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Work, Health and Safety Duties for Church Councils & Congregations – Summary Explanatory Note (WHS Act 2012)

Scope of Document	Congregation Church Councils of the of The Uniting Church Synod of South Australia
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Introduction

The Uniting Church SA is committed to providing and maintaining a safe, healthy and productive work environment for workers and other persons involved in its congregations and associated activities. We as a Church have both theological and legislative obligations in taking every practical step possible to ensure that people are valued and treated well and are provided with a safe and healthy Church environment.

This document is intended as a **summary explanatory** note for officers, workers and other persons as members of Church Councils and Congregations of The Uniting Church of Synod of South Australia in terms of the implications under the new WHS Act 2012.

This document sets out to:

- Identify the terminology contained within the WHS Act 2012 and how it relates to the Church Councils and Congregations structure of The Uniting Church of Synod of South Australia. The new terminology includes Persons Conducting a Business or Undertaking (PCBU), officers, workers, volunteers and other persons. These replace former terminologies such as employer and employee.
- Discuss in general terms implications of incorporated and unincorporated associations. The Uniting Church Synod of South Australia (UCSA) is an **unincorporated association** and each individual UCSA Church Council and its associated Congregation are also *unincorporated associations*.
- Discuss the implications of the provisions within the Act for *unincorporated associations* from the perspectives of a PCBU, officers, workers, volunteers and other persons in terms of duties and obligations. There are in some instances significant differences in the provisions for *unincorporated associations* in terms duties and prosecution under this Act. Please note: The prosecution detail is contained within each section of this document as it relates to the heading subject.

Uniting Church Synod of South Australia, Church Councils, Congregations and the Work Health Safety Act 2012.

Having and complying with effective Work, Health and Safety (“**WHS**”) policy is essential in order for the Church, its individual Church councils and their Congregations to comply with its WHS duties under the Work Health Safety Act 2012 (SA) (“**WHS Act**”).

The wider church is, and remains, an unincorporated association. The Uniting Church Synod of South Australia (“**UCSA**”) (an unincorporated association) is considered to be a Person Conducting an Undertaking or Business (“**PCBU**”) for the purposes of the WHS Act. Each individual UCSA Church Council

and its associated Congregation (an unincorporated association) will likely be considered individual PCBU's unless they are solely a volunteer association.

As UCSA Church Council's and their associated Congregations are PCBU's they have a duty to comply with the requirements of the WHS Act. Ministers (or other office holders within the church) are not themselves PCBU's but should regard themselves as officers within the meaning of the WHS Act.

WHS Duties

Duties under the WHS Act are things that a UCSA Church Council must do to ensure the health and safety of workers or other persons. Duties can be owed by an individual person or the organisation as an entity. If you owe a duty under the WHS Act you're consider to be a 'duty holder'. A duty cannot be transferred or contracted out to another person.

A person can have more than one duty by virtue of being in more than one class of duty holder. More than one person can concurrently have the same duty and each duty holder must comply with the duty to the standard required by the WHS Act even, if another duty holder has the same duty. A failure to perform a duty under the WHS Act is a criminal offence. For individuals this can mean a term of imprisonment and / or a fine and for the PCBU it can mean a very large financial penalty or other sanction.

Primary Duty of Care

A UCSA Church Council and its associated Congregation, have a primary duty of care to its workers and others persons under the WHS Act. This means that they must ensure, as far as reasonably practicable, the health and safety of workers whilst at work.

A UCSA Church Council and its associated Congregation must also ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of its undertaking that, being the operations and/or activities of individual Church Council and Congregation.

Officers Duties

The WHS Act creates 3 classes of persons with duties under the legislation. The first class of person is an officer. In the context of an individual UCSA Church Council this a person who falls within the following definition;

- *An office holder of the unincorporated association if the entity is an unincorporated association; or;*
- *A person; who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or who has the capacity to affect significantly the entity's financial standing.*

This means that a person who is a Minister or a member of the Church Council that, is making or participating in decisions that affect the whole or a large part of the Church Council or its associated congregation, should consider themselves to be an officer and to owe a duty under the WHS Act. The officers duty is that, they must exercise '*due diligence*' to ensure that the individual Church Council and Congregations (the PCBU) complies with their duties or obligations under the WHS Act.

Exercising Due Diligence means continuously and proactively taking six reasonable steps to ensure the individual Church Council and Congregation complies with their duties or obligations under the WHS Act. The six reasonable steps of due diligence can be seen below in Figure 1.

Figure 1: Six Reasonable Steps of Due Diligence:

1. **Acquire and keep up-to-date knowledge** of WHS matters
2. **Understanding of the nature of the operations and generally of the hazards and risks associated** with those operations
3. Has and uses, **appropriate resources and processes** to eliminate or minimise risk
4. Has **appropriate processes for receiving and considering safety information** and responding in a timely way to that information
5. **Implements, processes for complying** with any duty or obligation
6. **Verifies the provision and use of the resources and processes** referred to above

An officer cannot indemnify or insure themselves against a financial penalty imposed by a court nor can the officer's employer pay a financial sanction incurred by them, personally, under the WHS Act. It is important for officers to realise that they could be convicted of an offence, in relation to a duty under the WHS Act, in the absence of a notifiable incident, injury or near miss occurring.

Omitting to or failing to take reasonable steps to ensure a worker or other persons health and safety in the course of routine operations can be enough. Officers can also be liable for a failure in their duty under the WHS Act whether or not the UCSA or an individual Church Council and Congregation has been found guilty of an offence.

Workers Duties

The next class of duty holder is the Worker. The definition of a worker goes far beyond a person with an employment contract. A worker can be any of the following; an employee, a contractor or subcontractor, an employee of a labour hire company, an out worker, an apprentice or trainee, a student on work experience, a volunteer or a person or a prescribed class. The definition covers any person who conducts work for an individual Church Council and Congregation in any capacity including where the work is unpaid such as with a volunteer. The act of work is not defined in the WHS Act so takes its ordinary meaning to be something that a person is doing, or performing, a duty or task.

The workplace is defined in the WHS Act. It is taken to be a place where work is carried out for a UCSA Church Council and Congregation and includes any place where a worker goes, or is likely to be, while at work. The meaning is not limited to church premises but extends into places such as vehicles or the site of other businesses, agencies or organisations. This may mean an individual worker's home when they are there conducting administrative work on behalf of the church.

A worker has a duty of care under the WHS Act, whilst at work. This can be seen in Figure 2 below.

Figure 2: Workers duty of care under the WHS Act

- Take reasonable **care for their own** health & safety; and
- Take reasonable care that their acts or omissions do **not adversely affect** the health & safety of others; and
- **Comply**, so far as reasonably able, with **any reasonable instruction** given to comply with this Act; and
- **Co-operate** with **any reasonable policy or procedure**, relating to health or safety, notified to workers

Like the officer the worker cannot indemnify or insure themselves against a financial penalty imposed by a court nor can the worker's employer pay a financial sanction incurred by them, personally, under the WHS Act. Workers can also be liable for a failure in their duty under the WHS Act whether or not the UCSA or an individual Church Council and Congregation has been found guilty of an offence.

Other Persons Duties

The next class of duty holder is the 'other person'. The WHS Act does not define what an 'other person' is. In the context of the WHS legislation an 'other person' maybe any of the following, when at a workplace; a customer, a visitor to a church or a member of the congregation attending a church for worship. Specifically they could be someone attending the workplace who could not, be said to be conducting work (whether paid or unpaid) in any capacity for the individual UCSA Church Council and Congregation. A person at a workplace must take care as outlined in Figure 3.

Figure 3: Other Persons duty of care under the WHS Act

- Take reasonable care for his or her own health and safety; and
- Take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and
- Comply, so far as the person is reasonably able, with any reasonable instruction that is given by the individual UCSA Church Council and Congregation to allow compliance with the WHS Act

Like the workers the 'other person' cannot indemnify or insure themselves against a financial penalty imposed by a court. 'Other Persons' can also be liable for a failure in their duty under the WHS Act whether or not the UCSA or an individual Church Council and Congregation has been found guilty of an offence.

Prosecutions

A failure to comply with a duty under the WHS Act is a criminal offence. Where an offence occurs the relevant WHS regulator may prosecute an individual or an entity. Prosecution can occur for the person or entity where no injury or safety incident has occurred or been reported.

WHS regulator inspectors can enter a workplace at any time and conduct an inspection.

If as a result of the inspection, an Inspector detects a failure in a work health safety duty, this may result in a prosecution or other type of enforcement action.

There are three categories of offence set out within the WHS Act:

- Category 1 offences are where a person(s) had a duty and without reasonable excuse engaged in conduct that exposed a person to a risk of death, serious injury or illness and where the person with the duty is reckless as to that risk.
- Category 2 offences are where a failure in duty occurred and exposed a person to a risk of death, serious injury or illness.
- Category 3 offences are where a failure in duty occurred

All categories of offence attract a criminal conviction for the person or entity. The most serious penalties in terms of fines and imprisonment are reserved for category 1 offences however category 2 and 3 offences do have large fines associated with them. Other types of enforcement action include infringement notices, improvement notices, seizure of dangerous plant / premises or enforceable undertakings.

Exception for Individual Church Councils and Congregations as Unincorporated Association's

The WHS Act allows that where a PCBU is an unincorporated association it does not commit an offence under this Act, and is not liable for a civil penalty under this Act, for a failure to comply with a duty or obligation imposed on the unincorporated association under this Act.

As an individual Church Council and Congregation is also a PCBU it has a duty to comply with the WHS Act. However, as it is also an unincorporated association, if it should fail to comply with a duty it does not commit an offence under this Act. A PCBU found to have breached a duty under the WHS act could attract a criminal conviction and up to a \$3 million fine.

Volunteer Associations

Where an individual Church Council and Congregation employs no person they may be considered a volunteer association. A volunteer association does not conduct a business or undertaking for the purposes of the WHS Act. Within the WHS Act a volunteer association means 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.

If an individual Church Council and Congregation employed a cleaner, an office assistant, bookkeeper or a Minister or any similar situation it would preclude it from being a volunteer association. If an individual Church Council and Congregation were correctly considered as volunteer association they would not therefore be a PCBU. A volunteer association is exempt from the duties and obligations of the WHS Act. However, other legislative jurisdictions may still apply to a volunteer association such as, criminal law.

Exception for Volunteers as Officers

Whilst the WHS Act creates offences for failing to perform the duties within it, it also allows for exceptions to the offences and therefore the penalties under the WHS Act.

One of the exceptions relates to volunteers. A volunteer in the context of a Church Council and Congregation means someone who performs unpaid work for the church council and/or congregation in the form of tasks or jobs. The WHS Act allows that a volunteer does not commit an offence for a failure to comply with a health and safety duty, except as a worker or as an 'other person'.

In many individual Church Council's there will be persons who are volunteers and who make or participate in making in decisions that affect the whole or a substantial part of the Church Council and Congregation. These persons would therefore be conducting work for the individual Church Council and Congregation as an officer even where they are an unpaid volunteer.

Where an unpaid volunteer is performing work as an officer they would still have a duty comply with the 'due diligence' duty of an officer and therefore perform the six reasonable steps outlined above.

Where the volunteer is conducting work for individual Church Council and Congregation that involves the officer level decision making described above and fails to their due diligence duty they do not commit an offence. As a result, if they do not commit an offence they would not be prosecuted by the relevant WHS Regulator for breaching the duty of an officer.

A caveat applies to this exception and means that whilst the volunteers would not be prosecuted for committing an offence for failing in their duty as an officer they can be prosecuted for failing in their duty as a worker or other person.

Volunteers as Workers

One of the principles of the duties under the WHS Act is that a person can have more than one WHS Act duty by virtue of being in more than one class of person. A volunteer conducting unpaid work for an individual Church Council and Congregation as an officer will also simultaneously be considered a worker so will have duty as both classes of person.

The exception for the prosecution for volunteers only applies to an officer's due diligence duty. A volunteer could therefore be prosecuted for failing in their workers duties (or other persons duties) whilst making officer level decisions for an individual Church Council and Congregation.

The duties of a worker are less onerous than that of the officer and not subject to the same due diligence test. An example of how this would work could be; if the volunteer, was working on an individual Church Council and Congregation and, knew of a risk to the health and safety of a person(s) arising from the church's operations and, acted or omitted to act, and in so doing adversely affected the health and safety of other persons they could be held liable as a worker.

Liable could mean they may be subject to prosecution and subsequent conviction for failing to comply with the workers duty. This in itself may attract a criminal conviction as a worker, of up to \$300,000 fine and/or 5 years in prison.

Non-Volunteer Officers of an Unincorporated Association

Where a person is found to be an officer of an individual Church Council and Congregation (the unincorporated association) and they are not a volunteer, such as a paid Minister they may be liable for a failure to comply with the officer's 'due diligence' duty. As a result, they could be prosecuted for breaching the duty of an officer. The exception under section 34 of the WHS Act applies **only** to volunteer officers and only to the officer's 'due diligence' duty.

Members of the Congregation

WHS Act does mention members of an unincorporated association. A 'member' is not described in the Act. In this case it takes its ordinary dictionary meaning to be 'a person, belonging to a particular group'. This could therefore be said to extend to 'members of congregations'. The WHS Act highlights that a member could be liable for failing in their WHS duty as a worker or as an 'other person'

Summary / Conclusion

There are a number of key points to be taken from this paper in the context of how the WHS Act 2012 is applied and impacts on the Uniting Church SA Church Council and Congregations. The points below summarise how the Act applies to the Church Council and Congregations (PCBU, unincorporated associations) and the individuals associated with the PCBU (*officers*, paid and voluntary *workers*, members).

PCBU

A UCSA Church Council and Congregation is an *unincorporated association* and is therefore a PCBU for the purposes of the WHS Act. As a result it has a duty to comply with the WHS Act.

Unincorporated associations

As a UCSA Church Council and Congregation as a PCBU is an *unincorporated association* and does **not** therefore commit an offence under this Act, for a failure to comply with a duty or obligation imposed under this Act. However other jurisdictions may apply subject to the nature of the offence.

Volunteer working in capacity of Officer

Where a person, who is a volunteer, conducts work for a UCSA Church Council and Congregation, in the capacity of an *officer*, they have a duty to comply with due diligence duty of an *officer*. Where the volunteer (who conducts work in the capacity of an *officer* for a church council) fails to comply with the *officer's* due diligence duty, they do not commit an offence as an *officer*, but as a *worker* or *other person*.

The **six reasonable due diligence steps (Figure 1)** are a key point of this paper. These outline the requirements of the due diligence duty of an *officer* under the Act (whether voluntary or paid). *Officers* mindful and take action associated with these steps, will mitigate or minimise the risk of committing an offence under the Act.

Volunteer working in capacity as a *worker*

Where a person, who is a volunteer, conducts work for a UCSA Church Council and Congregation, in the capacity of a *worker* and they fail to comply with their duty as a *worker*, they do commit an offence and may be liable for failure to comply with that duty.

Paid *workers* and paid *workers* in capacity of *officer*

Where a paid *worker*, who is not a volunteer, conducts work for a UCSA Church Council and Congregation, must take a duty of care whilst at work (Figure 2).

Where a worker, who is not a volunteer (a paid worker), conducts work for a UCSA Church Council and Congregation, in the capacity of an *officer*, they have a duty to comply with *officers* due diligence duty and may be liable for failure to comply with that duty. Therefore paid *officers* such as a Minister, may be liable for a failure to comply with the *officer's* 'due diligence' duty. There are no exceptions for this category of person under the Act and as a result they could be prosecuted for breaching the duty of an *officer*.

A member of Church Council in capacity as a *worker* or as *other person*

A **member** of a UCSA Church Council and Congregation (the unincorporated association) may be liable for failure to comply with a duty as a worker (where they conduct work for UCSA) or as an 'other person'. Duty of care requirements are outlined in Figure 2 for *worker* and Figure 3 for *other person*.