

# NEW ZEALAND ALPINE CLUB

## Instruction, trips and legal liability

As an incorporated society, NZAC may be legally responsible for the safety of section instruction courses and trips, and must also protect its reputation as a club which promotes safe and responsible climbing. This paper outlines areas of possible liability, and suggests steps that must be taken at both section and national level to reduce the club's exposure.

### 1. Health and Safety in Employment Act

The Act is primarily about employment, but also has provisions that apply to *volunteers*, on the grounds that they should get some of the same protections as employees.

Volunteers are defined as people who don't expect *and* don't get any reward for what they do. Some sections do "reward" their instructors with subsidies on course fees (for instance outdoor first aid) and if this is a firm expectation, the volunteer could be seen as an employee.

Volunteers who regularly work for another person as an integral part of that person's business, and with that person's knowledge and consent, are treated in much the same way as employees, unless they are assisting with sports or recreation for a sports or recreation club. This probably excludes NZAC volunteer instructors from the Act, even though some work on a regular basis as instructors or trip leaders.

Volunteers who are excluded are themselves nevertheless given some protection. NZAC *should* take "all practicable steps" to ensure their health and safety "by taking hazards into account when planning the work activity" OSH, which polices the legislation, says in its Guidance Notes and Operating Procedures that this duty is not enforceable, and stresses that its policy is not to bring prosecutions about any volunteers. However s 49 of the Act itself seems to impose penalties for a failure to take any action required by the Act, knowing that this is reasonably likely to cause serious harm. NZAC's failure to ensure that people with inadequate skills did not instruct on section courses might for instance make it liable for a fine in cases where there was a risk that these volunteers would suffer serious harm.

The Act also has provisions about *contractors*. They are not employees, but the people who employ them *shall* take all practicable steps to ensure that they are not harmed while working. Guides or others hired by NZAC at section or national level to help with instruction or instructor training fall into this category, and the same penalties could apply. For instance the failure to inform a contractor of a student's disability or medical condition, or the provision of

inadequately maintained club gear may put that contractor at risk of injury.

“All practicable steps” relates to the severity of the injury that might be suffered by the volunteer, the current state of knowledge about how likely it might be, and the availability and cost of means of avoiding it. “Practicable” means reasonably practicable, “and the “steps” required are to avoid harm that a person knows or ought reasonably to know about. In both the examples given above, it would have been “reasonably practicable” for the club to take the steps necessary to avoid harm.

For NZAC as a whole, these steps include the procedures endorsed by CCM for ensuring some national uniformity in what we teach and who teaches it, backed up by bench-marking ourselves against good practice in the outdoor instruction industry – for instance by involving qualified people such as guides in instructing our instructors and vetting our syllabuses. Risk assessment exercises and current first aid qualifications are also required, and there needs to be some way of monitoring what goes on in the sections.

The HSE Act may also apply to volunteer leaders on club-sponsored trips in the same way as it does to instructors.

There’s plenty of room for legal argument in all this, but it would be much better for us if OSH was not even tempted to get into them because we have taken “all practicable steps” to minimise the safety risks for our volunteer instructors and paid professionals, and can produce the paper trail to prove it. These legal requirements match our safety objectives in any event.

It is not possible to insure or indemnify against liability for penalties under the Act, and exclusion clauses or disclaimers will be ineffective.

## **2. Crimes Act**

While the HSE Act does not give NZAC any duties towards participants on instruction courses or trips, the Crimes Act can make instructors and leaders liable for endangering participants’ lives, safety or health.

There are three ways this can happen:

### **?? *Criminal nuisance (section 145)***

This section provides that “Everyone commits criminal nuisance who does any unlawful act or omits to discharge any legal duty, such act or omission being one which he knew would endanger the lives, safety or health of the public, or the life, safety or health of any individual”.

The *Andersen* cycle race decision that a conviction under this section could be based on ordinary negligence alone has now been overturned by the Court of Appeal. For a conviction under s 146 it must now be shown that a defendant either knew he was endangering lives, safety or health, or was reckless whether he did or not. This is more difficult to prove than negligence, which is not much more than simple carelessness.

?? ***Dangerous things (Section 156)***

In the *Andersen* case the “unlawful act” in question was a breach of Section 156 of the Crimes Act.

This section provides that anyone who is in charge of “anything whatever, .... which, in the absence of precaution or care, may endanger human life is under a legal duty to take reasonable precautions against and to use reasonable care to avoid such danger”.

The cycle race in *Andersen* was held to be “anything whatever”, and to endanger human life. A rock or mountain instruction course or trip organised by the club at section or national level would also qualify.

This crime also stands on its own., rather than just as a ingredient of criminal nuisance under Section 145.

?? ***Dangerous acts (Section 155)***

This section provides that “everyone who undertakes (except in cases of necessity) to administer surgical or medical treatment, or to do any other lawful act the doing of which is or may be dangerous to life, is under a legal duty to have and use reasonable knowledge, skill and care in doing any such act”.

This section could include first aid or rescue exercises (crevasse extraction, escaping the system) or self-arrest, or prusiking in the hut, or any one of a number of inherently dangerous things we might get the students to practice. Instructors and trip leaders should have the reasonable knowledge, skill and care appropriate for volunteers rather than professionals, though it might be hard to argue in some cases that there is more than one “right” way to do things.

Again a crime under this section could either stand alone or be the unlawful act for Section 145.

Criminal liability falls on the individual, though officers of the NZAC at national or local level or the club itself could also be charged if responsibility can be traced back to them, for instance because they had not adopted any standards or checked that instructors knew what they were doing.

Until the *Andersen* decision, there was not much awareness that volunteers organising outdoor activities could be made criminally liable for the injury or death of participants. Now that recklessness rather than negligence is the test, findings of guilt are less likely, but the police and lawyers are probably more aware that prosecutions like this can be brought.

Again insurance and indemnities are not permitted, and disclaimers are ineffective. Our defence against liability under the Crimes Act is the same as it is for the HSE Act – making sure that we have good safety standards and applying them.

### **3. Civil negligence**

The final area of legal liability is civil negligence. For personal injury this is mostly a dead letter in New Zealand, because of accident compensation. But it is still possible to sue for exemplary damages, if there has been intentional damage or gross negligence. This is much the same test as for criminal liability.

The individual concerned or NZAC itself could be liable for damages. The steps we can take to avoid liability are the same as they are for criminal liability, but insurance and indemnities are lawful, and exclusion clauses can offer some protection.

### **4. Coroner's court**

The coroner's job is not to impose penalties, but he can be critical of people and institutions that he thinks have contributed to a death. Lawyers for relatives can also appear before a coroner, in preparation for later criminal or civil actions, and their submissions can be damaging.

### **Reputation**

Conviction (or sometimes even acquittal) in criminal proceedings, liability for damages or adverse comment from a coroner would all have a strongly adverse effect on NZAC's reputation, and this could be very damaging to our authority as a climbing organisation and our ability to attract members. The level of media interest in climbing accidents adds to the reputation effect.

The legal requirements are basically about not being reckless in an environment which is often inherently dangerous. We can't object to these requirements, and must try to follow national standards that measure up to them, without reducing the enthusiasm and adaptability of the sections and their volunteers.

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17.5.05