Activities regime or due to operators failing to follow their certificated processes.
11. In a 2021 consultation document MBIE outlined four broad tools in the adventure activities system that that could be used to improve safety standards; (a) change regulations; (b) change the safety audit standard; (c) adjust the audit process; and (d) change or add to guidance. Recreation Aotearoa commended the identification of those tools but detailed a strong order of preference regarding those tools.
12. Recreation Aotearoa submits its strong support for additions to guidance. This would be by far the most cost-effective and welcomed change by the

adventure activity sector. We note that despite assurances that WorkSafe would review the existing suite of Activity Safety Guidelines (ASGs), there has been no discernible progress on this yet.

13. With caveats, Recreation Aotearoa has supported both adjustments to the audit process and minor changes to the audit standard.
14. Recreation Aotearoa cautioned against fundamental changes to the regulations, which would risk costly and ineffective outcomes for the system. We commend, the restraint and focus of the draft amendments, as they have been presented.

Introducing a Risk Communication Duty

15. Recreation Aotearoa notes that risk disclosure is already a requirement of the Safety Audit Standard s4.5 and isn't aware of any evidence, with the possible exception of Whakaari/White Island, that a lack of risk disclosure is a problem within the adventure activity sector. We observe that WorkSafe has consulted with the sector on changes to the Safety Audit Standard in recent months, to which Recreation Aotearoa made a written submission. We await the final outcome of this process and are wary that there may be an element of duplication and/or redundancy here.
16. Recreation Aotearoa submits that over the last decade there has been a steady trend of adventure activity operators moving away from attempting to absolve themselves of liability by using waivers, and to disclose the risks. Invariably, leaders disclose the risks during the activity briefing. On rare occasions auditors need to point out that, important as that is, it is too late for most participants to withdraw, and that it also must be done when participants book.
17. Auditors have required two-way risk disclosure for some time – the operator discloses the risks to the potential participants and the participant discloses any personal issues that the operator may need to know to keep them safe. While it may be the case that auditors sometimes have to remind operators to comply with the standard, compliance is achieved.

18. Recreation Aotearoa, however, accepts that the current Safety Audit Standard doesn't specify when the risk disclosure must occur and that this must be rectified.
19. Recreation Aotearoa observes that issues around the communication of risk and risk disclosure will be felt far more keenly by operators in the Adventure Tourism sector, represented by TIA. In that sector, the use of international booking agents and international clients with English as their second language may provide additional issues for operators. We have recommended to WorkSafe and MBIE that they engage in additional sector consultation, to build a workable solution within a revised safety audit standard.

New registration process

20. Recreation Aotearoa does not oppose, in principle, the requirement for Adventure Activity Operators (AAOs) to register directly with WorkSafe, provided that the registration fee is minimal.
21. Similarly, it is not unreasonable that operators provide some additional information in applications, such as an indication of the number of customers taking part in activities with the operator each year.
22. Recreation Aotearoa submits concern regarding the proposal that WorkSafe will be able to make registration subject to conditions, where conditions are considered necessary in the interests of safety. Without further detail being provided, it is difficult to imagine what safety concerns WorkSafe would identify and apply conditions to, that wouldn't already be identified by the third-party audit and compliance with the Safety Audit Standard.
23. While it is important for operators to have a mechanism to appeal or have a decision reviewed in relation to their registration, the proposed arrangements have an element of the Registrar "marking their own homework". Recreation Aotearoa submits that MBIE might be the most appropriate body to provide a semi-independent review/appeal function.

Powers to suspend, cancel and refuse registration

24. During the design and implementation period of the Adventure Activities Regime in the early 2010s, it was widely accepted that the regime would be built on three broad components (a) The Standard; (b) Guidance and (c) Enforcement. The extent to which WorkSafe has not carried out the enforcement aspect of the regime has been clearly identified by MBIE, and independent KC and WorkSafe itself.
25. Recreation Aotearoa submits that WorkSafe must be empowered and prepared to deregister operators in circumstances where it and/or the audit body believes that the operator is not able to provide safe activities. This deregistration could be permanent or temporary. It would be based on factors such as incidents, key personnel changes, complaints, and failure to report.
26. However, Recreation Aotearoa submits that these powers should only be used as a last resort and only after efforts centred on education, guidance and support have been exhausted.

Sector-specific notifiable incidents

27. Recreation Aotearoa submits that critical to providing safe activities is operators collecting incident information, discussing it openly with staff, and analysing trends. The Safety Audit Standard requires this, and auditors ensure it happens. Aggregating that process nationally would enhance safety considerably. Currently, even information on significant incidents is hard to obtain. WorkSafe prosecutions take a long time and 'lessons-learned' are published late, if at all. This is an indicative of a system that is focused on prosecution rather than education and has driven a degree of mistrust and resentment among operators.
28. Recreation Aotearoa notes that the 2010 review of the sector recommended supporting and strengthening the National Incident Database (NID). However, WorkSafe (or MBIE then) was focused on implementing the Adventure Activities Regulations and gave it little attention.

29. Recreation Aotearoa notes that studies show that operators across all sectors have more near misses than accidents. The studies vary considerably in how much more, presumably through varying definitions and understanding of what a near miss is. This means that a detailed definition must be provided, along with examples of what is included and what is excluded. Good operators are already doing this for their own organisations.

30. Recreation Aotearoa submits its support for a revised definition of natural hazard risks but submits that to achieve clarity the Safety Audit Standard and the Regulations themselves should refer to the 12 natural hazards identified by MBIE in its Targeted Review of the adventure activities regime (2020). In Annex 1 of the document (page 19), MBIE states in consultation with DOC, GNS, and WorkSafe that 12 natural hazard risks intersecting with adventure activities, were identified. They are:

- Risks from extreme weather events – high winds, severe hot and cold weather, lightning strikes.
- Water surge risk – tidal surge, rogue waves, and tsunami, including tsunami and seiche on lakes.
- Flood (enclosed space) risk – flooding of an enclosed/contained space e.g., cave, canyon.
- Flood (surface) risk - river and surface flooding due to rainfall including upstream rainfall.
- Rockfall risk – sudden downward fall or collapse of rock material.
- Landslide risk – includes debris flow. A moving mass of loose mud, sand, soil, rock, water, and air that travels down a slope under the influence of gravity.
- Snow avalanche risk – mass of snow, ice and rocks falling down a mountainside.

- Icefall avalanche risk – falling blocks of ice as a result of glaciers flowing over cliffs.
- Risks from rapids – river rapids including changing river patterns due to obstacles and rainfall.
- Collapse risk – slippage or collapse of ground beneath, e.g., snow bridges, glaciers, cliff edge or inward collapse of natural structure e.g., cave system.
- Risk of volcanic eruption – activity in proximity to active or potentially active vents e.g., Whakaari/Tongariro/Ruapehu.
- Geothermal risk – including gas explosions, steam, ash fall etc. activity taking place in any known geothermal areas.

31. Recreation Aotearoa submits that by explicitly and only including these 12 natural hazards, much needed certainty will be provided to the sector.

32. In our submission to the WorkSafe review of the Safety Audit Standard, Recreation Aotearoa supported the change to the definition of 'near miss'. However, we noted the inadequacy of the existing near miss reporting infrastructure. We submit that much could be done to support and improve the adventure activity sector by WorkSafe in providing user-friendly systems, that could enhance analysis and information-sharing.

33. Recreation Aotearoa supports a system by which operators could input information directly to a National Incident Database using an electronic template, or preferably an app. Incidents would include accidents/near misses and be mandatory.

34. Recreation Aotearoa suggests that under such a system, operators or WorkSafe would need to share each incident report with the respective audit body to enable them to decide whether further audit action was required.

35. Over time, WorkSafe should provide workshop opportunities for operators and auditors based on the information on the aggregated incident information they collect. **It is critical that near-miss and notifiable incident data is aggregated, analysed, and shared with the sector in a way that informs and educates the sector, in order to improve safety.**

Offences and penalties

36. Recreation Aotearoa makes no submission in relation to the offences and penalties outlined in the consultation document. But we will use this opportunity to make the point that WorkSafe should engage in a well-resourced and ongoing programme of education, guidance, and sector support to achieve the intended safety outcomes of the revised regulations and safety audit standard.

Implementation timing

37. Recreation Aotearoa submits its support for a three-month implementation period. Noting that regardless of the timeframe, there will be operators audited against the old Safety Audit Standard and Regulations after the new ones have been released.

38. Recreation Aotearoa observes that the revised Safety Audit Standard has not been released by WorkSafe and that will be determinative as to how and when adherence to the (yet to be finalised) regulations will be achieved.