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New Workplace Safety Laws and Church Volunteers

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Will church volunteers face jail under tough new OHS laws? Has this nefarious legislation stripped ordained ministers of their centuries-old status as "servants of God"? Yes to both, if you believe Imre Salusinszky's article in *The Australian* (Jan 18, 2012). In fact neither proposition is true.

Status of Ministers of Religions

Let's start with the proposition that the legislation has done something to the legal status of ministers of religion. This assertion is made in the first sentence of the article, but is not supported by any evidence except a later assertion by Bill Tobin, described as the workplace safety manager of the Uniting Church. He is quoted as saying that "Ministers were previously deemed not to be employees but servants of God receiving a stipend, not a wage". The relevance of this is said to be that, since Ministers are now "employees", then churches become "workplaces" and hence are covered by the new legislation.

It is hard to know where to start to untangle this misleading set of propositions. In fact the legal status of ordained clergy was as Mr Tobin says in the past, but in more recent years the highest courts in a number of jurisdictions have started to doubt whether it is always appropriate to apply the "only working for God" analysis to the wide range of people who work for churches in various capacities. In *Percy v Church of Scotland Board of National Mission* [2005] UKHL 73, [2006] 2 WLR 353 the House of Lords held that it should no longer be presumed that there is no intention to contract in relation to the work of a parish minister. Similar doubts were raised in the High Court of Australia decision of *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8, (2002) 209 CLR 95. Note that these were decisions of respected common law courts over the last decade, not changes recently made by legislation.

But the main problem with Mr Tobin's statement is that the employment status of ministers of religion is just **not mentioned at all** in the new legislation governing workplace safety in NSW, the *Work Health and Safety Act* 2011. (This Act is the NSW version of so-called "harmonised" workplace safety legislation that commenced in a number of States on 1 January 2012.)

Does the WHS Act apply to ministers of religion? Arguably, yes. The primary safety obligations under the legislation are imposed on "persons conducting a business or undertaking" (sometimes abbreviated to "PCBU"). The word "person" can mean either an individual or a corporate body (many traditional denominations are incorporated by Act of Parliament in their respective States; other local churches like the one I attend are often incorporated under legislation like the *Associations Incorporation Act* 2009 in NSW.) The WHS Act makes it clear in s 5(2) that even an "unincorporated association" (such as a small church with no formal legal structure) can conduct a relevant undertaking. Section 5(1)(b) says that the law applies even if the undertaking is not conducted for profit or gain.

So local churches will be conducting undertakings when they put on church services or provide sausage sizzles for the community. They will be corporately responsible to comply with s 19 of the legislation, to "ensure, so far as is reasonably practicable" the safety of "workers" as well the safety of "other persons" who may be put at risk by their actions. The minister of the church will

be classified as a "worker" whether or not they are an employee, under s 7(1) (which is why the comments about the employment status of clergy noted above were not really relevant to safety.)

There seems to be no doubt that the place where the church carries out its activity will be a "workplace" under s 8 of the Act, as it is a "place where work is carried out" for the church. There is no need to show that anyone there is a formal employee.

And none of this is radically new! The previous law on this matter in NSW was the *Occupational Health and Safety Act* 2000 (NSW). Churches under that law were obliged if they formally employed anyone to comply with s 8 of the Act to ensure safety of employees and anyone else who was at their "place of work". If they had no "employees", then the minister would have been a "self-employed person". The definition of "work" in s 4 included "work as an employee or as a self-employed person". Since at least the time of the common law decisions mentioned above, clergy have been, if not employees, arguably "independent contractors" providing pastoral services to their congregations, and hence "at work". The minister as a self-employed person had a duty under s 9 of the *OHS Act* to ensure safety of others.

Have there been many prosecutions of ministers of religion for causing harm under the Act? No, there have none to my knowledge. In general WorkCover has far more seriously risky workplaces to investigate than to spend time checking whether someone has spilled the communion wine and led to a congregation member tripping over. There seems no reason to think the practical situation will change in the future.

Volunteers Facing Jail?

What about the claims that elderly church volunteers will rot in prison for minor safety breaches at sausage sizzles? While they make good headlines, they seem also to be wrong. Yes, it is true that the definition of "worker" under the WHS Act does include "volunteers"- s 7(1)(h). Under s 28 workers do have a duty to "take reasonable care" that they do not cause harm to others.

And yes, under s 31 of the Act, a worst-case scenario where that volunteer, "without reasonable excuse", exposes someone to a risk of death or serious injury or illness, and where that exposure is "reckless", could see a potential maximum penalty of $300,000 or 5 years imprisonment.

But it has to be stressed how "worst-case" this is! Section 31 corresponds to the previous offence under the *OHS Act* 2000 created by s 32A of that Act, which was designed to be an "industrial manslaughter" provision and was introduced in 2005. There has **never** been a prosecution under s 32A. Most commentators have suggested that the standard of "recklessness" required is so high that a person would have to subjectively foresee the danger in question and consciously choose to run that risk, for there to even be an arguable case.

It should also be pointed out that there has **never** been a sentence of imprisonment handed out to **anyone** in Australia for breach of workplace safety laws. No, not even after the Longford Gas explosion or any of the other major disasters, nor after any of the tragic workplace deaths that have occurred in high risk factory and construction industries. So the chance of a court choosing to impose a sentence of imprisonment against a church volunteer? Maybe only a

touch higher than the chance you will find some real angus beef at the next church sausage sizzle!

In short, the article gets it wrong both by suggesting that harsh and unreasonable penalties are suddenly likely to be levied on innocent church volunteers and ministers (the body conducting prosecutions, WorkCover NSW, has shown no tendency to target churches in the past and is unlikely to do so in the future), and also by suggesting that the law in the area has radically changed. In recent years churches and their ministers and governing bodies should already have been thinking about possible risks created by their activities and taking reasonable steps to minimise those risks. No more, but certainly no less, is required under the new laws. Not in the interest of reduced insurance policies, but simply as part of a commitment to a Lord who tells his people to "do good to everyone" (Gal 6:10), whether they are church members or not.

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