



**CONSULTATION ON THE DRAFT HEALTH AND SAFETY IN
EMPLOYMENT (ADVENTURE ACTIVITIES) REGULATIONS
2011**

SUMMARY OF SUBMISSIONS

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EXECUTIVE SUMMARY

Seventy-three written submissions or questionnaires were received on the draft Health and Safety in Employment (Adventure Activities) Regulations 2011.

Respondents were evenly divided about whether they thought the definition for “adventure activity” was understandable, whether the proposed exclusions for specific activities and the general exclusions were appropriate, and whether anything should be added or deleted from the illustrative schedule. A clear majority of respondents (57 of 73) felt that no other exclusions from the regulations were necessary.

The key themes included:

- more clarity was needed on specific terms used in the definition of adventure activity, particularly “isolated” and “specified waters”
- the coverage of the regulations should be based on the risk associated with the activity rather than including or excluding specific activities from the regulations
- there was some uncertainty about whether some specific activities came under the definition of adventure activity
- the regulations should cover voluntary associations and/or schools and tertiary education providers
- the schedule should be a living document that is regularly updated and it should be clearer that the schedule is not an exhaustive list of activities covered by the regulations.

Other issues raised by respondents included how operators could describe their “place of work” and whether adequate dispute resolution and appeals processes were in place.

The major changes that were made to the regulations included: tightening the generic definition and illustrative schedule; replacing the proposed accreditation scheme for safety auditors with recognition by the Secretary of Labour; extending the period during which operators must notify the Department of certain information about their businesses; and allowing certain operators to seek an exemption from the Secretary of Labour from the registration and safety audit requirements.

INTRODUCTION

In December 2010, Cabinet agreed to make regulations under the Health and Safety in Employment Act 1992 (HSE Act) to ensure the safety of adventure activities. The regulations require adventure activity operators to obtain a safety audit from an accredited provider as a requirement to become registered to provide defined types of adventure activities.

Between 13 July and 9 August 2011, public responses to a questionnaire were sought on the draft Health and Safety in Employment (Adventure Activities) Regulations 2011 (draft regulations). The responses were sought to inform possible changes to the regulations before a final version of the regulations were approved by Cabinet. The regulations were rescheduled to come into force on 1 November 2011.

SUMMARY OF RESPONDENTS

The Department of Labour received seventy-three completed questionnaires or written submissions on the draft regulations.

Table 1 shows the types of respondents. 16 respondents indicated that they fell into two or more categories.

Table 1: Type of respondent

Type of respondent	Number
Association/organisation representing a number of adventure and/or outdoor commercial sector businesses	17
Auditing, monitoring or quality assurance body	7
Owner/manager of an adventure or outdoor commercial sector business	37
Central or local government agency	3
Employee of adventure or outdoor commercial sector operator	6
Licensing or registration body	5
Industry training organisation, standard setting or educational body	9
Other	11
Unknown	2
Total	97

SUBMISSIONS ANALYSIS

A draft of the Health and Safety in Employment (Adventure Activities) Regulations 2011 was released for public submissions in July 2011. A copy of the draft regulations can be found at: <http://www.dol.govt.nz/consultation/adventure-tourism/regulations/hse-adventure-activities-regulations-consultation-draft.pdf>.

Respondents were provided with a questionnaire with six questions about the draft regulations.

Five of the questions were about regulation 4 (the definitions of adventure activity and related terms) and the illustrative schedule in the draft regulations. Respondents were asked to indicate whether they agreed with each question (provide a "yes" or "no" response to each question) and to suggest improvements.

The final question asked respondents to suggest changes to the other clauses of the draft regulations.

Definition of adventure activity

Q1. Do you think the definition of adventure activity in regulation 4 of the draft regulations is understandable?

Respondents were evenly divided about whether the definition for "adventure activity" was understandable.

Table 2: Do you think the definition of adventure activity in regulation 4 of the draft regulations is understandable?

Response	Number
Yes	34
No	33
Maybe	1
Did not say	5
Total	73

Respondents expressed concern about the definition being too complex or open to interpretation and that it was unclear what activities were covered.

Twenty-five respondents felt that the meaning of particular terms used in the definition was unclear. The most common areas of concern were "isolated" and "specified waters". Both of these terms were considered to be unclear, incorrect or unnecessary. Respondents provided examples of where the use of these terms may not ensure that a particular activity is safe. For example, diving activities could take place within 50 metres of land but still be at significant depth and risk.

Respondents, including some who considered the definition to be understandable, were concerned that the definition may create gaps in coverage, such as not

covering new activities. There was some uncertainty around whether some specific activities came under the definition.

Q1b. If 'no', how do you think it could be improved?

Thirteen respondents made recommendations for, mostly minor, wording changes to the definition to improve its clarity. There was no clear consensus on potential wording changes.

Seventeen respondents considered that the focus of the definition should be on the level of risk associated with the activity. Two respondents suggested tiered systems where the requirements on operators would be closely linked to the level of risk of individual activities.

Two respondents explicitly recommended deleting the definitions of "isolated" and "specified waters". Nine respondents recommended defining the term "turbulent" in "specified waters" or using an alternative classification system, such as a river grading system.

Two respondents recommended that the regulations should explicitly cover contractors and subcontractors or overseas-based operators.

Exclusion of specific activities from the regulations

Q2. Do you think that the exclusions in relation to cycle touring, land-based fishing, tramping or hiking, skiing and related activities and water sports as set out in regulations 4(3)(g) to 4(3)(k) are appropriate?

Respondents were also evenly divided about whether the proposed exclusions for specific activities were appropriate.

Table 3: Do you think that the exclusions in relation to cycle touring, land-based fishing, tramping or hiking, skiing and related activities and water sports as set out in regulations 4(3)(g) to 4(3)(k) are appropriate?

Response	Number
Yes	35
No	30
Did not say	8
Total	73

The majority of comments expressed concern with one or more of the exclusions for specific activities. However, views were mixed. Some considered that exclusions should not apply to particular activities, while others considered that the exclusions should be wider. Some respondents who supported the exclusions considered that further work was needed to provide certainty on what activities were actually excluded.

Five respondents were concerned that the exclusions may create loopholes or undermine the intent of the regulations. These respondents often suggested the focus should be on the risk involved rather than the type of activity. Respondents

were concerned that activities where there was risk, such as skiing and rock fishing, were excluded. One submitter pointed out that some activities where the level of risk is perceived to be low had still resulted in tragedies because significant hazards were not identified.

Eighteen respondents expressed concern about the exclusions for cycle touring, land-based fishing, tramping or water sports being based on the activity being "isolated" or taking place in "specified waters". Some of these comments reflected respondents' views that the meanings of these terms were unclear. Other comments reflected respondents' views that the basis for exclusion was not appropriate (e.g. cycle touring would never be isolated and someone could unintentionally enter specified waters while tramping or fishing).

Two respondents expressed concern that the basis for excluding some activities and not others was inconsistent. For example, if skiing was excluded because it was patrolled by people who can attend to injuries, so should a number of other activities that also had people who could provide first aid.

Two respondents considered that mountain biking should be excluded as the risks were similar to cycle touring.

There was some uncertainty about whether specific activities were covered or excluded, for example rafting, fishing from boats and activities that had a combination of air and land-based activities.

Q2b. If 'no', how do you think they could be improved?

Eight respondents suggested alternative criteria to base exclusions upon. These included only covering activities that were guided or where participants paid to take part in the activity (including voluntary associations, schools and tertiary education providers). Other suggestions included excluding any activities that are covered by other safety regulations. For instance, activities where participant involvement does not have an effect on safety should be covered by the Amusement Devices Regulations.

Three respondents considered that the regulations should focus on including activities, with exemptions decided on an individual basis.

Excluding other activities from the regulations

Q3. Do you think that the other exclusions under regulations 4(3) to 4(5) are appropriate?

Respondents were fairly evenly divided on whether the proposed other exclusions were appropriate.

Table 4: Do you think that the other exclusions under regulations 4(3) to 4(5) are appropriate?

Response	Number
Yes	29
No	39
Did not say	5
Total	73

Most respondents provided comments on regulations 4(4) (voluntary associations) and 4(5) (schools and tertiary education providers).

Seven respondents explicitly stated that voluntary associations should not be excluded from the regulations. Ten respondents considered that schools and tertiary education providers should not be excluded. Comments on these exclusions reflected previous comments that coverage should be based on the level of risk associated with the activity. There was concern that many high profile accidents had occurred with volunteer instructors or school groups.

Eleven respondents raised concerns about the potential loopholes that could allow commercial operators to avoid being covered by the regulations. For instance, respondents felt that a commercial operator could set themselves up as a club and charge a "membership fee" instead of an entry fee.

Respondents who supported the exclusions for voluntary associations or schools and tertiary education providers considered that including these types of organisations in the regulations would increase compliance costs and have negative consequences. They felt, for instance, that it could discourage voluntary organisations from running introductory courses which helped to encourage membership and general interest in the activity. They also felt that school children may miss out on valuable development opportunities.

Respondents had mixed views on the exclusion for the hiring of equipment. Four considered that this involved greater risks as guided activities would have safety management systems in place. Two agreed with the exclusion.

Q3b. If 'no', how do you think they could be improved?

Two respondents felt that the 12 day limit for voluntary associations providing activities to non-members was too short. There was a recommendation to extend this period to 25 days. Another respondent recommended reducing the 12 day limit.

Two respondents recommended defining a voluntary organisation.

One respondent considered that the regulations should specifically state that volunteer bodies such as “NZ Mountain Safety, Land and Urban Search and Rescue and the Volunteer Coast Guard” were excluded. Another suggested that national sporting organisations should be excluded.

One respondent suggested the regulations had a specific clause to prevent commercial companies making customers “temporary members” to avoid being covered by the regulations. This was the approach taken in the United Kingdom.

Another suggested that the regulations should state whether the agreement between associations that would allow provision of activities to members of other voluntary associations to be excluded would be required to be in writing.

Potential other exclusions

Q4. Do you think that there needs to be exclusions in relation to other specific activities?

A clear majority of respondents felt that no other exclusions were necessary.

Table 5: Do you think that there needs to be exclusions in relation to other specific activities?

Response	Number
Yes	9
No	57
Did not say	7
Total	73

Q4b. If ‘yes’, please suggest exclusions in relation to other activities

Six respondents suggested other activities that could be excluded, including mountain biking, Skyline Luge, yachting and activities with an air component. Two respondents felt that members of their organisation should be excluded. It was also suggested that organisations that offered rescue or educational programmes should be excluded.

Examples of adventure activities covered

Q5. The schedule at the end of the draft regulations (‘activities included as adventure activities’) lists examples of activities that would be covered by the regulations to the extent that they comply with the definition of adventure activity in regulation 4. Do you think anything should be added to or deleted from the list of activities in the schedule?

Respondents were evenly divided on whether anything should be added to or deleted from the illustrative schedule.

Table 6: Do you think anything should be added to or deleted from the list of activities in the schedule?

Response	Number
Yes	32
No	32
Unsure	1
Did not say	8
Total	73

Six respondents were concerned that the schedule could quickly become out of date as new adventure activities emerge. They recommended that the schedule be regularly updated. Five respondents felt that it should be clearer that the schedule was not an exhaustive list of activities covered by the regulations.

Q5b. If 'yes', please explain what you think should be added or deleted from the list of activities in the schedule

Respondents identified 32 activities that could be added to the schedule. Most of these activities were identified by only one respondent. The activities most commonly suggested were: flying kiwi, flying foxes and ziplines (5 respondents); paintball (4 respondents); kite surfing/kite boarding (4 respondents); karting (3 respondents); and shooting activities (3 respondents).

Eight respondents suggested amending the descriptions of activities listed on the schedule to provide greater clarity. These activities included skiing, ice skating, diving, luge, climbing, quad bike touring and rope course crossing.

Five respondents suggested deleting from the schedule activities that were covered by maritime regulations (such as rafting) or the Amusement Devices Regulations (such as bungee jumping, canyon swinging, and activities using a motorised vehicle). Other activities respondents suggested be deleted from the schedule included: horse or pony trekking; unsupported cycle touring; and any activity with an air component (1 respondent each).

Comments on the remaining regulations

A number of comments were made in relation to the other parts of the regulations. This summary reflects only the most common concerns raised.

Six respondents commented on the phrase "place of work" (used in regulations 5, 8 and 18). They were concerned that it was unclear what was meant by this term, that their place of work could change over time, or that it may not be an actual address (e.g. it may be between two points on a river).

Four respondents recommended that there be clear dispute resolution and appeals processes in place for a number of the regulations. These included: when a safety audit was failed; if an accreditation body declined to register an adventure activity operator or suspended or cancelled their registration; if an accreditation body declined granting accreditation to a safety auditor or withdrew

their accreditation; and where the Secretary of Labour placed conditions on an accreditation body or withdrew their recognition.

Two respondents were concerned about the ongoing validity of a safety audit if an accreditation body or safety auditor had their recognition or accreditation withdrawn. There was some concern that a new safety audit may be required and about the increased costs associated with that.

Respondents also raised concerns about the registration fee set out in regulation 18. One explicitly stated that \$100 per year was too high, particularly in addition to the cost of an audit. Two respondents felt that the fee should not be included in the regulation, that it should be reviewed annually and should be reasonable and justifiable.

Other comments

Respondents made a number of comments on the regulations in general. Most comments were on the safety audits.

Safety audits

Four respondents made suggestions on what the safety audits should cover. These included operators' skills, auditing the actual activity undertaken (rather than business records) and auditing the mechanical and structural soundness of equipment.

One respondent was concerned that with an increased number of audits being undertaken there was a danger that auditing will become just a checklist and that the educational component of existing audits would be lost. The educational component of audits was seen as an important component.

Two respondents considered that operators should be able to expand their activities between audits in a timely, non-costly way. They queried whether separate audits would be required for each activity and whether new audits would be required when a new activity was introduced during the term of a current safety audit certificate.

Three respondents were concerned about the cost of the safety audits. One considered the cost should be regulated as the regulations could set up a monopoly situation where auditors could charge what they like. Another felt that, ideally, the government should pay the cost of the audits.

Safety auditors

Five respondents considered that auditors need to be suitable, credible and independent. This reflected concerns of three respondents that some in the industry see the introduction of the regulations as a marketing tool or a way to increase revenue and are taking advantage. These three respondents considered that the Department of Labour should undertake the safety audits.

Registration process

Six respondents made comments on the registration process. Two were concerned that it was unclear at this time how this process would work. One respondent recommended keeping the registration process simple and having only one point of contact for operators. One respondent felt that the regulations and registration process should be implemented at the same time.

Guidance

Six respondents highlighted the need for good guidance on the regulations, as they felt there was a lot of uncertainty about what activities were covered, which operators the regulations would apply to and what the regulations actually meant for operators in practice. They felt it would help operators to comply with the regulations and reduce the need for them to get legal advice. One respondent also suggested guidance for overseas visitors so they are informed about the risks and how to tell if an operator is safe.

Other comments

Some comments reflected respondents' feelings that the regulations needed to balance protecting participants with the cost to participants and operators. Three respondents felt that good operators were already running activities safely but that it was necessary to raise the bar, as unsafe operators adversely affected all operators. Two respondents felt that it was unnecessary to regulate or that the regulations would increase bureaucracy. They supported better enforcement of existing regulations instead.