



SUBMISSION ON THE MBIE ADVENTURE ACTIVITIES – KEEPING IT SAFE CONSULTATION DOCUMENT

TO: Health and Safety Policy Team
Ministry of Business, Innovation & Employment

Name of submitter: Aotearoa Climbing Access Trust

1. INTRODUCTION

- 1.1 This is a submission on MBIE's "Adventure Activities – keeping it safe" Consultation Document.
- 1.2 The Aotearoa Climbing Access Trust ("ACAT") is a national organisation that represents the interests of New Zealand's rock climbing community. Climbing is a rapidly growing sport in New Zealand and internationally, so much so that it recently debuted in the Olympic Games. ACAT's purpose is promote public access to rock climbing areas ("craggs") in Aotearoa, and to promote conservation and safe and responsible use of the climbing environment.
- 1.3 ACAT recognises that the Adventure Activities Regulations do not directly apply to the majority of the rock climbing community, as for most climbers it is a recreational activity that is neither guided nor paid for. However, ACAT felt compelled to comment on MBIE's proposal for the following reasons:
 - (a) The recommendations specifically identify accountabilities, actions and risks for landowners which could be perceived as applying in recreation scenarios as well as adventure activity scenarios. This is a concern to us, as landowner perceptions of accountability or risk is a significant threat to maintaining recreational access to crags;
 - (b) Some of our community either operate as outdoor rock climbing instructors / guides, or consume outdoor rock climbing instruction or guided climbing; and

(c) We note that a stated aim of the MBIE proposal is to “avoid having a chilling effect on the adventure activities sector or unnecessarily restricting public access to outdoors and recreation activities”, (page 7 of the document).

1.4 ACAT’s submission has been prepared by authors with extensive experience in the fields of risk management, auditing and health & safety law.

2. PROPOSED CHANGES RELATING TO LANDOWNERS

2.1 Please consider the below feedback on the proposed changes regarding landowners’ involvement in the strengthening of natural hazard management.

2.2 With regards the comments on page 26 of the document that in some situations the landowner may be in a position to add value to the risk management process, particularly those relating to the land, e.g. landslide, avalanche, flooding. In some cases, this may be the case. However, in many cases this will **not** be the case.

(a) Consider, for example, a situation where land has recently changed hands. The new landowner will have no historical experience.

(b) In many cases the landowner will not have the technical skills or experience to assess natural hazards. For example, most landowners will have little or no experience above the snowline. Unless the hazard in question is a direct hazard to the landowner’s own operations (i.e. farming, buildings, roads) they are unlikely to be interested or an expert in that hazard. For example, landowners will not have knowledge of river flow rates and associated risks for white water activities, unless they are personally interested in those activities. In the case of climbing crags, there are over 200 individual crags around New Zealand and we are only aware of one landowner who has any specific knowledge and understanding of climbing and the associated risks including how climbers interact with natural hazards on the land. This is because they also happen to be an adventure activity operator.

2.3 We also note that on page 26 of the document it is stated landowners will “generally be the party best able to monitor and control the number of people that are exposed to a hazard where more than one operator is providing activities in the same area”. We do not believe this to be the case. Many private and public landowners do not monitor on a daily basis how many people are on their land, where they are and what they are doing. This is an administrative hassle. In regard to climbing crags, many landowners have permitted access for visiting climbers without requiring any access request or sign-in procedures.

2.4 The document suggests that the regulation will only apply to private landowners or land managers in a small number of cases. We acknowledge the Department of Conservation estate is large. However, we believe these proposed changes would have a significant impact on many private landowners. This appears vastly understated in the proposal. Most climbing crags reside on private or iwi land. All landowners with crags on their land may perceive these legislative changes as a reason for denying access to recreational climbing, i.e. 100% of climbing venues could be jeopardised.

- 2.5 We note that iwi have significant land holdings including land returned through the Treaty settlement process. This proposal may impact iwi's ability to grant recreational and adventure activity access to their land, as it makes it too expensive or risky to do so, and this may impact the value of the land holding. We question whether the consultation process has adequately addressed consultation with iwi and landowners in general.
- 2.6 We believe the cost to landowners, for permitting access, is not adequately acknowledged in the proposal. Costs could include:
- (a) Liability insurance to cover legal costs.
 - (b) Professional advice about duties and risks, and how to mitigate them.
 - (c) Time and costs involved in creating a robust system to capture knowledge of risks and provide targeted advice to visitors and/or actively manage visitor numbers and activities to mitigate hazards.
 - (d) Residual risk of WorkSafe investigation and enforcement action, taking into account both the time-consuming, disruptive and emotionally challenging experience of being subject to a formal investigation, the significant penalties that may be imposed for breach of the regulations, and the reputational risk for the landowner.
- 2.7 Our reading of the proposal seems to imply that landowners always commercially benefit from adventure activities that occur on their land. In our experience, this is often not the case. If any form of change regarding landowner duties was to proceed we suggest that consideration should be given to a distinction between landowners who commercially benefit versus those that do not.
- 2.8 Our feedback, therefore, is that the proposed explicit requirement on landowners is ill-conceived. It will not achieve the desired outcome of improving safety, but it would have unintended consequences, namely removal of access and increased costs. We are very concerned that the removal of access will spill over into the removal of recreational access to crags. The proposals impose duties, liability risks and associated costs on landowners, who, in many cases, have zero incentive to provide access other than goodwill. There is no quid pro quo. The rational response for landowners is to shut down access. This is a marked departure from the scheme of health and safety law in New Zealand to date, where duties have historically only been imposed on entities in relation to their own operations.
- 2.9 With regards **Question 8** in the consultation document (page 28), we do not believe there should be an explicit requirement for landowners around managing natural hazards, and we do not believe this would improve safety, for the reasons outlined above.
- 2.10 With regards **Question 9** in the consultation document (page 28), whilst we believe specific duties should **not** be introduced for landowners, if the proposal was to go ahead, our strong preference as the least bad outcome would be a) a requirement to provide information to operators. We believe b) is not practical and will be costly. For the most part the operator is better placed to assess the hazards and the landowners do not have the technical skills or experience. The outcome of b) would invariably be a "chilling effect on the adventure activities sector or unnecessarily restricting public access to outdoors and recreation activities".

3. TIMING & SCOPE OF THIS PROPOSAL

- 3.1 We note that the definition of “what is an adventure activity” is out of scope for this review and consultation, but it is noted that further discussion on this topic is required and a review is intended to begin in 2026. It is far from ideal that sweeping changes are being proposed now, when the definition of who they apply to is not settled.

4. QUALIFICATIONS, TRAINING & INDUSTRY GUIDANCE

- 4.1 To achieve the stated aim of reducing harm, we recommend greater emphasis on operator training and qualifications. We consider it is primarily the operator’s role to manage adventure activity risk, including natural hazard risk. Consistent, skilled, experienced operators across the sector is the best mitigation to reduce harm. Reward the better operators who are better trained, have better systems and a better track record, with less compliance cost and focus regulator and auditor time and energy on the operators who need help.
- 4.2 The examples on page 32 demonstrate this. The most appropriate control for example 2 is that the mountain guide is skilled, qualified and experienced. In example 1 the best controls are around PPE, maintenance of equipment, design of the course, and protocols / procedures for introducing clients to the environment. These two examples demonstrate why a one-size-fits-all approach is not productive. The audit activity should be designed around the nature of the operation and the performance of that individual operator. The logic that a one-size-fits-all risk assessment should dictate audit activity does not make sense. It is highly unlikely that a qualified mountain guide’s performance will slip and they will start to operate unsafely. We would suggest that it is in fact more likely that the controls at a high ropes course would slip over time (as they are procedural and likely reliant on transitory staff who are not professionally qualified). Therefore, it is arguable that it makes more sense to audit the high ropes course more regularly.
- 4.3 In response to **Question 14**, whilst we believe in a risk-based approach, we do not consider that a one-size-fits-all risk classification system is the correct way to determine the frequency of safety audits, for the reasons noted above. The additional information that is proposed to be provided to WorkSafe at registration, reported annually and for notifiable events, would be a better source for a risk-based decision on safety audit frequency for a particular operator, rather than a one-size-fits-all risk classification of the activity itself.
- 4.4 We consider that a return to investing in activity-specific guidance, sharing experience and learning within the sector, and providing templates and guidelines will be more effective at improving the outcomes desired, rather than imposing additional one-size-fits-all regulation.

5. CHALLENGE OF RARE AND EXTREME NATURAL HAZARDS

- 5.1 It is a common problem for risk management professionals to pragmatically calibrate risks that are very low likelihood (i.e. rare) and very high consequence (i.e. impactful). By

definition there is a lack of data and experience for rare events such as once in a hundred or even once in a thousand year hazards such as volcanic eruptions, landslides and extreme weather.

- 5.2 Most of the risks that adventure activity operators manage (for example avalanche hazard, equipment failure, common weather) are more likely risks, typically but not always with a lower consequence. There is a body of data and experience for these types of risks. Based on the data provided in the consultation document it appears the sector is on the whole good at managing these risks.
- 5.3 The White Island accident was tragic and impactful for a large number of people. The fundamental questions are should people have been on White Island that day? And can volcanic activity be adequately predicted to ensure that people are not on the island when an eruption occurs? We believe that the existing regulatory regime (Health and Safety at Work Act 2015 and Adventure Activities Regulations 2016), including the registration process and audit requirements, clearly places an expectation on the operators to consider the risk of natural hazards like volcanic eruptions and there is oversight and the ability for the auditor and regulator to step in if they believe an operator is putting their customers at unacceptable risk. Sadly, all parties either underestimated that an unlikely eruption could happen; or the magnitude of that eruption; or overestimated the reliability of our ability to predict an eruption.
- 5.4 We believe regulatory change for the entire sector in response to this one event, which is relatively unique, is unwarranted and unwise (based on the potential to have a chilling effect on the adventure activities sector or unnecessarily restricting public access to outdoors and recreation activities).

6. POTENTIAL IMPACT ON CLIMBING COMMUNITY OF THE PROPOSED CHANGES

- 6.1 It is our view that it is inevitable that landowners will perceive responsibilities, cost and risk to them, whether the activities taking place on their land are those covered by the Adventure Activities regime or are recreational in nature. This will result in access to crags being closed to the public for recreational climbing.
- 6.2 By way of background, our experience has been that recreational access to many irreplaceable outdoor climbing areas has already been lost directly as a result of the Health and Safety at Work Act 2015. Specific examples include:
 - (a) Auckland Grammar School Rockwall (Auckland). Closed after the school sought a legal opinion regarding its potential liability under the HSWA, despite the school's proud tradition as Sir Edmund Hillary's school and the school's own use of the crag historically for outdoor education. This was a tremendous loss for the third of New Zealanders who live in Auckland, as the Rockwall was the highest-quality climbing area in the region.

- (b) Bayley's Road crag (Waikato). This beginner-friendly farmland crag was closed in 2018 due to the farm owner's health and safety liability concerns, despite intensive efforts by the climbing community to provide reassurance.
- (c) Motutere aka Castle Rock crag (Coromandel). This popular crag on Maori land was closed to the public by the owners, Ngāti Huarere ki Whangapoua, citing liability concerns after a recreational climbing accident in 2018 (among other issues). This was despite two years of effort by the climbing community to engage with the iwi and allay these concerns.
- (d) Phoebe Creek crag (Southern Lakes). This popular and historic crag was the first climbing area to be developed in the Wanaka area. Recreational access was closed by the Matukituki Station owner due to health and safety liability concerns.

6.3 This is just a few examples of the many crags that have been closed or threatened with closure as a direct result of the HSWA. The extent of crag closures in the North Island, where most crags are on private farmland or Maori land, has been so severe that the future of the sport is threatened. This has occurred despite WorkSafe's 2019 Guidance documents which confirm that landowners are not responsible for risks associated with recreational activities on their land. The current proposal may be perceived to remove this protection for landowners and is likely to result in even more widespread climbing access restrictions and closures.

6.4 MBIE's proposal will also increase cost to the Adventure Activity sector and will therefore make climbing tuition, outdoor education and guided climbing more expensive. Tuition and guiding are important for newcomers to the sport to gain skills and experience and for those wanting to safely experience adventurous climbs. Increased costs may result in less people using tuition and guiding services and that may increase the risk in the recreational climbing community.

6.5 With regards **Question 32**, specifically in the field of rock climbing tuition and guided rock climbing, we do believe the climbing community is price-sensitive. We consider that this sector is currently well managed and safe and, as outlined above, consider that any additional regulatory cost will be detrimental to safety as less recreational climbers will obtain professional training and use guiding services.

7. IF CHANGES DO PROCEED – CLEAR COMMUNICATION THAT THIS DOES NOT APPLY TO RECREATIONAL ACTIVITIES INCLUDING ROCK CLIMBING

7.1 WorkSafe's guidance confirms that HSWA does not apply to recreational activities such as outdoor rock climbing, and that landowners do not have to manage the risks of the recreational activity. WorkSafe made a particular point of emphasising that it does not want to stop recreational access, and that it has never taken action in relation to recreational accidents. Recreational users are responsible for their own safety, and organisations like the New Zealand Alpine Club and ACAT work to promote safe and responsible climbing.

- 7.2 As noted above, WorkSafe's guidance was unfortunately released only four years after the HSWA came into effect. In the intervening period, many climbing areas were irreversibly closed by confused and uncertain landowners and the climbing community was largely powerless to prevent this. This should not be repeated.
- 7.3 If changes are to be made, it is imperative that the above sentiment is clearly and promptly communicated to reduce the risk that landowners will remove access for recreational activities.

Dated at AUCKLAND this 4th day of November 2021

AOTEAROA CLIMBING ACCESS TRUST



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