This guide sets out the basic understandings of occupational health and safety laws for community organisations in Victoria.

September 2017
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Part 1 – Do OHS laws apply to out not-for-profit community organisation?
The Victorian OHS laws aim to improve the standards of workplace health and safety to reduce the chances of work-related injury and illness from occurring.

In Victoria, occupational health and safety (OHS) in the workplace is principally regulated by the Occupational Health and Safety Act 2004 (Vic) and the Occupational Health and Safety Regulations 2017 (Vic) \((\text{Victorian OHS laws})\). The regulator of these laws in Victoria, in September 2017 is Worksafe Victoria (the \text{Victorian WorkCover Authority}).

There are different laws in other States and Territories and your organisation will need to check these other obligations if it operates outside of Victoria.

The Victorian OHS laws will apply to all community organisations that have employees, and may also apply to community organisations that are completely volunteer-based where they conduct work or activities at a "workplace".

To work out whether the Victorian OHS laws apply to your community organisation, you will need to consider whether your organisation:

- is an ‘employer’, and/or
- is an organisation that manages or controls a ‘workplace’.

These two questions are dealt with separately below.

### CAUTION

Alongside the duties imposed on employers under Victorian OHS laws, there are also common law duties to provide employees with a safe workplace. The common law is the law that has been developed by the courts when deciding cases over time. Under the common law, all employers have a legal duty to take reasonable care to avoid exposing employees (and others who might be exposed to risks from the business) to reasonably foreseeable risks of injury. These obligations are not exhaustively covered in this guide, and independent advice should be sought in relation to a question about these common law duties.

### Is our community organisation an ‘employer’?

The Victorian OHS laws apply to all ‘employers’ in Victoria, whether they are not-for-profit or for-profit. Your community organisation will be considered to be an ‘employer’ if it:

- employs one or more people under a contract of employment (i.e. has at least one ‘employee’), or
- employs one or more people under a contract of training (i.e. has at least one ‘trainee’ or ‘apprentice’).

Therefore, your organisation will not be an employer if it operates exclusively on the basis of assistance provided by volunteers who do not have a contract of employment or training.
NOTE

For the purpose of determining whether a community organisation is an ‘employer’:

- it is not relevant that a community organisation relies heavily on volunteers - if an organisation employs even one person (e.g. a part-time bookkeeper), it may be considered an ‘employer’ under the OHS Act and should to comply with all of the ‘employer duties’, and
- it is not relevant if your organisation is an unincorporated entity – the OHS Act also applies to unincorporated bodies who are ‘employers’, and a breach of the OHS laws could mean a committee member is personally liable.

If your community organisation is an ‘employer’, you are required to meet a number of obligations under the Victorian OHS laws. We have listed these obligations under the heading: If Victorian OHS laws do apply, what are the specific duties?

Does our community organisation manage or control a workplace?

If your community organisation is not an ‘employer’, your organisation may still be required to comply with Victorian OHS laws if it has ‘management or control of a workplace’. Under Victorian OHS laws, a ‘workplace’ is broadly defined as a place, whether or not in a building or structure, where ‘employees’ or ‘self-employed persons work’.

Therefore, if your community organisation manages or controls a place where employees or self-employed persons work, then the place will be considered a ‘workplace’, and your organisation may owe a duty of care to ensure that the workplace (and access to the workplace) is safe and without risks to the health of people in the vicinity. The various duties owed within a workplace are listed below under the heading: If Victorian OHS laws do apply, what are the specific duties?

It is important to note that even if your community organisation has no employees, is completely volunteer-based and does not engage contractors or consultants, it may still be taken to ‘manage or control a workplace’. This is because the Victorian OHS laws do not require that your community organisation be involved in the engagement of those persons. All that is required is that your community has a degree of control over the place at which the work is carried out.

This will mean that if the place at which the community organisation carries out its work has contractors or other self-employed persons who attend the workplace from time-to-time, then this place may be a ‘workplace’ for the purposes of the Victorian OHS laws and your organisation may owe a duty of care in relation to that workplace.

EXAMPLE

A community centre or community hub may have a range of organisations that operate within the same building. Some of the community organisations operating out of the centre may be entirely volunteer-based, whereas others have employees. If this is the case, a volunteer-based organisation with management and control of the centre will still be required to comply with the ‘workplace’ duties in the OHS Act.
If your community organisation operates in a “workplace”, you will have a number of obligations under the Act. You can find a summary of these obligations, together with practical examples under the heading: If Victorian OHS laws do apply, what are the specific duties? (at page 8 of this Guide).

What if our organisation does not employ people and does not manage or control a workplace?

If your community organisation is not an employer and the people involved in your organisation have no contact with a ‘workplace’ that is managed or controlled by your community, the Victorian OHS laws are unlikely to apply.

**EXAMPLE**

An entirely volunteer-run group meets in each other’s homes regularly to discuss their organisation’s progress and plan for the future. Because there are no employees in the organisation and no employees are present in the various homes, Victorian OHS laws will not apply.

However, there may be other laws which are applicable to your specific circumstances and which may create obligations and/or duties of care. If you are unsure as to what laws or duties apply to your community organisation outside of the Victorian OHS laws, you should seek independent legal advice.

**CAUTION**

If your community organisation is not an employer, and does not operate in a workplace, this does not mean you can ignore health and safety altogether! Your organisation may not have to comply with Victorian OHS laws, but will still need to take reasonable care to ensure that volunteers and members of the public who come in to contact with the organisation and its activities are safe.
Part 2 – If Victorian OHS laws do apply, what are the specific duties?
If Victorian OHS laws do apply, what are the specific duties?

This section covers

- What are the duties under OHS laws?
- What should our organisation do to meet these duties?

There are many duties under OHS laws.

This section outlines the key duties under OHS Laws and who they apply to, and what the duties require community organisations to do in order to meet their obligations.

What are the duties our organisation has under OHS laws?

Once you have worked out whether your community organisation is an ‘employer’, or ‘manages or controls a workplace’, the following table provides a list of the key responsibilities that community organisations have under Victorian OHS laws.

More information about each of the below duties is set out under the heading: Specific information on the key duties owed under the OHS Act.

<table>
<thead>
<tr>
<th>Responsibility under Victorian OHS laws (Note: click on key duties for more details)</th>
<th>Section of Act</th>
<th>Organisation with at least one ‘employee’</th>
<th>Organisation who ‘controls or manages a workplace’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provide and maintain a working environment that is safe and without risks to health</td>
<td>s.21</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Monitor the conditions of the workplace and the health of employees</td>
<td>s.22</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Protect other people from risks arising from the organisation’s activities</td>
<td>s.23</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Keep the workplace (including all entrances and exists) safe and without risks to health</td>
<td>s.26</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>

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<table>
<thead>
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<th>Section of Act</th>
<th>Organisation with at least one ‘employee’</th>
<th>Organisation who ‘controls or manages a workplace’</th>
</tr>
</thead>
<tbody>
<tr>
<td>Take care in the design, manufacturing, installation or supply of plant, substances and materials (such as machinery and equipment)</td>
<td>s.27-31</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Not to recklessly endanger a person who is at the workplace</td>
<td>s.32</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Consult with employees on OHS issues</td>
<td>s.35-36</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Notify Victorian WorkCover Authority about certain incidents and preserve the incident site</td>
<td>s.38-39</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Hold appropriate licenses, registrations and permits where required</td>
<td>s.40-42</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>On request, negotiate with employees to establish a designated work group to represent employees on health and safety issues</td>
<td>s.43-44</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>On request, establish a health and safety committee</td>
<td>s.72</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Attempt to resolve OHS issues with employees (or representative) within a reasonable time frame</td>
<td>s.73</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Not to discriminate against those people who are involved in health and safety matters</td>
<td>s.76</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Allow access to an authorised representative who is acting within his or her powers</td>
<td>s.93</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>On request, produce OHS documentation and answer questions put to them by the inspector</td>
<td>s.100</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Comply with a non-disturbance notice issued by an inspector</td>
<td>s.110</td>
<td>✓</td>
<td>✓</td>
</tr>
</tbody>
</table>
Responsibility under Victorian OHS laws  (Note: click on key duties for more details) | Section of Act | Organisation with at least one ‘employee’ | Organisation who ‘controls or manages a workplace’
--- | --- | --- | ---
Comply with an improvement notice issued by an inspector | s.111 | ✓ | ✓
Comply with a prohibition notice issued by an inspector | s.112 | ✓ | ✓
Comply with a direction given by an inspector at the workplace | s.120 | ✓ | ✓
Not to intentionally obstruct, mislead or intimidate an inspector who is performing his or her functions or powers | s.125 | ✓ | ✓

CAUTION

There are also further duties and obligations set out in the OHS regulations that will be specific to certain employers and workplaces. These cover topics such as manual handling, noise, prevention of falls, confined spaces, plant, high risk work, hazardous substances and materials, hazardous industries, licensing and registration. Community organisations must be aware of and comply with these duties.

Specific information on key duties owed under the OHS Act

This part provides more information about the key duties under Victorian OHS laws.

As you read more detail about each of the duties, you will notice that many of these responsibilities require a community organisation to ensure that risks to health and safety are eliminated or reduced so far as is ‘reasonably practicable’. To find out more about what ‘reasonably practicable’ means, and what your organisation can do to make sure it complies with this standard of care, see: What can your community do to comply with Victorian OHS laws?

Duty to provide and maintain safe and healthy working environment (s.21)

1. **Who must comply with this duty?**
   
   All community organisations that are employers must comply with this duty.

2. **What is the duty?**
   
   Community organisations that are employers must, so far as reasonably practicable, provide and maintain a safe and healthy working environment. Employers must ensure:
• there are safe systems of work (e.g. employees are not required to lift heavy objects in an unsafe manner)
• all plant and equipment (machinery, equipment, appliances or tools) remain safe
• there is safe use, handling, storage and transport of plant and substances
• there are adequate welfare facilities made available to employees (e.g. first aid, dining, bathroom facilities), and
• there is appropriate information, instruction, training and supervision for employees.

3. Who is the duty owed to?
A community organisation employer owes this duty to its employees and any independent contractors or consultants it engages (as well as any employees of those independent contractors or consultants). This duty does not specifically apply to volunteers, but employers do owe a similar duty to volunteers and members of the public that are at the workplace or who are affected by their activities.

CASE EXAMPLE
A support worker at a not-for-profit, non-government organisation was injured while travelling in a car by a client with autism. The client had previously assaulted a staff member. The organisation made no changes to the way it moved clients following the previous incident. The court found the organisation failed to maintain a safe working environment and fined it $15,000. On appeal, the fine was reduced to $10,000. The organisation now uses a vehicle to transport the client which has a row of seats separating the client and the workers.

DPP v Golden City Support Services (Unreported, Bendigo County Court, Patrick J, 26 August 2016)

CASE EXAMPLE
A religious charity organisation operated a residential care facility for intellectually disabled clients with challenging behaviour problems. A worker at the facility was attacked by residents on two separate occasions. One the first occasion, a resident assaulted the worker with a used syringe that the client had found in a public toilet while on an outing. Ten months later, a different resident assaulted the worker. Both residents had histories of physical aggression. The magistrate found that the assault (with the syringe) could have been life threatening, and that the organisation did not provide sufficient supervision on the outing. The magistrate also found the organisation provided its workers with little training in self defence, and that staff levels were inadequate to deal with the residents known to have violent tendencies. The organisation was ordered to pay fines totalling $27,300.

Australian Services Union of NSW (Ms Kristyn Thompson) v Mercy Centre, Lavington Limited [2005] NSWCIMC 156 (13 October 2005)

Duty to monitor workplace conditions and health of employees (s.22)

1. Who must comply with this duty?
All community organisations that are employers must comply with this duty.

2. What is the duty?
Employers must, so far as reasonably practicable, monitor the health of employees, the conditions of their workplace, and provide information to employees concerning health and safety at the workplace. Where reasonably practicable, community organisations must:

- keep information and records on employee health and safety (eg first aid records and relevant employee medical information), and
- engage a suitably qualified person to advise the organisation on employee health and safety.

3. **Who is this duty owed to?**

Employers owe this duty to its employees. ‘Monitoring’ might include for example, the monitoring of fatigue in employees who are working long shifts, regularly testing the hearing of those employees exposed to high noise levels or arranging medical tests if employees are regularly exposed to certain substances.

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**CAUTION**

Community organisations should ensure that they monitor the mental health of their employees. This may involve consulting with employees about mental health, discussing mental health issues with the health and safety committee (where one exists, or even establishing such a committee) and using focus groups and regular employee surveys.

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**TIP**

In order to meet this duty, community organisations might consider engaging a suitably qualified person to advise on OHS:

- during periodic OHS reviews of the operations of the organisation
- when developing and implementing systems for the long term management of OHS
- when establishing OHS consultative and issue resolution structures for the workplace
- when planning to modify the work premises, plant, substances or materials for use at work
- before changes to work practices and systems of work are introduced
- when establishing new operations or projects
- when new OHS information becomes available from an authoritative source
- when a hazardous exposure or incident, injury, illness or adverse result of environmental or health monitoring indicates that risk control measures are inadequate, and
- when managing complex issues related to psychological health such as bullying and stress.

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**CAUTION**

Employing or engaging a suitably qualified person to provide OHS advice does not guarantee legal duties and responsibilities under the OHS Act and Regulations will be met. Legal duties and responsibilities cannot be transferred or delegated to a consultant. If an employer is found to be in breach of their duties, it is not a defence to have relied on the advice or recommendations of a consultant. Therefore it is important for community organisations that employ or engage a person for advice to stay actively involved in OHS issues, including monitoring and reviewing risk controls.
Duty not to expose other persons to risk (s.23)

1. Who must comply with this duty?
All community organisations that are employers must comply with this duty.

2. What is the duty?
Community organisations who are employers must, so far as reasonably practicable, ensure that people are not exposed to risks to their health and safety arising from the employer's conduct, activities or operations. This will include:

- any activity which is done in the course of carrying on the organisation’s activities (e.g. holding a fun day at a community kindergarten)
- when performing work or providing services at one or more places (regardless of whether these are carried on within a defined physical boundary), and
- any activity which is ancillary to the organisation’s operations (e.g. contractors cleaning a premise after hours).

3. Who is this duty owed to?
Employers owe this duty to everyone, not just employees. The duty therefore extends to volunteers, independent contractors or consultants (and the employees of contractors or consultants) and any other members of the public that might be affected by the organisation’s activities.

**EXAMPLE**
A charity organisation, staffed by employees and volunteers, arranges a sausage sizzle to raise money. The event takes place at a local park, where an employee and volunteer are responsible for the set up of a barbeque. They recklessly cause a gas leak which results in a minor explosion. The employee, volunteer and a passer-by are injured. As the charity is an employer, it will owe a duty to all three injured parties (the employee under section 21 of the OHS Act and the volunteer and passer-by under section 23 of the OHS Act).

**EXAMPLE**
A council allowed 21 volunteer members of a cricket club to remove cement render and sheeting from the walls of its premises. Members of the club were exposed to asbestos in the process. Prior to conducting the work, the council failed to make enquiries as to the presence of asbestos in the walls of their buildings. The court found that the council failed to ensure that people (volunteer members of a community organisation) were not exposed to risk as a result of an undertaking. The council was found to have breached the OHS Act and fined $20,000.
Duty to keep the workplace safe and without risks to health (s.26)

1. Who must comply with this duty?
All community organisations that are employers and/or control or manage a workplace to any extent must comply with this duty.

2. What is the duty?
This duty requires community organisations to ensure, as far as is reasonably practicable, that the workplace, and the means of entering and leaving it, are safe and without risks to health. This duty is on the controller or manager of the workplace, which means that it will often be the responsibility for an entity even when it is not the owner of the premises. Accordingly, a number of parties who jointly occupy a premises might owe concurrent duties under this section.

3. Who is the duty owed to?
This duty is not limited to people employed at the workplace, it also extends to any person who is likely to enter the premises at some stage. This could include volunteers, clients, customers, service providers, contractors and others who enter the workplace.

Example
A community organisation is temporarily leasing office space. The organisation has been made aware that the front doormat has been damaged and protrudes from the ground, however fails to remove the tripping hazard. A maintenance person arrives to fix the air-conditioning unit and trips on the mat, causing injury. The community organisation may be liable under s.26 as it was in control of the workplace and the means of entering it at the time, even though it does not own the premises.

Duties to take care in the design, manufacturing, installation or supply of plant, substances and other materials (ss.27-31)

1. Who must comply with these duties?
Any community organisation that designs, manufactures, supplies or installs:
- equipment used in a workplace (e.g. machinery, appliances or tools)
- substances used in a workplace (e.g. natural or artificial substances, whether in solid, liquid, gaseous or vapour forms), or
- structures or buildings that comprise a workplace.

2. What are the duties?
If you think your community organisation may be subject to these duties, you should seek legal advice about your obligations under the Victorian OHS laws as they are complex duties that require expert advice. It is not anticipated however that many not-for-profit organisations will fall within the scope of these duties, as they are intended to apply to specialised businesses involved in the design, manufacture, supply, installation and maintenance of plant, machinery and equipment or substances.
3. **Who are the duties owed to?**

These duties are broad and owed to all people who might use or be affected by the design, manufacturing, installation or supply of plant, substances or materials.

### Duty not to recklessly endanger persons at workplaces (s.32)

1. **Who must comply with this duty?**

All community organisations who are employers and/or control or manage a workplace. Each person in the organisation must also comply with this duty.

2. **What is the duty?**

All community organisations and persons at the workplace have a duty not to recklessly engage in conduct that may place another person who is at a workplace in danger of serious injury.

A person will be reckless where they do an act (or omit or fail to do something), knowing that serious injury is foreseeable and a probable consequence of their act or omission. Serious injury includes both physical and mental injuries that are significant and severe (for example injuries which impair enjoyment of life or ability to work in the future).

3. **Who is the duty owed to?**

This duty is owed to everyone who comes in contact with the workplace, including employees, independent contractors (and their employees), volunteers and any other members of the public who would be affected by the community organisation’s conduct.

### EXAMPLE

A volunteer-based, environmental lobby group is protesting outside a science laboratory. Inside the building, an experiment being carried out causes toxic fumes to escape. An emergency evacuation of the building is called, however, when attempting to exit the building, the employees inside are blocked at the exit by the group. The lobby group recklessly delays the evacuation procedure and some employees are rushed to hospital because they have inhaled toxic fumes. The lobby group members may be found guilty of an offence under section 32 of the OHS Act in these circumstances.

### EXAMPLE

An employee of a community organisation directed a volunteer to drive a truck of donated furniture to one of the organisation’s stores. The truck that the volunteer was instructed to drive had defective brakes and the employee knew this. While driving to the store, the volunteer attempted to apply the brakes which failed. The volunteer swerved to the left side of the road to avoid traffic and collided with the support column of a road sign. The volunteer died as a result of the injuries sustained in the collision. The employee who directed the worker to drive the truck may be found guilty of an offence under section 32 of the OHS Act in these circumstances.
Duty to consult with employees on OHS matters (ss.35-36)

1. Who must comply with this duty?
All community organisations that are employers must comply with this duty.

2. What is the duty?
Community organisations who are employers have a duty to consult with their employees and independent contractors regarding matters that affect, or could possibly affect their health and safety. Employers are required to consult with employees on the following matters:

- identification of hazards or risks to health and safety at the workplace
- making decisions about ways to control risks to health and safety
- making decisions about the adequacy of facilities
- making decisions about various health and safety procedures
- determining the membership of a health and safety committee
- proposing changes that may affect health or safety
- establishing designated work groups represented by health and safety representatives, and
- establishing health and safety committees.

Consulting with employees requires the employer to provide employees with information about these matters. It would also mean giving the employees a reasonable opportunity to express their views about matters affecting health and safety and taking those views into account. In some circumstances, it may be necessary to arrange members of designated work groups to elect a health and safety representative from among the group. The views of employees can be effectively communicated to an employer through a health and safety representative.

Figure 1: The meaning of consultation

[Diagram showing the meaning of consultation with labels for Reasonable opportunity and Timely manner]

Source: Michael Tooma, Due Diligence; Horizontal and Vertical Consultation (CCH Australia Limited, 2012)
3. Who is this duty owed to?

Employers must consult with their employees and any independent contractors / consultants they engage. This does not extend to volunteers; however it is best practice for community organisations to include volunteers in these consultations.

TIP

While the duty to consult is not owed to volunteers, it is a good idea to involve all people involved in a community organisation in health and safety work practices. Volunteers will often have some great ideas about how to make the workplace safer, to reduce the risk of injuries.

Duties about notifying of an incident and preservation of site (ss.38-39)

1. Who must comply with this duty?

All community organisations that are employers who have the management and control of a workplace must comply with this duty. Even where there is a manager or supervisor on duty, the ultimate responsibility to report incidents will rest with the employer (e.g. your community organisation).

2. What is the duty?

This duty creates an obligation on employers to immediately notify the Victorian WorkCover Authority of serious workplace incidents. For further information on this duty, including the types of incidents that will require notification and the process for notifying the Victorian WorkCover Authority, please see (page 30): What should your organisation do if there is a workplace incident?

3. Who is this duty owed to?

This duty is owed to all employees, volunteers and members of the general public who are seriously injured or affected by a workplace incident.
Part 3 – Who may be legally responsible under Victorian OHS laws?
Who may be legally responsible under Victorian OHS laws?

The short answer to this question is that it will depend on the circumstances, however there is a chance that both your organisation and its individual officers could be liable for failure to comply with Victorian OHS laws. The Victorian WorkCover Authority is able to prosecute the organisation, its officers, or in some circumstances, both of these.

Liability of the community organisation itself

Incorporated community organisations

If your community organisation is incorporated (such as an incorporated association or a company limited by guarantee), the organisation itself is considered to be an employer or ‘person’ for the purposes of the Victorian OHS laws and can be found guilty of breaches of the OHS Act.

This means that an incorporated organisation as a whole can be held responsible for breaches of the Act by its officers, employees, or agents, where those officers, employees or agents are performing tasks within the scope of their authority.

The fines that can be given for a breach by a not-for-profit organisation are potentially the same as they are for for-profit organisations, and they are significant (the maximum penalty is well over $1 million, although it is likely that lesser fines would be given in most circumstances). In addition to finding the incorporated community organisation liable, the Victorian WorkCover Authority may also prosecute the organisation’s officers personally (see below for more information on ‘officers’ of a community organisation).

Unincorporated community organisations

If your community organisation is unincorporated, it is not recognised by law and cannot itself be prosecuted for breaches of the Victorian OHS laws.

However, as with an incorporated organisation, the ‘officers’ or individual members of an unincorporated organisation can be held personally liable for a breach, and could potentially incur penalties where there has been a serious failure to take reasonable care to prevent or report workplace injuries.

Please see below for further information on who will be considered an ‘officer’ of a community organisation.
The ‘officers’ of a community organisation

Under certain circumstances, the Victorian WorkCover Authority can also look to prosecute the officers of a community organisation when there has been a breach of the Victorian OHS laws.

Who is an officer?

Under Victorian OHS law, ‘officers’ of a community organisation (whether incorporated or unincorporated) will include any of the following:

- a member of a committee of management of a community organisation
- a person who makes decisions that affect the whole or a substantial part of the operations of a community organisation
- a person who has the capacity to significantly affect the community organisation’s financial standing
- a person who commonly instructs the committee of management how to perform its functions, and
- various people who may be involved in a community organisation as a receiver, administrator, liquidator or trustee of a community organisation.

Figure 2: Who is an ‘officer’?
When can officers be personally liable?

Paid officers

An officer of a community organisation (whether incorporated or unincorporated), may be found personally liable for a breach of the Victorian OHS laws if:

- they receive payment for their position as an officer in the organisation (that is, they are not a volunteer officer), and
- they fail to take reasonable care, so that a breach of a duty (that the organisation is required to comply with) may be attributable to them personally.

Volunteer officers

Volunteer officers of an organisation will generally not be held liable for breaches of the Victorian OHS laws for anything done by them in a volunteer capacity, even where they fail to take reasonable care. However, they must act in good faith in that capacity at all times and not recklessly engage in conduct that may place another person who is at a workplace in danger of serious injury in order to avoid potential prosecution. The Act defines a ‘volunteer’ as being a person who is acting on a voluntary basis, namely those individuals who are not being compensated for their work.

Therefore, if your community organisation is made up of officers who are volunteers, then the Victorian OHS laws will generally not hold your volunteer officers personally liable for breaches of the organisation’s duties as an employer. However, as noted earlier in this Guide, a volunteer officer may, in their personal capacity, still owe duties under Victorian OHS Laws where they are managing or controlling the workplace at the time of an incident. There will also be other duties under common law that will require a standard of care to be met in these circumstances.

What is a ‘failure to take reasonable care’?

In determining whether an officer of an organisation has failed to take reasonable care and may be guilty of an offence, the Victorian WorkCover Authority will consider:

- what the officer knew about the likelihood of an incident occurring
- the extent of the officer’s ability to make, or participate in the making of, decisions that could have prevented the incident, and
- whether the incident occurred due to an act or omission of any other person.

**CASE EXAMPLE**

A research and public display facility allowed members of the public to feed and interact with bats. The facility’s staff (many of whom were volunteers) and visitors were exposed to scratches and bites from the bats and a risk of infection. None of those interacting with the bats were notified of the risk or treatment. An officer of the facility was aware of the risk of infection yet failed to implement proper procedures and protocols to eliminate or reduce the risk. The officer was sentenced to a 12-month court-ordered undertaking with a recognisance (similar to a bond, if the court order is not followed the sum is forfeited) of $10,000 and ordered to pay court costs of $1,082.

*Australian Services Union of NSW (Ms Kristyn Thompson) v Mercy Centre, Lavington Limited* [2005] NSWCIMC 156 (13 October 2005)
TIP

If you take on a paid position as an ‘officer’ in a community organisation, you may have responsibilities under the OHS Act and are potentially liable if something goes wrong. Therefore, it is a good idea to make sure you are aware of your organisation’s obligations under the OHS Act and the measures that are being put in place to eliminate or minimise risks.

In many cases, a breach of a duty in the OHS Act will only be found when a community organisation (and its officers) did not take reasonably practicable steps to eliminate or reduce a risk. You should ensure that OHS is seriously discussed regularly at the committee meetings so that you can satisfy yourself that all reasonably practicable steps are being taken to ensure a safe working environment for people involved in your community organisation.
Part 4 – What can your community organisation do to comply with Victorian OHS laws?
What does ‘reasonably practicable’ mean?

You may have noticed that many of the duties within the Victorian OHS laws require that employers do what is ‘reasonably practicable’ in the circumstances to ensure they have met their obligations to provide a safe and healthy working environment.

This standard of care requires the employer to eliminate potential risks to health and safety, or where this is not reasonably practicable, reduce the risks to an acceptable level. In this context, risk prevention and elimination will depend on:

- the likelihood of the hazard or risk concerned eventuating
- the degree of harm that would result if the hazard or risk eventuated
- what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk
- the availability and suitability of ways to eliminate or reduce the hazard or risk, and
- the cost of eliminating or reducing the hazard or risk.

In Australia, the courts have confirmed that:

- something will not be ‘reasonably practicable’ simply because it is physically possible
- what is ‘reasonably practicable’ is judged according to what was known at the time of the alleged breach, and
- to determine what is ‘reasonably practicable’, it is necessary to balance the likelihood of the risk occurring against the cost, time and difficulty involved in removing that risk.

**Figure 3: The meaning of ‘reasonably practicable’**
The Victorian WorkCover Authority has published a useful guide for workplaces entitled ‘Controlling OHS hazards and risks’ which sets out methods for organisations wishing to identify and limit OHS hazards in the workplace. A link to the Victorian WorkCover Authority site is available at the end of this guide under Resources.

The Victorian WorkCover Authority advises duty-holders to undertake a four stage process to controlling OHS risks which requires community organisations to:

1. identify any hazards within the workplace
2. assess the risks that may result as a consequence of the hazards
3. decide on appropriate control measures to prevent or minimise the level of the risks, and
4. implement those control measures and monitor and review those control measures.

**Figure 4: Steps in controlling OHS hazards and risks**

![Diagram showing the four steps in controlling OHS hazards and risks]

Source: Worksafe Victoria, *Controlling OHS hazards and risks* (June 2017)
When determining what controls are appropriate, the OHS Act requires you to apply the hierarchy of controls by implementing the highest order of controls before the lower order of controls.

**Figure 5: The hierarchy of controls**

![Diagram of the hierarchy of controls](source)

**Source:** Worksafe Victoria, *Controlling OHS hazards and risks* (June 2017)

**TIP**

The cost of eliminating or minimising risks may be a relevant factor for many community organisations with limited resources. However, if there is an incident in the workplace, it is not a defence to a breach of the OHS Act to claim “We are a not-for-profit group and we couldn’t afford to reduce that risk.” If you cannot eliminate or minimise the risk, you should cease the activity which gives rise to the risk.

To reduce your chance of being found guilty for a breach of the OHS Act, your organisation needs to be able to show (documented proof is best!) that it has identified and considered risks and then took practical steps within its resources to eliminate or reduce those risks. Often these don’t need to be expensive measures. For example, if your volunteers are lifting items, you are not obliged to buy an expensive hydraulic lifting machine, but instead you could train volunteers in safe lifting practices and post reminder notices around the premises to comply with the same OHS duties.

Your community organisation may wish to review its approach to risk management, as well as review the appropriate insurance options. Not-for-profit Law has produced a separate guide to risk management and insurance which is located at [www.nfplaw.org.au/insurance](http://www.nfplaw.org.au/insurance).
What are the obligations of an employee?

Under Victorian OHS laws, an employee is a person employed under a:

- contract of employment, or
- contract of training.

Employees have a duty to take reasonable care for their own health and safety and for the health and safety of others who may be affected by their actions while at work (section 25 of the OHS Act).

In determining whether an employee has breached this section, your organisation should consider:

- whether the employee acted in a manner consistent with the skills and expertise of a reasonable person in the employee’s position, or
- whether the employee acted within the organisation’s OHS policies and procedures.

Employees also have a duty not to recklessly engage in conduct which places, or may place another person in danger of serious injury. This is consistent with section 32 of the OHS Act as detailed above (see the examples on page 16 and 17).
Part 5 – What should your organisation do if there is a workplace incident?
What should your organisation do if there is a workplace incident?

There is no ‘one size fits all’ response to an OHS incident or complaint. The best and most appropriate response will largely depend on the nature of the incident, however there are some incidents that require immediate responses and notification to the Victorian WorkCover Authority under Victorian OHS laws.

There are significant penalties for employers who fail to follow the correct procedures in the wake of a serious workplace incident. These procedures, together with the types of incidents that require notification are discussed below.

Initial response to an incident

Immediately after a workplace incident, the first thing a community organisation should do is assess the seriousness of the incident and find out whether an injury has occurred to any person, irrespective of whether they are an employee or not.

If an injury has occurred, you should apply or seek immediate and appropriate medical treatment for the injured person.

**TIP**

It is a good idea to have one or two people in your organisation (an officer or a manager) who agree to be responsible for the co-ordination of the response to a workplace incident. This does not mean that the person is solely responsible – just that it is helpful to have one person to co-ordinate the response so that the incident can be dealt with appropriately. That person should be aware of the responsibilities of the organisation under the OHS Act (including notification and preservation requirements, as outlined below).

Consider notification requirements

While all workplace incidents should be recorded by all community organisations no matter how large or small, there are particular legal obligations on community organisations as employers for the reporting of incidents which result in death or serious injury.

The immediate reporting requirement

An employer must notify the Victorian WorkCover Authority immediately after they become aware of an incident that results in serious injury or a death in the workplace. ‘Serious’ injury is defined in the following section.
A ‘workplace’ will include any place, whether or not a building, where employees work. This could include sporting fields, vehicles and any other places that employees of your community organisation undertake their duties. Serious incidents occurring in these places may require notification to the Victorian WorkCover Authority by your organisation.

‘Serious’ Injury

The Victorian WorkCover Authority requires notification of incidents that lead to ‘serious’ injury. This term includes (but is not limited to) incidents which require:

- medical treatment within 48 hours of exposure to a substance
- immediate treatment in hospital as an in-patient, or
- immediate medical treatment for severe injuries, e.g. amputation, serious head or eye injuries, serious lacerations, loss of a bodily function, spinal injuries or electric shock.

It is important to remember that an organisation’s duty to notify the Victorian WorkCover Authority of incidents causing serious injury will apply in relation to any person, not just employees. This will therefore include volunteers, or even members of the public.

Duty to report specific incident types

The duty to notify the Victorian WorkCover Authority also applies to incidents that expose a person (which includes employees, volunteers or members of the public) who are in the vicinity to an immediate health or safety risk or dangerous occurrence, which includes:

- the collapse or partial collapse of a building or structure
- the fall and release from a height of any plant, substance or object
- the collapse or failure of an excavation or of any shoring supporting an excavation
- an implosion, explosion, or fire, or
- the escape, spillage or leakage of any substance, including dangerous goods.

An employer is not required to notify the Victorian WorkCover Authority of a serious incident where the employer is the only person injured or otherwise harmed, or exposed to risk.

The notification procedure

If you believe that an incident has occurred which requires notification to the Victorian WorkCover Authority (see above), the initial step is to seek legal advice immediately.

Your organisation must telephone the Victorian WorkCover Authority as soon as it becomes aware of a notifiable incident. Any delay in reporting the incident could mean that your organisation is in breach of the Victorian OHS laws, which require immediate reporting of a notifiable incident.
The 48 hour written notification requirement

In addition to telephoning the Victorian WorkCover Authority to report a notifiable incident, an employer must provide the regulator with a written record of what occurred within 48 hours of becoming aware of the incident. A record of this Incident Notification Form must be kept by the employer for at least 5 years. Written notification is required to be in a form specified by the Victorian WorkCover Authority. Copies of the required form can be obtained at www.worksafe.vic.gov.au.

CASE EXAMPLE

An organisation operated residential home care sites for the elderly and those with a disability. A resident of the organisation was performing routine exercises on a tilt table under the supervision of his carer. During the exercises another resident called out to the carer for assistance and the carer left the patient on the tilt table in a squatting position. As he left he told the patient he would be back in 5 minutes and gave him the controls. While alone the patient pressed a button to change the angle of the tilt table. The button he pressed in fact changed the angle of the table so that a significant amount of pressure was placed on his legs. Unable to support his own weight, he fell to the floor and broke both his legs. He required a significant hospital stay after the incident. The organisation failed to notify Worksafe immediately after becoming aware of the incident in writing within 48 hours of the incident. The organisation submitted an enforceable undertaking to the regulator which was accepted (an undertaking to the regulator which are enforceable in a court - they are generally taken accepted as an alternative to civil or administrative action where there has been a breach of the law).

Victorian WorkCover Authority v Australian Home Care Services Pty Ltd (Unreported, Moorabbin Magistrates’ Court, Clifford M, 11 May 2017)

TIP

Your organisation should retain a number of copies of blank Incident Notification Forms on hand to minimise delays in providing written notice should a notifiable incident occur in your workplace. You can download the Incident Notification Form from the the Victorian WorkCover Authority website at www.worksafe.vic.gov.au or by calling 132 360.

Preservation of incident site

The Victorian OHS laws require that incident sites be preserved to allow a full investigation to occur (if required). If a notifiable incident does occur within your organisation, the site should not be disturbed until a Victorian WorkCover Authority inspector arrives at the workplace, unless you have been directed otherwise by WorkSafe.

Site preservation means that you should not disturb anything within the vicinity of where the incident occurred. However, there are exceptions to this which allow a site to be disturbed, including where disturbance is required in order to:

- protect a person's health or safety
- help someone who is injured, or
- make the site safe or prevent further injury.
If you are unsure as to whether you are allowed to enter the incident site, or the extent to which you can disturb the incident scene, you should telephone the Victorian WorkCover Authority on 132 360 to discuss your concerns.

**Keep a register of injuries**

Victorian OHS laws require an employer to keep a Register of Injuries in which employees should record any workplace incidents or injuries, no matter how minor they appear to be at the time. The employer must also inform its employees about how to access this Register.

The Register of Injuries must include the following information:

- the employee's name and job title
- the date and time of the employee's injury or illness
- the employee's exact location when he or she was injured or became ill
- how the injury or illness happened
- the nature of the injury or illness and what parts of your body were affected
- any witnesses to the injury or illness, and
- the date the employee notified his or her employer.

**Investigate and prevent reoccurrences**

- Following an incident, community organisation employers should investigate the circumstances of how the incident occurred in the first place. Notes should be recorded and witness accounts should be taken to provide the employer with a clear picture of how and why the incident occurred. Assistance and advice should be sought from the community organisation's lawyers in relation to the process.

- The Victorian OHS laws require an employer to consult with employees regarding the identification of any risks and possible resolution of any health and safety issues. In the context of an investigation, employers should work with employees and volunteers to put measures in place (both remedial and precautionary) to ensure that a similar incident does not occur in the future.

- These health and safety systems, including any plans to prevent incident occurrence, should be regularly reviewed and updated by the community organisation.
Part 6 – What are the powers of the Victorian WorkCover Authority inspectors?
What are the powers of the Victorian WorkCover Authority inspectors?

The Victorian WorkCover Authority inspectors have various powers of entry into and inspection of workplaces under the Victorian OHS laws. These powers apply to workplaces that community organisations might occupy, ‘control or manage’, or conduct work at, and are briefly summarised below.

**Victorian WorkCover Authority inspector’s power to enter a workplace**

A Victorian WorkCover Authority inspector may enter a workplace at any time during business hours. If it is after business hours, a Victorian WorkCover Authority inspector may enter a workplace where they reasonably believe that there is an immediate risk to a person’s health and safety.

Immediately upon entering a workplace, a Victorian WorkCover Authority inspector must take all reasonable steps to notify the employer and any health and safety representatives of his or her presence, and produce appropriate identification. Once inside a workplace, a Victorian WorkCover Authority inspector is permitted to:

- make enquiries
- inspect and examine the workplace and anything in the workplace including documents
- bring any equipment or materials that may be required
- seize anything that may provide evidence of an offence
- seize anything that requires further testing offsite
- take photographs, samples or measurements, or make sketches or recordings
- exercise any powers available to them under the Act or regulations
- do anything that is reasonably necessary to perform their functions, and
- require a person to produce certain documentation or answer questions.

**Victorian WorkCover Authority inspector entry reports**

After any workplace visit, a Victorian WorkCover Authority inspector must detail their findings in a written report to the workplace’s occupier and any health and safety representatives. This report must include:

- the time of entry and departure
- the purpose of entry
- what was done during the visit
- a summary of the inspectors observations
- the procedures for obtaining further details from the Victorian WorkCover Authority
- how to seek review of the inspector's decision, and
- whether any photographs, sketches or recordings were made and where they may be inspected.

**Victorian WorkCover Authority improvement or prohibition notices**

A Victorian WorkCover Authority inspector has the authority to issue an Improvement or Prohibition Notice to an employer if they reasonably believe that employer has contravened the OHS Act or regulations or there is an immediate risk to health and safety.

An Improvement Notice may contain directions as to how to remedy a breach of the OHS Act. If your community organisation received an Improvement Notice, you should take it very seriously. There are penalties for failing to comply with an Improvement Notice, and any directions provided to your community organisation should be followed as soon as possible unless you do not agree with them and wish to seek internal review of the notice (see below).

A Prohibition Notice prevents a duty holder (i.e. the employer, which can be an organisation or person) from, for example, undertaking certain work or operating specified plant until the alleged immediate risk is remedied. Again, a community organisation should seek to comply with the directions contained in a Prohibition Notice within the prescribed timeframe unless it does not agree with the proposed measures and wishes to seek internal review of the notice.

**Seeking review of the Victorian WorkCover Authority decisions**

Your organisation, its officers or other eligible persons can seek a review of certain decisions of the Victorian WorkCover Authority. There are both internal review mechanisms and/or application to the Victorian Civil and Administrative Tribunal (VCAT) for administrative external review of a decision.

There are strict timeframes for seeking a review of a Victorian WorkCover Authority decision (generally 14 days within receiving an Improvement or Prohibition Notice). If your organisation is unhappy with a Victorian WorkCover Authority decision, you should seek independent legal advice immediately to discuss your review rights.

The Victorian WorkCover Authority has released guidelines that will assist your organisation to deal with bringing an application for internal review. These guidelines can be found on the Victorian WorkCover Authority website at [www.worksafe.vic.gov.au](http://www.worksafe.vic.gov.au)
Resources

Related Not-for-profit Law Resources


Not-for-profit Law's Risk Management and Insurance Guide can help your organisation identify and address risks. There are other types of risks to consider covered in this topic like OHS, negligence, PPSR and risks involving employees.


People involved with your organisation might be on the committee, a member, employed by the organisation, a volunteer, funder, donor or a service user. Read more about the special legal obligations and rights that apply to each of these relationships in this section of the Not-for-profit Law website.

Legislation


Related Resources

- [Victorian WorkCover Authority](http://www.nfplaw.org.au/riskinsurance)

Resources include the [A-Z of safety topics](http://www.nfplaw.org.au/riskinsurance) and a survey to check “How safe is your workplace