

# WORK HEALTH AND SAFETY – INFORMATION SHEET

## INTENDED USE

This document is intended for the Board of Directors of St Euphemia College.

The document outlines the primary duty of care and obligations of the 'PCBU' ('person conducting a business or undertaking') under the *Work Health and Safety Act 2011 (NSW)*. This document also examines duties of specific persons such as workers, other persons at a workplace and duties of Officers. It also summarises the standards and concepts under the new Work Health and Safety legislation.

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## **Introduction**

- In NSW, schools have obligations under the *Work Health and Safety Act 2011* (Act) and the *Work Health and Safety Regulations* (Regulation).
- Schools should note that the terminology has now changed – and the Act mentions 'work' health and safety (or WHS) rather than 'occupational' health and safety (or OHS).
- In summary, the Act and Regulation impose general obligations on a person conducting a business or undertaking (PCBU) to ensure, so far as is reasonably practicable:
  - the health and safety of workers at work in the business or undertaking
  - that the health and safety of others is not put at risk from work carried out as part of the business or undertaking.
- It is important to remember that there does not need to be an accident or injury for a breach of the Act to occur. It is sufficient if the worker or other person is exposed to a risk to health and safety.
- A breach of WHS legislation is a criminal offence. If an employer or individual is found guilty of breaching the WHS legislation he/she will be convicted and will have a criminal record.

## **Primary duty of care - PCBU**

### ***Workers***

- Section 19(1) of the Act imposes an obligation on a person conducting a business or undertaking to ensure, so far as is reasonably practicable, the health and safety of:
  - workers engaged, or caused to be engaged by the person, and
  - workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking.
- The definition of a '*worker*' is broad under the Act – a person is a worker if the person carries out work in any capacity for the PCBU, including work as:
  - an employee
  - a contractor or subcontractor
  - an employee of a contractor or subcontractor
  - an employee of a labour hire company who has been assigned to work in the person's business or undertaking
  - an outworker
  - an apprentice or trainee
  - a student gaining work experience
  - a volunteer.

### ***Others***

- Section 19(2) of the Act imposes an obligation on a person conducting a business or undertaking to 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 the conduct of the business or undertaking.
- The duty imposed under section 19(2) extends to '*persons*' including students, parents, caregivers, members of the public and trespassers.

### ***Guidance***

- The obligations in section 19(1) (to workers) and section 19(2) (to others) extend, without limitation, to:
  - the provision and maintenance of a work environment without risks to health and safety
  - the provision and maintenance of safe plant and structures
  - the provision and maintenance of safe systems of work
  - the safe use, handling, and storage of plant, structures and substances
  - the provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities
  - the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking
  - that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury of workers arising from the conduct of the business or undertaking.
- Further, if a worker occupies accommodation that is owned by or under the management or control of the person conducting the business or undertaking and the occupancy is necessary for the purposes of the worker's engagement because other accommodation is not reasonably available, the person conducting the business or undertaking must, so far as is reasonably practicable, maintain the premises so that the worker occupying the premises is not exposed to risks to health and safety.

### ***Scope***

- Any activity conducted on School premises will be part of the School's undertaking and the School's duty as a PCBU will therefore apply to that activity.
- Further, any activity conducted elsewhere by the School - such as an excursion, inter school sporting event, outdoor activity such as orienteering or abseiling, or overnight camp - will also be part of the School's undertaking and again, the School's duty as a PCBU will apply to that activity. The extent of the School's duty in relation to that activity will depend on what is 'reasonably practicable'. Other persons and entities may also be duty holders in relation to those activities.
- In the Act, 'workplace' is defined broadly as a place where work is carried out for a business or undertaking and includes any place where a worker goes or is likely to be while at work.

Where a School has approved a working from home arrangement, the School's duty as a PCBU will apply to that arrangement.

### **Other duties – PCBU - duties related to specific activities**

- The Act also provides for duties of a PCBU with management or control of a workplace and a PCBU with management or control of fixtures, fittings or plant at a workplace.
- The term 'workplace' is defined broadly as a place where work is carried out for a business or undertaking and includes any place where a worker goes or is likely to be while at work.

- Sections 20 and 21 of the Act impose a duty on:
  - a person with management or control of a workplace to ensure, so far as is reasonably practicable, that the workplace, the means of entering and exiting the workplace and anything arising from the workplace are without risks to the health and safety of any person
  - a person with management or control of fixtures, fittings or plant at a workplace must ensure, so far as is reasonably practicable, that the fixtures, fittings and plant are without risks to the health and safety of any person.
- In addition, the Act states that a person who designs, imports, supplies, installs, constructs or commissions or manufacturers plant, substances or structures must ensure, so far as is reasonably practicable, that the plant, substance or structure is without risk to health and safety of persons, including those who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose such as storage, decommissioning, dismantling, demolition or disposal.

## **Duties related to specific persons**

### ***Duties of workers***

- Workers have duties under the Act while at work to:
  - take reasonable care of their own and other persons' health and safety
  - comply, so far as the worker is reasonably able, with any reasonable instruction from the person conducting the business or undertaking
  - cooperate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health and safety.
- The requirement to take 'reasonable care' is proportionate to the level of control a worker is able to exercise over his or her work activities in a work environment.
- The obligation to cooperate is not just a prohibition against obstructing or hindering a person who is attempting to comply with various safety requirements under the Act, but may also require the worker to actively assist another person. A worker must also cooperate by reporting any accidents.

### ***Duties of other persons at a workplace (including students, parents, caregivers and other visitors)***

- All persons at a workplace (regardless of whether they have another duty, such as a worker):
  - a) must take reasonable care for their own health and safety at the workplace and take reasonable care that their conduct does not adversely affect the health and safety of others at the workplace
  - b) must comply, so far as they reasonably are able to, with any reasonable instructions given by the person conducting the business or undertaking.

This will apply to students, parents, caregivers, other visitors and even trespassers.

### ***Duties of officers***

- The Act also imposes a duty of care on officers of a PCBU to exercise due diligence to ensure that the PCBU complies with its obligations. This is dealt with in more detail below.
- This is significantly different to the previous position in NSW where a person who was a director of a corporation or was concerned in the management of the corporation were automatically deemed to have breached the legislation if the corporation had breached the legislation (subject to very limited defences including the defence of due diligence).

### ***Interaction of duties***

- Under the Act, more than one person may concurrently hold a duty. That means that two or more entities or individuals can be prosecuted successfully in respect of the same incident.
- Under the Act, concurrent duty holders must discharge the duty *'to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.'* The Act also provides that duty cannot be transferred.
- The practical effect of these provisions is that organisations will be prevented from 'offloading' health and safety obligations on to single representatives or managers or other entities. Anyone who falls into a class of duty holder must discharge their duty to the extent that they have capacity to influence and control the matter.
- A person can also have more than one duty by virtue of being in more than one class of duty holder - eg. worker and officer.

### ***Duty standards***

- The standard required to fulfil each duty differs depending on the nature of the duty holder:
  - for PCBUs - the duty is to ensure *'so far as is reasonably practicable'*;
  - for workers and other persons – *'the duty is to take 'reasonable care'*;
  - for officers - the duty is to exercise *'due diligence'*.

### ***So far as is reasonably practicable***

- The Act relies on the concept of *'reasonably practicable'* in describing how a duty must be discharged by a PCBU.
- The concept of *'reasonably practicable'* is generally accepted to require a balancing of the risks to health and safety on one hand, and the practicability and cost of mitigating those hazards on the other.
- The Act requires a consideration of the following specific matters in determining reasonable practicability:
  - likelihood of hazard or risk concerned occurring
  - degree of harm that might result from the hazard or risk
  - what the person concerned knows, or ought reasonably to have known, about a hazard or a risk and ways of eliminating or minimising the hazard or risk
  - availability and suitability of ways to eliminate or minimise the hazard or risk
  - the cost of eliminating or minimising the hazard or risk.

This is not an exhaustive list.

In determining what is reasonably practicable in a given situation, no one factor is determinative and the test involves a weighing up of each of the factors in the context of the circumstances of the particular situation.

The following summary is a good guide to the principles set out in relevant case law:

Factor	Guidance
Likelihood of hazard or risk concerned occurring.	The greater the likelihood of a hazard or risk eventuating, the greater the significance this factor will play when weighing up all matters to be taken into account in determining what is reasonably practicable.
Degree of harm that might result from the hazard or risk.	The greater the degree of harm that would be likely to result if the hazard or risk eventuated, the greater the significance this factor will play when weighing up all matters to be taken into account in determining what is reasonably practicable.
What the person concerned knows, or ought reasonably to have known, about a hazard or a risk and ways of eliminating or minimising the hazard or risk.	<p>Knowledge about the hazard or risk, or any ways of eliminating or reducing the hazard or risk, must be determined objectively by reference to what the person concerned actually knows and what a reasonable person in the duty holder's position who is required to comply with the same duty should know.</p> <p>What a person knows or reasonably ought to know is commonly referred to as the state of knowledge.</p>
Availability and suitability of ways to eliminate or minimise the hazard or risk.	<p>Equipment to eliminate or reduce a hazard or risk should be regarded as being available if it is available on the open market or if it is feasible to manufacture it.</p> <p>A work process (or change to a work process) to eliminate or control a hazard or risk should be regarded as being available if it is feasible to implement.</p> <p>A way to eliminate or reduce a hazard or risk should be regarded as being suitable if:</p> <ul style="list-style-type: none"> <li>• it is feasible to implement in a specific circumstance</li> <li>• it is effective in eliminating or reducing the likelihood or degree of harm from a hazard or risk</li> <li>• it does not introduce new and higher risks, having regard to all of the circumstances</li> <li>• it is a practical measure given the circumstances in which the hazard or risk exists.</li> </ul> <p>If there are no available or suitable ways to eliminate a hazard or risk, it is necessary to consider all available and suitable ways of minimising the risk, so far as is reasonably practicable.</p>
The cost of eliminating or minimising the hazard or risk.	<p>There must be a clear presumption in favour of safety.</p> <p>Once the likelihood and degree of harm from a hazard or risk is understood, and the availability and suitability of a relevant safety measure to eliminate or reduce the hazard or risk is established, that safety measure should be implemented unless the cost of doing so is so disproportionate to the benefit (in terms of reducing the severity of the hazard or risk) that it would be clearly unreasonable to justify the expenditure.</p> <p>In determining whether a particular level of expenditure is reasonable in the circumstances, the duty holder must have regard to the:</p> <ul style="list-style-type: none"> <li>• likelihood and degree of harm of the hazard or risk</li> <li>• the reduction of the likelihood and/or degree of harm that will result if the control measure is adopted.</li> </ul>

### *Due diligence - Officers*

- The Act places a positive obligation on 'officers' of a PCBU to exercise 'due diligence' to ensure that the PCBU complies with its duties.
- This is a significant change from the old legislation which means that an 'officer' can be prosecuted for breach of their obligation to exercise 'due diligence' – even where there has been no safety incident or the company has not breached its duties.
- A Workcover inspector could ask any 'officer' to produce evidence of compliance during a routine audit. If evidence of compliance is not produced, the inspector could issue an improvement notice or prosecute if there is a serious, reckless or flagrant breach (see our comments below at paragraph 49 about volunteers). For this reason it is important that officers are ready, willing and able to demonstrate compliance.

### **Who is an officer?**

- 'Officer' is defined in the Act as, relevantly, an officer within the meaning of section 9 of the *Corporations Act 2001* (Cth) other than a partner in a partnership. Section 9 of the *Corporations Act 2001* relevantly provides that:

An officer of a **corporation** means:

- a director or company secretary
- a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the corporation
- a person who has the capacity to significantly affect the corporation's financial standing
- a person who instructs the directors how to act
- a receiver, or receiver and manager
- an administrator or liquidator
- an administrator of the corporation's deed of company arrangement
- certain trustees.

An officer of an **entity that is neither an individual** nor a corporation means:

- an office holder of the unincorporated association if the entity is an unincorporated association; or
  - a person:
    - a) who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or
    - b) who has the capacity to affect significantly the entity's financial standing.
- Under the old legislation the definition of 'officer' or 'persons concerned in the management of the business' was much broader. The narrower definition of officer in the Act means that in some organisations less people in management roles are likely to be subject to the duty (although these people will still have an obligation as a worker to exercise reasonable care).<sup>1</sup>

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<sup>1</sup> The obligation on workers includes an obligation to take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons. A person in a management role who does not qualify as an officer could be prosecuted under this provision.

### What is meant by due diligence?

- The Act expressly defines due diligence. It includes (but is not limited to) an officer taking reasonable steps to:
  - acquire and keep up-to-date knowledge of work health and safety matters
  - gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations
  - ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking
  - ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information
  - ensure that the PCBU has, and implements, processes for complying with any duty or obligation of the PCBU under this Act (e.g., in relation to reporting notifiable incidents, consulting with workers, ensuring compliance with notices issued and ensuring the provision of training and instruction to workers about work health and safety)
  - verify the provision and use of the resources and processes referred to in (c) to (e) above.
- This is a non exhaustive list of steps that need to be taken by an officer to meet their due diligence obligations. Officers should also consider whether there are any other steps they should be taking to meet their obligations.
- Officers will discharge their positive obligation if they reasonably believe that the PCBU is managing its workplace health and safety risk appropriately and can point to pro-active and specific strategies and initiatives which were designed to achieve this result. Officers will not discharge this obligation if they have taken insufficient steps to achieve compliance - even if they could not have predicted the precise breach which occurred.
- Whether an individual acted diligently depends on whether he or she took every precaution reasonable in the circumstances of that particular case. What might constitute due diligence in one situation may not be enough in another. This is because every situation and each workplace must be assessed on an individual basis.

### Prosecution and penalties

- Under the Act there are three categories of offences where a safety duty has been breached, graded to reflect the degree of recklessness of the duty holder and the seriousness of the risk or hazard involved.

Type of offence	Proposed maximum penalty for corporation	Proposed maximum penalty for individual
Category 1: <ul style="list-style-type: none"> <li>health and safety duty</li> <li>engages in conduct, without reasonable excuse, that exposes a person to whom duty is owed to a <b>risk</b> of death or serious illness or injury</li> <li><b>reckless</b> as to risk to any individual</li> </ul>	\$3,000,000	\$600,000 for officers and/or up to 5 years' imprisonment \$300,000 for workers and other persons and/or up to 5 years imprisonment
Category 2: <ul style="list-style-type: none"> <li>health and safety duty</li> <li>fails to comply with duty</li> <li>exposes individual to a risk of death or serious injury or illness</li> </ul>	\$1,500,000	\$300,000 for officers \$150,000 for workers and other persons
Category 3: <ul style="list-style-type: none"> <li>health and safety duty</li> <li>fails to comply with duty</li> </ul>	\$500,000	\$100,00 for officers \$50,000 for workers and other persons

### **Relevant Exceptions to Prosecution**

- Certain individuals and entities, while still having obligations as duty holders, are not able to be prosecuted for a breach of those obligations.

### **Volunteer Officers**

- If an officer is a 'volunteer', the officer **cannot** be prosecuted for a failure to comply with the obligation on 'officers' of a PCBU to exercise 'due diligence' to ensure that the PCBU complies with its duties.
- A person will be a volunteer for the purposes of the Act if they are '*a person who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses)*' (**Volunteer**). The Explanatory Memorandum to the Act provides that out-of-pocket expenses would include reimbursement for direct outlays of money for travel, meal and incidentals - but would not include payment of directors' fees or reimbursement for loss of remuneration.
- However, it is important to remember that an officer (whether a Volunteer or not) may also have obligations as a worker or as an 'other person at the workplace' under the Act. The exemption from prosecution for Volunteers referred to above does **not** apply to the duty of workers or other persons. On this basis, Volunteer officers **can be prosecuted** for breach of their duty as a worker or other person.

### **Unincorporated associations**

- An unincorporated association cannot be prosecuted under the Act for a failure to comply with a duty or obligation imposed on the unincorporated association under the Act.
- However:
  - a) an officer of an unincorporated association (other than a volunteer) **can be prosecuted** for a failure to comply with the obligation on 'officers' of a PCBU to exercise 'due diligence' to ensure that the PCBU complies with its duties
  - b) a member of an unincorporated association **can be prosecuted** for breach of their duty as a worker or other person.

### **Onus of Proof and Standard of Proof**

- The onus for proving each element of the offence is on the prosecutor. Because the offence is a criminal offence, each element of the offence must be proved beyond reasonable doubt.

### **Fulfilling your obligations**

- Attached to this Information Sheet is a **general checklist** for schools to achieve WHS compliance in NSW.
- In our view, the two principal areas of practical focus for schools are:
  - a) identifying and addressing the risks to health and safety of its own activities
  - b) dealings with third party providers including contractors.
- In relation to its own activities, a school should:
  - conduct a risk assessment in relation to each of its activities - that is, it should identify hazards and assess the risks associated with those hazards
  - determine whether the risk can be eliminated and, if that is not reasonably practicable, how it can be minimised
  - put in place procedures for the elimination or minimisation of the risks
  - ensure that it conducts appropriate training in relation to the safe procedures
  - ensure that it supervises the activities to ensure compliance with the procedures
  - monitor compliance and take action to enforce the safe procedures if there is a failure to comply
  - ensure that there is an appropriate system in place to report WHS incidents
  - ensure that there is an appropriate system for reporting regarding WHS generally to the management committee and/or board or council of the School.
- **Attached** to this Information Sheet is a standard **Risk Assessment Form** for schools to use.

- In relation to third party providers, such as contractors who perform work on school premises or organisations whom the School uses for excursions, camps or other outdoor activities, schools need to ensure that they are satisfied that the third party provider has taken all steps reasonably practicable to ensure health and safety. This will not necessarily include reviewing all of the third party's documentation etc (although that may be appropriate in some circumstances), but does involve the school taking steps such as:
  - a) in selecting the provider, asking questions about:
    - i. their expertise and qualifications - including the expertise and qualifications of their staff;
    - ii. their WHS policies and procedures
    - iii. what risk assessment has been undertaken and what safe procedures have been developed
    - iv. the training, supervision and monitoring which will be in place to ensure compliance with the safe procedures
    - v. their safety record.
  - b) in working with the contractor, ensuring that if any matter causes the School or its representative concern, that it raises that concern with the contractor.
- The higher the risk of the activity the more likely that the School will need to review the third party's documentation. We recommend that for very high risk activities you seek advice on this issue.
- The overlap of responsibility in this area is a difficult area of the law. Suffice to say that despite using a contractor or third party provider, a school cannot simply delegate or pass on its responsibilities under WHS law. Instead, both the school and the contractor or third party provider will have obligations.
- Schools should carefully consider the circumstances of each dealing with a contractor or third party provider and consider the extent to which they should seek information, documentation or assurances from such providers. There are no black or white answers to these questions, but if in doubt, schools should err on the side of caution.
- Schools should consider having a contractor management procedure to assist with the management of third party contractors.