



## Anglican Church Diocese of Sydney

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Dear Minister and Wardens

### **New Work, Health and Safety legislation and its application to volunteers**

You may be aware of recent coverage in the press raising concerns about the obligations of volunteers under new model national work, health and safety legislation. In NSW this legislation, the *Work, Health and Safety Act 2011*, took effect on 1 January 2012 and has replaced the *Occupational Health and Safety Act 2000*.

While there is merit to some of what is being said in the media, much of it is overly alarmist. To a large degree there is in fact less risk of a volunteer being prosecuted for a work, health and safety breach under the new legislation.

The purpose of this circular is to address the issues raised in the recent media coverage concerning the potential for volunteers to be liable for work, health and safety breaches. It does not attempt to comprehensively outline the work, health and safety obligations of our churches.

The changes under the new legislation were outlined in regional seminars held by SDS in September last year. For the most part, in the parish context, the actual health and safety measures required to be implemented in workplaces have not changed significantly under the new legislation. The *Parish Risk Management Program* is still applicable and the modules are currently being updated and amended as appropriate. A further circular on the changes to the Program will follow in due course.

### **Are churches workplaces to which the legislation applies?**

The legislation applies in circumstances where a person conducts a "business or undertaking". A business or undertaking need not be undertaken for profit and may be conducted by an unincorporated body.

In most cases a parish will be conducting a business or undertaking, meaning that church sites and other places where staff of the parish carry out their work will be workplaces and subject to the terms of the legislation.

An exception arises if the parish is a "volunteer association". A parish will be a volunteer association if it does not have any employees. Clergy licensed to the parish by the Archbishop are typically not employees. If your parish does not have any employees the legislation does not apply to your parish until such time as your parish engages one or more employees.

## Who owes work, health and safety duties?

Duties are owed by the following persons in relation to a business or undertaking to which the legislation applies –

### 1. A person conducting a business or undertaking (PCBU)

A PCBU is a person who controls, influences or directs work. There may be more than one. For a parish the PCBUs would commonly be the Minister and the Wardens. Parish Councillors would also have some responsibilities as PCBUs in view of the Parish Council's control over property of the parish through setting policies.

The primary obligation of a PCBU is to ensure health and safety in the workplace in so far as it is reasonably practicable to do so. This includes eliminating or, where this is not reasonably practicable, managing risks.

There is a provision in the new legislation which prevents a PCBU who is a volunteer from incurring liability in that capacity. This is covered in more detail below.

### 2. An officer of the business or undertaking

For an unincorporated entity, such as a parish or church, an officer is a person who makes or participates in making decisions affecting the whole, or a substantial part, of the entity or a person who has the capacity to affect significantly the entity's financial standing. In the parish context it would include Parish Councillors and perhaps also others depending on their authority and influence.

The primary duty of an officer is to exercise due diligence to ensure a PCBU complies with his or her obligations.

There is a provision in the new legislation which prevents an officer who is a volunteer from incurring liability in that capacity. This is covered in more detail below.

### 3. A worker engaged by the business or undertaking

This might be an employee, contractor, student on work experience, volunteer, etc. For a parish it would include virtually any person who performs some authorised function on a paid or voluntary basis but only to the extent they are at the workplace in that capacity. For example, if a person leads a mid-week youth group but is on the premises to attend a church service they are not a worker while they are attending the church service.

Workers have four duties. These are to –

- (a) take reasonable care for his or her own health and safety,
- (b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons,
- (c) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with the *Work, Health and Safety Act 2011*, and
- (d) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

### 4. Other persons at the workplace

This captures any person present at a workplace and would include a parishioner or visitor.

The duties of other persons at the workplace are the same as for workers (see above) except that (d) does not apply to a person who is not a worker when at the workplace.

## Did these duties change on 1 January 2012?

Yes, in several ways.

- The nature of the duty owed by PCBUs

Under the former legislation an employer or controller of a workplace had an absolute duty to ensure health and safety. Under the new legislation PCBUs are to ensure health and safety *so far as it is reasonably practicable* that they do so. Although this change is helpful to Ministers and Wardens in the parish context, it is yet to be seen what difference the change will make to the standard of compliance that is owed in practice.

- Expansion in the persons comprising officers

Previously the definition of “officer” only included persons who were officers of a corporation. Since parishes are not corporations the “officer” provisions did not apply. However under the new legislation a person can be an “officer” of an unincorporated body. This means that Parish Councillors (and possibly also others) now have due diligence obligations which include matters such as understanding the risks of the workplace, acquiring knowledge about safe work practices, ensuring the PCBU has adequate resources and processes and so forth.

As stated above Parish Councillors would also have some obligations as PCBUs in respect to the control of property.

- Volunteers now categorised as workers

Volunteers were treated as “visitors” to the workplace under the former legislation. Under the new legislation they are categorised as “workers”. The only substantial difference in the duties owed by volunteers is that volunteers now have a legal duty to “co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers”. The precise scope of this duty will not be clear until it is tested before the courts but the use of the word “co-operate” rather than a word such as “comply” would tend to suggest that a volunteer who is attempting to follow policies and procedures in good faith and in doing so inadvertently breaches a policy or procedure would not fail in their work, health and safety duties as a worker. The duty may be intended to capture situations where a worker, including a volunteer, shows wilful disregard for the health and safety policies and procedures of the workplace.

The categorisation of volunteers as workers is also significant for PCBUs and officers because it means that volunteers have the same status as employees under the legislation. PCBUs must now ensure that volunteers are provided with a safe work environment, safe systems of work, training and so forth whereas previously the obligation was limited to ensuring they were not exposed to risks while present in the workplace. There is also now a duty to consult with volunteers on work, health and safety matters.

## Exceptions for people who undertake responsibilities as volunteers

The new legislation provides that a person who is acting in a voluntary capacity does not commit an offence for failure to comply with a health and safety duty except for duties that apply to them as “workers” or as “other persons at the workplace”.

This means that a volunteer who breaches a duty to ensure health and safety that applies to them in their capacity as a PCBU or officer cannot be prosecuted by WorkCover for that breach. Of course this should not cause PCBUs and officers to have a lax attitude towards health and safety but it does mean that people can volunteer to serve in these capacities without fear of the threat of prosecution.

It should be noted that Ministers of a parish, though not employees, are not volunteers.

It should also be noted that there are other duties in the legislation that are not covered by the exception. For example, the duty to notify WorkCover about certain workplace accidents and incidents and obligations to comply with improvement and prohibition notices issued by WorkCover. However this is no different to the former law.

Despite comments made in the media in recent time concerning the effect of the new legislation on volunteers, the only expansion in the duties owed by volunteers under the new legislation (for which they can be prosecuted) is to “co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers”.

It should be noted that the civil law of negligence is not affected by this legislation and that the comments above do not apply in relation to negligence.

If you have any questions or comments in relation to the matters covered in this circular please feel free to contact me via the telephone number or email address listed below.

Kind regards

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