



“Have your say on workplace safety laws.”



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Public Comment Response Form – PilchConnect

Introduction

PilchConnect is a specialist pro bono legal service established to provide free legal information, training and advice for small to medium community not-for-profit (NFP) organisations. Being itself a NFP, PilchConnect represents a sector-based response that promotes good governance among NFPs and assists them to understand and deal with their regulatory obligations, including compliance with occupational health and safety (OHS) laws.

PilchConnect provides support to NFPs through a range of methods including a web-based information portal which provides plain language fact sheets and guides on the legal issues commonly present in the NFP sector. In July this year, PilchConnect launched a new guide on its web portal titled *‘Community organisations and Victoria’s OHS laws’*, which provides community-based organisations with practical guidance on how Victorian OHS laws apply to them, and what legal considerations are applicable (see www.pilch.org.au/OHS).

In addition to the web portal, PilchConnect also runs regular low-cost training seminars for Victorian NFPs on a range of legal compliance areas, including legislative OHS requirements. This is consistently one of our most popular seminar topics, with high attendance numbers reflecting the complexity and often overwhelming nature of OHS laws on community organisations.

We wish to comment only on those issues that are of significance to the NFPs we assist daily, specifically in relation to the application of OHS laws to volunteer-based community organisations. In particular, our comments are directed at improving clarity for how OHS laws will apply to community-based NFPs, including work safety for volunteers and the potential civil and criminal liabilities imposed organisations that are reliant on volunteers to manage their governance and day-to-day operations.

The Australian Bureau of Statistics reports in 2006-07, volunteers contributed 623 million hours to Australian not-for-profit organisations, equivalent to 317,200 full time jobs. The NFP sector alone contributed close to \$43 billion (or 4.1%) to Australia’s economy in 2006-07. Australia’s OHS laws must strike the appropriate balance between providing adequate protection for volunteer workers in community organisations, whilst recognising that excessive statutory obligations and penalties for individuals may discourage voluntary participation in NFP management and committee roles. Our comments to this review reflect this position.



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Questions

Part 1 – Preliminary Matters

Q2. Does the definition of ‘*officer*’ clearly capture those individuals who should have ‘*officer*’ duties under the model Act?

PilchConnect submits that as a matter of policy it is extremely important that adequate protection is given to volunteer committee members against prosecution under OHS laws, so as to ensure that individuals are not discouraged from taking on these valuable roles which already carry a significant number of legal duties and liability risks.

PilchConnect receives a large number of inquiries from volunteers in positions of management (eg, volunteer board members and executive officers) within community organisations, who are concerned about the potential for personal liability to arise from their role in the organisation. These fears commonly relate to the prospect of incurring personal liability, civil or criminal, in instances where the community organisation has potentially breached the law, or is suspected of failing to meet OHS standards.

In Victoria, the *Occupational Health and Safety Act 2004 (Vic)* expressly excludes volunteer officers from liability under the OHS offence provisions (see s.144). The draft Model Act does not contain this specific exclusion, however our understanding of the proposed legislation is that the blanket exemption for ‘volunteers’ at s.33 will extend to volunteer officers, and therefore exempt these individuals from prosecution under OHS legislation. If this interpretation is correct, we believe this to be an appropriate measure particularly given these volunteers will still owe general duties of care under laws of negligence and related legislation (eg, *Wrongs Act 1958 (Vic)*) in their capacity within the organisation.

Q6. Is the scope of the ‘*worker*’ definition appropriate? Should it cover students gaining work experience?

The inclusion of volunteers within the definition of ‘workers’ at s.7 of the Model Act is appropriate to ensure that volunteers receive the same level of statutory OHS protection as employees.

Further, it is our view that individuals (particularly students) engaged in work experience should be provided with the same level of protection under the Model Act that are owed to employees. In this regard, we believe that the Model Act’s inclusion of ‘a student gaining work experience’ within the definition of ‘worker’ at s.7 is appropriate.



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Q7. Is the definition of ‘workplace’ appropriate?

The definition of ‘workplace’ at s.8 of the Model Act appears sufficiently broad to cover the many non-traditional workplaces that are common within the not-for-profit sector (eg, private residences and public spaces).

However, while not forming part of the Model Act, we note our reservations about a statement at page 8 of the Discussion Paper (dated September 2009) which states that a workplace ‘*does not stop being a workplace simply because there is no work occurring there at a particular time.*’ This position should be clarified (either in the Model Act or supplementary explanatory material) with particular reference to the community sector’s high level of activity that takes place outside of conventional workplaces.

As noted above, clarity is the paramount consideration to the definition of ‘workplace’, and any definition will need to reflect the community sector’s propensity to conduct activities outside of what would be considered a traditional workplace. In this regard, we support the comments by the National Disability Service at page 6 of its submission to the previous National OHS Review regarding the definition of workplace in a not-for-profit context (Submission 173).

Part 2 – Safety Duties**Q16. Is the treatment of volunteers under the model Act appropriate?**

Section 33 of the Model Act excludes volunteers from the offence provisions. We believe this to be an appropriate measure to ensure that community organisations are able to continue to attract volunteer workers without creating the potential for civil and criminal penalties under OHS legislation.

However, while the exclusion for individual volunteers is welcome, we seek greater clarification about the Model Act’s treatment of volunteer-based organisations, particularly the exclusion of ‘volunteer associations’ from the definition of ‘conducting a business or undertaking’ at s.5(3). The exclusion of volunteer associations from the definition of ‘conducting a business or undertaking’ is important for allowing wholly-run volunteer organisations to operate without excessive OHS obligations while still having to comply with common law negligence and duties under state laws such as the *Wrongs Act 1958* (Vic), however there should be more consideration given to how this exemption will apply in practice.

The notion of ‘conducting a business or undertaking’ is a fundamental concept in the Model Act, as most ‘safety duties’ contained at Part 2 impose obligations



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on persons that are ‘conducting a business or undertaking’. It is therefore important to clearly establish the circumstances where a community organisation is entitled to rely on the exclusion for ‘volunteer associations’, and conversely when an organisation will become bound by the prescribed safety duties. In this regard, the Model Act defines a ‘volunteer association’ at s.5(5) as:

‘... a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.’

To achieve greater clarity, the definition of ‘volunteer associations’ could be further articulated in the following two areas:

(i) ‘community purpose’

PilchConnect considers it unnecessary for the definition of ‘volunteer association’ at s.5(5) of the Model Act to contain the criteria that a group of volunteers must work towards ‘one or more community purposes’ to meet this exemption. Without further guidance on what the term ‘community purpose’ is intended to include or exclude, this appears to place a seemingly unnecessary additional level of ambiguity for voluntary-based NFPs seeking advice on whether they fit into this exemption.

PilchConnect recommends that the term ‘one or more community purposes’ is either clarified or removed from s.5(5) of the Model Act.

(ii) ‘where none of the volunteers ... employs any person to carry out work for the volunteer association’

While PilchConnect understands the need to differentiate between those organisations that are predominantly reliant on volunteers and those that employ staff, our experience in Victoria is that many community organisations are unsure about how this distinction applies to them in practice. As an example, the Victorian *Occupational Health and Safety Act 2004* (Vic) imposes a number of safety duties on ‘employers’, a term which is defined at s.5 as a person who ‘employs one or more other persons under contracts of employment or contracts of training’. Victorian community organisations are often advised that the strict OHS duties of ‘employers’ under Victorian law will therefore apply to their entire organisation as soon as they take on even one paid staff member – this could include a part-time bookkeeper or a contractor brought in for a specific task.

In practice, this strict ‘volunteer association versus employer’ approach to OHS laws creates confusion amongst many not-for-profits who, while being predominantly volunteer-run, will commonly take on a consultant or contractor at various times. Applying this very real scenario to the proposed Model Act, there is likely to be uncertainty as to whether volunteer-run organisations who decide to employ or contract a person will still be able to rely on the



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‘volunteer association’ exemption, or whether they will fall into the scope of a ‘business or undertaking’ and therefore be open to prosecution under the Act’s safety duties.

PilchConnect therefore submits that the Model Act or associated explanatory material should be clarified so as to address those situations where volunteer-based community organisations engaging contractors or consultants from time-to-time are provided with greater certainty about whether the exclusion at s.5(3) is still available.

The circumstances mentioned above at (i) and (ii) are both very real practical outcomes arising from the Model Act in its current state, and we submit that greater clarification is required on the point in which volunteer-based organisations will be brought within the jurisdiction of the Model Act.

Do you have any other comments?

Our submission focuses on greater clarity for community organisations. However the Model Act is finalised, it is critical that there is a comprehensive education and information program associated with the reforms. This includes legal information which is tailored to the needs and activities of the not-for-profit sector. This is essential for community based not-for-profits who are generally unable to access in-house legal support, and are often overwhelmed by the myriad of statutory obligations they face on a daily basis. We ask that these considerations are taken into account not only in the legislative drafting stage, but also as the laws are implemented on a national scale.