National Volunteer Guide
(Part 3)

This part provides guidance on a community organisation’s responsibilities in regard to volunteer safety

October 2018
Part 3: Volunteer safety

1. Introduction

2. Negligence

   2.1 The two sides to safety

   2.2 Negligence laws

      Your organisation should ask itself the following questions:

      2.2.1 Duty of care
      2.2.2 Standard of care
      2.2.3 Breach of duty
      2.2.4 Damage and causation
      2.2.5 Consequences of liability
      2.2.6 Proportionate liability

   2.3 Your organisation’s legal responsibility for actions of its volunteers

      2.3.1 Australian Capital Territory
      2.3.2 New South Wales
      2.3.3 Northern Territory
      2.3.4 Queensland
      2.3.5 South Australia
      2.3.6 Tasmania
      2.3.7 Victoria
      2.3.8 Western Australia

   2.4 Can we get our volunteers to agree to reimburse our organisation for any compensation payable as a result of their actions?

      2.4.1 Australian Capital Territory
      2.4.2 New South Wales
      2.4.3 Northern Territory
      2.4.4 Queensland
      2.4.5 South Australia
2.4.6 Tasmania  
2.4.7 Victoria  
2.4.8 Western Australia

2.5 What happens if our organisation (or a volunteer) makes an apology or expresses regret?  
2.5.1 Australian Capital Territory  
2.5.2 New South Wales  
2.5.3 Northern Territory  
2.5.4 Queensland  
2.5.5 South Australia  
2.5.6 Tasmania  
2.5.7 Victoria  
2.5.8 Western Australia

3. Health and safety in the workplace

3.1 Harmonised WHS Laws

3.1.1 Do the Harmonised WHS Laws apply to your not-for-profit organisation?  
3.1.1.1 Does your organisation fit within the definition of a ‘Person conducting a business or undertaking’?  
3.1.1.2 Is your organisation a ‘volunteer association’?  
3.1.1.3 What if our organisation does not fit into the definition of PCBU or is a volunteer association?  
3.1.2 Who holds a duty under the Harmonised WHS Laws?  
3.1.3 Volunteers and the two sides to safety under Harmonised WHS Laws  
3.1.4 If the Harmonised WHS Laws apply to our organisation, what are the specific duties?  
3.1.4.1 Primary duty of care to ensure the health and safety of workers  
3.1.4.2 The duty to ‘consult’ with volunteers about safety  
3.1.4.3 The duty to notify the regulator immediately of notifiable incidents and the duty to preserve incident sites  
3.1.5 Who may be legally responsible under WHS laws?  
3.1.6 Liability of the community organisation itself  
Incorporated community organisations  
Unincorporated community organisations  
3.1.7 Liability of directors and officers  
3.1.8 Liability of volunteers as workers

3.2 Victorian OHS Laws

3.2.1 Do the Victorian OHS Laws apply to your not-for-profit organisation?  
3.2.1.1 Is your community organisation an ‘employer’?  
3.2.1.2 Does our community organisation manage or control a workplace?
### 3.2.1.3 What if our organisation does not employ people and does not manage or control a workplace?

### 3.2.2 Who holds a duty under Victorian OHS Laws?

### 3.2.3 Volunteers and the two sides to safety under OHS Laws

### 3.2.4 If the Victorian OHS Laws do apply to our organisation, what are the specific duties?

#### 3.2.4.1 Duty not to expose other persons to risk

#### 3.2.4.2 Duty to keep the workplace safe and without risks to health

#### 3.2.4.3 Duty not to recklessly endanger persons at workplaces

#### 3.2.4.4 The duty to notify regulator immediately of notifiable incidents and duty to preserve incident sites

### 3.2.5 Who may be legally responsible under Victorian OHS Laws?

#### 3.2.5.1 Liability of the community organisation itself

#### 3.2.5.2 Liability of directors and officers

### 3.3 Western Australia OSH Laws

#### 3.3.1 Do the Western Australia OSH Laws apply to your not-for-profit organisation?

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

#### 3.3.1.2 Does our community organisation have, to any extent, control of a workplace?

#### 3.3.1.3 What if our organisation does not employ people and does not have, to any extent, control of a workplace?

#### 3.3.2 Who holds the duty under Western Australian OSH Laws?

#### 3.3.3 If the Western Australian OSH Laws do apply to our organisation, what are the specific duties?

#### 3.3.4 Duty not to adversely affect the safety and health of other persons

#### 3.3.5 Duty to notify of deaths, injuries and diseases

#### 3.3.6 Duty to ensure that persons at the workplace are not exposed to hazards

#### 3.3.7 Who may be legally responsible under Western Australian OSH Laws?

#### 3.3.8 Liability of the community organisation

#### 3.3.9 Liability of officers (including volunteer officers)

### 4. Safety of children

#### Overview

#### 4.1 Safety laws, child safety and your duty of care

#### 4.2 Screening checks

#### 4.3 Victorian Child Safe Standards

#### 4.4 Insurance and child safety
4.5 Litigation involving children
5. Managing risk
5.1 Risk management strategies
5.2 Insurance
  5.2.1 Volunteer personal accident insurance
  5.2.2 Workers Compensation
  5.2.2.1 Australian Capital Territory
  5.2.2.2 New South Wales
  5.2.2.3 Northern Territory
  5.2.2.4 Queensland
  5.2.2.5 South Australia
  5.2.2.6 Tasmania
  5.2.2.7 Victoria
  5.2.2.8 Western Australia
Annexures
  Victoria
  New South Wales
  Queensland
  Western Australia
  South Australia
  Australian Capital Territory
  Tasmania
  Northern Territory
  Related Not-for-profit Law Resources
  Other related Not-for-profit Law Resources
  Legislation
  Workplace regulators
  Other resources on working with children
  State and territory peak bodies for volunteering
Part 3: Volunteer safety
Introduction to the key safety issues to consider in the volunteer relationship

This part covers:

- negligence laws and volunteers
- health and safety of volunteers in the workplace
- child safety
- managing safety risks, and
- volunteer insurance

1. Introduction

This Part of the Guide covers a range of issues faced by community organisations in relation to safety and volunteers.

Many community organisations require the support of their volunteers to effectively pursue their stated purpose. Understanding your community organisation's legal obligations in relation to safety is crucial to protecting this valuable resource.

This Part begins by considering the two primary sources of “safety” law that your organisation will need to be aware of when engaging and working with volunteers – negligence law and work health and safety (or occupational health and safety) laws.

When considering “negligence laws” it is crucial for community organisations to understand the “two sides to safety” – that is, the safety of the volunteer, as well as the safety of the people that the volunteer is interacting with, such as clients, employees, other volunteers and members of the public. In some cases, community organisations can be held liable, that is legally responsible, for the actions of their volunteers. Annexed to this Part is a suite of checklists to help organisations understand when they may or may not be liable for the actions of a volunteer.

The section on negligence laws also provides information on apologising for damage that is caused, as well as information about seeking reimbursement or compensation from volunteers if they cause harm.

This Part then deals with the laws that govern safety in the workplace in Australia, that is work health and safety (or occupational health and safety) laws. The Part provides guidance on when organisations are obliged to comply with these laws, and what their particular obligations towards volunteers are. The Part also provides organisations with some guidance on who may be liable (that is, legally responsible) if a volunteer, or an organisation breaches a ‘duty’ under work health and safety laws.
The Part then briefly addresses the particular considerations that organisations may need to have if they have children involved in their organisation - that is the safety of children who are volunteers, and the safety of children that your volunteers may be interacting with through your organisation.

The Part concludes with a discussion on how to manage the risks associated with safety and volunteers – through risk management strategies and insurance.

**NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT**

*Volunteering Australia’s National Standards for Volunteer Involvement* have two standards that relate to the safety of volunteers. These are **Standard 5: Support and Development** and **Standard 6: Workplace safety and wellbeing**. Understanding your legal obligations and implementing practices to ensure the safety of volunteers will help your organisation demonstrate it is meeting these standards and abiding by the relevant legislation.

**CAUTION**

You community organisation's obligations come from various sources and it is important to ensure that you understand which laws apply to your organisation. This can sometimes be a complex legal issue and legal advice may be required on this issue.
2. Negligence

Overview

Not-for-profit community organisations have safety obligations under the common law (judge made law) of negligence and under the negligence provisions in state and territory legislation.

These obligations extend to both the safety of the volunteer and the safety of the people that your volunteer is interacting with.

If your organisation is found negligent (that is, it failed to meet its obligations) the court will order that a remedy be provided to the person who has suffered damage as a result of the organisations actions (or failure to act). In some circumstances, your organisation may also be held liable, that is ‘legally responsible’ for the negligent actions (or any failures to act) of its volunteers.

Volunteer involving organisations should understand their duty of care, and the standard of care it needs to meet so that they can protect their volunteers, their organisation and the people that their organisation interacts with.

2.1 The two sides to safety

Section 2.3 of Part 3 of this Guide provides details on the principles underpinning negligence law.

When considering your obligations under negligence laws, your community organisation will need to consider the two sides to safety:

- its duty of care, and the standard of care it needs to meet to prevent volunteers from suffering damage, and
- its duty of care, and the standard of care it needs to meet to prevent the people your volunteers are interacting with (i.e. clients, other “workers” or the public) from suffering damage (discussed in further detail in section 2.3 below).

2.2 Negligence laws

Your organisation has safety obligations under the common law (judge made law) of negligence and under the negligence provisions in state and territory legislation.

If your organisation:

1. owes a duty of care (to the volunteer, or the person that the volunteer is interacting with)
2. breaches this duty, and
3. the breach is the cause of damage to a person to which the duty is owed,

it may be found liable (legally responsible) for the damage caused.

Your organisation should ask itself the following questions:
2.2.1 Duty of care

Generally, a person or organisation will only be held liable for the damage caused to another person if they were under a duty to prevent such injury or loss from occurring – that is, if they had a ‘duty of care’.

In short, your community organisation unequivocally owes a duty of care to any person it employs. Although dependent on the circumstances of the case, you should also assume that your organisation owes a duty of care to its volunteers, to the people it assists (including people who rely on any material it might publish) and to people who enter its premises.

NOTE & CAUTION – NEW SOUTH WALES & VICTORIA

NSW and Victoria have introduced amendments to the legislation that deals with negligence law aimed at protecting young people from child abuse. In both jurisdictions, organisations have a duty of care to take steps to prevent volunteers (along with other individuals associated with the organisation, such as board members, employees and independent contractors) do not perpetrate child abuse.

2.2.2 Standard of care

If your organisation owes a ‘duty of care’ to a person or category of person, such as a volunteer, your organisation needs to treat those persons with an appropriate standard of care.

Essentially, in all of the states and territories, the standard of care expected is the standard of ‘the reasonable person’ in the same position and with the same knowledge as the person being judged.

So, in any negligence proceedings, your organisation will be judged by reference to a reasonably competent and prudent organisation, in the same position, and with the same knowledge as your organisation.

The legislation in both South Australia and the ACT contains a definition of 'standard of care', which is used as a starting point to determine if particular conduct is negligent. The other states and territories rely on the common law rule (described above), which is essentially equivalent.

2.2.3 Breach of duty
If your organisation does not meet the applicable standard of care to volunteers or the public interacting with your volunteers, it will be considered to have ‘breached its duty’. In every state and territory other than the Northern Territory (whose legislation does not address breach of duty) the starting point for determining whether there has been a breach of duty is the legislation. These statutory provisions are generally an expression of the pre-existing common law principles. So, the same general principles apply in the Northern Territory.

The relevant provisions in the various states and territories are very similar, and set out general principles which can be summed up as follows for the purposes of your community organisation:

Your organisation may be considered negligent for failing to take precautions against a risk if:

- the risk was one which your organisation should have known about
- the risk was ‘not insignificant’, and
- a ‘reasonable’ organisation in the same position as yours, would have taken precautions against the risk.

In deciding whether a reasonable organisation would have taken precautions against the risk, a court will consider (among other things):

- **the social utility of the organisation's conduct that created the risk** - e.g. Did the incident happen during meal preparation by a volunteer in your organisation's soup kitchen? If so, the court will consider the benefit of your work to your community when determining whether there was a breach of duty. The court does not want to discourage people from participating in important work of this kind

- **the burden for the organisation of taking precautions to avoid the risk** - i.e. Was there an easy and inexpensive way to prevent the incident from happening, such as putting up a cautionary sign to prevent a slip on a wet floor? If so, it is more likely that you breached your duty of care. If the only way for your organisation to avoid the risk was to install expensive equipment, which your organisation could not afford, you are less likely to have breached your duty by failing to do so, and

- **the gravity of the risk** - i.e. Was the risk that your organisation failed to mitigate one that could result in serious harm? If so, your duty would involve going to greater lengths to avoid that harm eventuating than it would were the potential consequences of your conduct less serious.

As you can see, whether or not your organisation will be found to have breached its duty will involve a detailed assessment of what was reasonable conduct in all of the circumstances of the case. As mentioned above, the standard of care expected of your organisation is that of a reasonably competent and prudent organisation, in the same position, and with the same knowledge as your organisation. So, if your organisation acts in accordance with an established practice within the community sector, you will be less likely to be found to have breached your duty of care in regards to volunteers or the public interacting with volunteers.

### 2.2.4 Damage and causation

Your organisation cannot be found negligent unless someone has suffered **some type of damage recognised by the law** as giving rise to a cause of action – if no legally recognised damage is suffered, there will be no negligence, even if your organisation has not conducted itself appropriately.
The most common categories of damage in negligence are personal injury, property damage and financial loss.

In addition to ‘damage recognised by the law’, your organisation cannot be found negligent unless its failure to take reasonable care has actually caused the damage complained of (referred to as ‘causation’). The person who has suffered damage carries the burden of establishing that the negligence caused their damage.

To establish causation it must be shown that the negligence was ‘a necessary condition of the occurrence of the harm’. The question to ask here is whether the damage would have occurred ‘but for’ your organisation's conduct.

**NOTE**

With the exception of Queensland and the Northern Territory, causation has been defined in legislation nationwide. The common law treatment of causation is not substantially different to that in legislation. This means that the same general principles will apply in Queensland and the Northern Territory.

**EXAMPLE**

Matthew, a volunteer at a community-based organisation cleaned the floors of its premises and, contrary to policy, forgot to put up the sign to caution people that the floors were slippery. Unaware of the slippery floors, Simon, a regular client of the organisation, tripped and broke his back. If Simon can establish that, had the sign been up, he would not have walked across the floor (and therefore would not have slipped), causation will be established.

If, however, there is evidence that Simon routinely ignored such cautionary signs, and he would likely have walked across the slippery floor regardless, he will find it difficult to establish that, ‘but for’ the organisation's negligence, Simon would not have been injured.

Your organisation will generally be legally responsible for the actions of volunteers, but not in all cases. This is discussed in greater detail in section 2.3 below.

### 2.2.5 Consequences of liability

If your organisation is found negligent or vicariably liable for the actions of a volunteer (see Section 2.3 below), the court will order that a remedy be provided to the person who has suffered damage as a result of the relevant conduct. This remedy is almost always in the form of monetary compensation, with the aim being to put the person who has suffered damage (personal injury, property damage or financial loss) in the position they were in before the act (or failure to act) occurred.

If a person has suffered non-monetary loss (in particular, personal injury) it is impossible to put the injured person back into her original position, but best attempts will be made by the court to provide 'full and adequate' compensation, which caters for an injured person's past and future needs. Compensation will be assessed by the court on a 'once and for all' basis, and your organisation will be ordered to pay a lump sum that cannot be revised at a future date.

### 2.2.6 Proportionate liability

In some cases, damage can be caused by the negligent conduct of multiple people or organisations.
All of the states and territories have 'proportionate liability' provisions in legislation, which, in claims for financial loss or property damage, may limit the liability of any one wrongdoer to the proportion which reflects their responsibility for damage suffered.

**EXAMPLE**

If your organisation is one of three organisations that negligently caused damage to property, provided certain conditions are met, you will only need to contribute to the sum of damages awarded by the court – a percentage which is considered to reflect your share of the responsibility.

The proportionate liability provisions do not apply to claims for personal injury. Where a person has been injured by the negligent conduct of multiple people, each wrongdoer is 'jointly and severally liable' for the whole loss. This means that an injured person can recover the whole award of damages from any one person or organisation found to have caused or contributed to their injury. This shields injured persons from the risk of being short-changed if some of those responsible for their injury are unable to pay the damages.

This is a complex area of the law and your organisation will require legal assistance if this situation arises.

**NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT**

*Volunteering Australia’s National Standards for Volunteer Involvement, Standard 5: Support and Development* “Volunteers understand their roles and gain knowledge, skills and feedback needed to safely and effectively carry out their duties” recommends that:

- **5.1** Volunteers are provided with orientation relevant to their role and responsibility
- **5.2** Volunteers’ knowledge and skill needs relevant to their roles are identified, and training and development opportunities are provided to meet these needs
- **5.3** Volunteers are provided with supervision and support that enables them to undertake their roles and responsibilities.

Providing volunteers with support and development so that they understand their safety obligations and are adequately supervised is one way to help organisations meet their safety obligations under negligence law.

**2.3 Your organisation’s legal responsibility for actions of its volunteers**

As discussed above, your organisation will need to consider the two sides to safety – the duty to the volunteer, and the duty to the people that your volunteer interacts with. In some circumstances, your organisation may be held liable, that is ‘legally responsible’ for the negligent actions (or any failures to act) of its volunteers.

This is because each state and territory has legislation that sets out a special protection for volunteers from personal civil liability for anything done or not done in good faith when performing community work for a community organisation. Civil liability refers to liability arising out of a civil proceeding, which is a legal action between two citizens. For example, compensation for personal injury, property damage or financial loss as a result of negligence.
A volunteer will only be protected if they satisfy all the tests under the relevant state or territory legislation (see boxes starting at 2.3.1 below).

Generally, if a volunteer is protected, the volunteer will not be personally liable to pay any compensation to anyone to whom they may have caused personal injury, property damage or financial loss, as a result of their own actions or failures to act. Instead, if harm is caused by a volunteer, the community organisation may be liable rather than the volunteer individually.

Note that in NSW and Queensland this does not occur and, instead, an organisation is provided the same protection as the volunteer and therefore cannot be held vicariously liable for the volunteer’s acts or omissions covered by the legislation. Despite this protection, there are still circumstances where an organisation could be liable, including where it has been negligent.

**EXAMPLE**

Natalie is a volunteer patient transport driver for a not-for-profit organisation which transports clients to and from medical appointments and on outings to do their shopping.

Natalie has recently separated from her husband of 20 years. She generally suffers from anxiety and is not coping well with the separation. She has confided in her supervisor about her increased intake of alcohol since the separation. Natalie’s supervisor has noticed that Natalie sometimes appears to be drowsy when she reports for volunteering duties.

Instead of requiring Natalie to undergo breath testing in accordance with the organisation’s drug and alcohol policy, Natalie’s supervisor dismisses her concerns as Natalie is a long-standing volunteer with a good record and is just “going through a rough patch”.

Unfortunately, after again reporting for volunteer duties in a drowsy state, Natalie has a car accident while transporting an elderly client. Natalie drove through a red traffic light and crashed into a mother walking her two primary school-aged children to school. The mother and one of the children was killed. The other child survived but has severe injuries which will take many months to heal and will require ongoing rehabilitation. The client in Natalie’s car also suffered cuts and abrasions as well as severe shock.

Natalie was breath tested at the scene and found to have a blood alcohol level in excess of the legal driving limit. News of the accident was widely reported on the television, in newspapers and on the internet.

In this case, in addition to breaking criminal laws, Natalie has been negligent by breaching her duty of care to her passenger and other road users. Although the state in which Natalie and the organisation operates has legislation protecting volunteers (and the organisation) from civil liability, the fact that she was under the influence of alcohol at the time of the accident means that that protection is no longer available to her or the organisation.

Therefore, as Natalie was undertaking volunteer work for the organisation, the organisation will be vicariously liable for Natalie’s negligence. The organisation has also breached its duty of care to the client and other road users by failing to take reasonable steps to prevent a reasonably foreseeable incident from occurring.

As a result, the organisation is exposed to claims from the client, the family of the deceased mother and child, the injured child and, potentially, onlookers who suffered psychological damage as a result of seeing the accident and its aftermath. In addition, the organisation itself has suffered reputational damage as a result of negative publicity generated by the incident. This has impacted its funding and ability to attract workers, volunteers and clients.

**2.3.1 Australian Capital Territory**
2.3.2 New South Wales

The Civil Liability Act 2002 (NSW) (the NSW Civil Liability Act) sets out a special protection for volunteers which provides that volunteers are not personally liable (legally responsible) for anything they have done (or not done) in good faith while doing community work that is organised by a community organisation.

In most other Australian states and territories, civil liability incurred by a protected volunteer is automatically transferred to the community organisation (so that the organisation itself would have to pay any compensation). In NSW, there is no such automatic transfer. The NSW Civil Liability Act operates to the effect that if a volunteer is protected under the Act, then the community organisation is also protected and does not take on the volunteer’s liability.

However, a community organisation in NSW may nevertheless be liable for damage caused by a volunteer who was acting in good faith if the community organisation was in breach of a ‘non-delegable duty of care’ – which is a common law duty owed by the community organisation itself, rather than the volunteer, to the person who suffered the damage. This may include providing adequate training, equipment or supervision to volunteers. So, for example, if a volunteer causes an injury to another person because the organisation failed to give the volunteer appropriate safety training, the organisation may be liable to pay compensation to the injured person.

This is a complicated area of law and your organisation should seek legal advice about any potential liability in these circumstances.

To work out whether or not a volunteer might gain the benefit of protection under the NSW Civil Liability Act, or whether or not an exception to the protection applies, see the Annexure to Part 3 of this Guide ‘Checklist: Are our volunteers protected against personal liability under the NSW Civil Liability Act?’

2.3.3 Northern Territory

The Personal Injuries (Liabilities and Damages) Act 2003 (NT) (the Personal Injuries Act) sets out a special protection which provides that volunteers are not personally liable (legally responsible) for anything they have done (or not done) honestly and without recklessness, while carrying out community work for a community organisation.

If a volunteer is protected under the ACT Wrongs Act (that is, all of the tests have been met), the volunteer will not be personally liable to pay any compensation for personal injury, property damage or financial loss caused by their own actions or failures to act. Instead, if harm is caused by a volunteer, the community organisation (the legal entity) may be liable rather than the volunteer individually.

To work out whether or not a volunteer might gain the benefit of protection under the ACT Wrongs Act (and potentially therefore, your organisation), or whether or not an exception to the protection applies, see the Annexure to Part 3 of this Guide ‘Checklist: Are our volunteers protected against personal liability under the Wrongs Act?’
personal injury caused by anything they have done (or not done) in good faith and without recklessness, while doing community work that is organised, directed or supervised by a community organisation. If a volunteer is protected under the Personal Injuries Act (that is, all of the tests have been met), the volunteer will not be personally liable to pay any compensation for personal injury caused by their own actions or failures to act. Instead, if harm is caused by a volunteer, the community organisation (the legal entity) will be liable rather than the volunteer individually.

In this context, civil liability refers to liability arising out of a civil proceeding for personal injury.

To work out whether or not a volunteer might gain the benefit of protection under the Personal Injuries Act (and potentially therefore, your organisation), or whether or not an exception to the protection applies, see the Annexure to Part 3 of this Guide ‘Checklist: Are our volunteers protected against personal liability under the Personal Injuries Act?’

### 2.3.4 Queensland

The Queensland Civil Liability Act 2003 (QLD) (the QLD Civil Liability Act) sets out a special protection which provides that volunteers are not personally liable (legally responsible) for civil liability which arises as a result of anything they have done (or not done) in good faith and without recklessness, while doing community work that has been organised by a community organisation.

In most other Australian states and territories, civil liability incurred by a protected volunteer is automatically transferred to the community organisation (so that the organisation itself would have to pay any compensation). In Queensland however, there is no such automatic transfer. The QLD Civil Liability Act is, in fact, silent on whether the organisation itself takes on the volunteer’s liability and there is no clear case law on this, so the legal position is not yet settled. It is possible that liability might transfer from the volunteer to the organisation under the legal principle of ‘vicarious liability’, where one party becomes liable for the actions of another (the usual example is that an employer is vicariously liable for its employees), but it is not clear whether this principle applies in the volunteering context.

However, regardless of this lack of clarity, the community organisation could be liable for damage caused by a volunteer who was acting in good faith if the organisation was in breach of a ‘non-delegable duty of care’ – which is a common law duty owed by the organisation itself, rather than the volunteer, to the person who suffered the damage. The organisation’s duty of care may include providing adequate training, equipment or supervision to volunteers. So, for example, if someone is injured by a volunteer because the organisation failed to give the volunteer appropriate safety training, the organisation could be liable to pay compensation to the injured person.

This is a complicated area of law and your organisation should seek legal advice about its own potential liability in such circumstances.

To work out whether or not a volunteer might gain the benefit of protection under the QLD Civil Liability Act, or whether or not an exception to the protection applies, see the Annexure to Part 3 of this Guide ‘Checklist: Are our volunteers protected against personal liability under the QLD Civil Liability Act?’

### 2.3.5 South Australia
The Volunteers Protection Act 2001 (SA) (the Volunteers Act) sets out a special protection which provides that volunteers are not personally liable (legally responsible) for civil liability which arises as a result of anything they have done (or not done) in good faith and without recklessness, while doing community work for a community organisation.

If a volunteer is protected under the Volunteers Act (that is, all of the tests have been met), the volunteer will not be personally liable to pay any compensation for personal injury, property damage or financial loss caused by their own actions or failures to act. Instead, if harm is caused by a volunteer, the community organisation (the legal entity) will be liable rather than the volunteer individually.

To work out whether or not a volunteer might gain the benefit of protection under the Volunteers Act (and potentially therefore, your organisation), or whether or not an exception to the protection applies, see the Annexure to Part 3 of this Guide ‘Checklist: Are our volunteers protected against personal liability under the Volunteers Act?’

2.3.6 Tasmania

The Civil Liability Act 2002 (Tas) (the TAS Civil Liability Act) sets out a special protection which provides that volunteers are not personally liable (legally responsible) for civil liability which arises as a result of anything they have done (or not done) in good faith, while doing community work that is organised by a community organisation.

If a volunteer is protected under the TAS Civil Liability Act (that is, all of the tests have been met), the volunteer will not be personally liable to pay any compensation for personal injury, property damage or financial loss caused by their own actions or failures to act. Instead, if harm is caused by a volunteer, the community organisation (the legal entity) will be liable rather than the volunteer individually.

To work out whether or not a volunteer might gain the benefit of protection under the TAS Civil Liability Act (and potentially therefore, your organisation), or whether or not an exception to the protection applies, see the Annexure to Part 3 of this Guide Checklist: Are our volunteers protected against personal liability under the TAS Civil Liability Act?’

2.3.7 Victoria

The Wrongs Act 1958 (Vic) (the Wrongs Act) sets out a special protection which provides that volunteers are not personally liable (legally responsible) for civil liability which arises as a result of anything they have done (or not done) in good faith while doing community work that is organised by a community organisation.

If a volunteer is protected under the Wrongs Act (that is, all of the tests have been met), the volunteer will not be personally liable to pay any compensation for personal injury, property damage or financial loss caused by their own actions or failures to act. Instead, if harm is caused by a volunteer, the community organisation (the legal entity) will be liable rather than the volunteer individually.

To work out whether or not a volunteer (and potentially therefore, your organisation) might gain the benefit of protection under the Wrongs Act (, or whether or not an exception to the protection
applies, see the Annexure to Part 3 of this Guide ‘Checklist: Are our volunteers protected against personal liability under the Wrongs Act?’
2.3.8 Western Australia

The Volunteers and Food and Other Donors (Protection from Liability) Act 2002 (WA) (the Protection Act) sets out a special protection which provides that volunteers are not personally liable (legally responsible) for civil liability which arises as a result of anything they have done in good faith while doing community work for a community organisation.

If a volunteer is protected under the Protection Act (that is, all of the tests have been met) the volunteer will not be personally liable to pay any compensation to anyone whom they may have caused personal injury, property damage or financial loss, as a result of their own actions or failures to act. Instead, the liability of a protected volunteer will be transferred to the organisation the volunteer was performing the community work for, and the injured party would be able to sue the community organisation (rather than the volunteer) for any injury, damage or loss caused by the volunteer.

To work out whether or not a volunteer might gain the benefit of protection under the Protection Act (and potentially therefore, your organisation), or whether or not an exception to the protection applies see the Annexure to Part 3 of this Guide ‘Checklist: Are our volunteers protected against personal liability under the Protection Act?’

NOTE – OPERATING IN MULTIPLE STATES OR TERRITORIES

If your organisation has volunteers operating in another state or territory, generally they will be subject to the laws in that state. It does not matter that the volunteer is resident in the one state or territory or that the community organisation is registered in a particular state or territory. Determining which law a volunteer will be subject to can be complicated and may require legal advice.

2.4 Can we get our volunteers to agree to reimburse our organisation for any compensation payable as a result of their actions?

2.4.1 Australian Capital Territory

The ACT Wrongs Act does not explicitly prohibit these kinds of agreements (known as indemnity agreements), under which a volunteer agrees to reimburse the organisation for any compensation which may be payable due to their actions. However, protection provided by legislation cannot generally be ‘waived’, so any such agreement is very unlikely to be valid.

2.4.2 New South Wales

The NSW Civil Liability Act does not explicitly prohibit these kinds of agreements (known as indemnity agreements), under which a volunteer agrees to reimburse the organisation for any compensation which may be payable due to their actions. However, protection provided by legislation cannot generally be ‘waived’, so any such agreement is very unlikely to be valid.
2.4.3 Northern Territory

The Personal Injuries Act specifically states that these kinds of agreements (known as indemnity agreements) have no effect. Your organisation cannot try to ‘contract out of’ the volunteer protection provisions to avoid being legally responsible for volunteers’ actions.

2.4.4 Queensland

The QLD Civil Liability Act is silent on the effect of these types of agreements (known as indemnity agreements), but contains a general provision which allows parties to enter into a contract which makes ‘express provision for their rights, obligations and liabilities’. However, if your organisation asks a volunteer to sign an indemnity agreement, note that it may not protect your organisation from liability in all circumstances, especially where there has been gross negligence or breaches of specific laws.

2.4.5 South Australia

The Volunteers Act is silent on the effect of these types of agreements (known as indemnity agreements), under which a volunteer agrees to reimburse the organisation for any compensation which may be payable due to their actions. However, protection provided by legislation cannot generally be ‘waived’, so any such agreement is very unlikely to be valid.

2.4.6 Tasmania

The TAS Civil Liability Act specifically states that these kinds of agreements (known as indemnity agreements) have no effect. Your organisation cannot try to ‘contract out of’ the volunteer protection provisions to avoid being legally responsible for volunteers’ actions.

2.4.7 Victoria

The Wrongs Act specifically prohibits these kinds of agreements (known as indemnity agreements). Your organisation cannot try to ‘contract out of’ the volunteer protection provisions to avoid being legally responsible for volunteers’ actions.

2.4.8 Western Australia

The Protection Act specifically states that these kinds of agreements (known as indemnity agreements) have no effect. Your organisation cannot try to ‘contract out of’ the volunteer protection provisions to avoid being legally responsible for volunteers’ actions.
2.5 What happens if our organisation (or a volunteer) makes an apology or expresses regret?

2.5.1 Australian Capital Territory

Under the ACT Wrongs Act, a volunteer or community organisation may make an apology to another person about an incident without fearing it will be construed as an admission of liability in a claim or proceeding arising out of the incident.

The ACT Wrongs Act specifies that an apology is an oral or written expression of sympathy or regret, or of a general sense of benevolence or compassion in relation to an incident, whether or not the expression admits or implies fault or liability in relation to the incident. The ACT Wrongs Act expressly states that an apology:

- is not (and must not be taken to be) an express or implied admission of fault or liability by the person in relation to the incident;
- is not relevant to deciding fault or liability in relation to the incident, and
- is not admissible in any civil proceeding as evidence of the fault or liability of the person in relation to the incident.

2.5.2 New South Wales

The NSW Civil Liability Act specifies that an apology is an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter, whether or not the apology admits or implies an admission of fault in connection with the matter. In a civil proceeding to which the Civil Liability Act applies, an apology:

- does not constitute an admission of fault or liability by the person in connection with that matter; and
- is not relevant to the determination of fault or liability in connection with that matter.

In addition, evidence of an apology is not admissible in any civil proceedings as evidence of the fault or liability of the person in that matter.

2.5.3 Northern Territory

The Personal Injuries Act specifies that an expression of regret can be an oral or written statement by a person that expresses regret for an incident that is alleged to have caused personal injury and does not contain an acknowledgement of fault by that person.

An expression of regret that is made at any time before the commencement of a proceeding relating to that injury is not admissible as evidence in the proceeding, meaning that it cannot be used as evidence of an admission of liability or to prove that the person was at fault.
2.5.4 Queensland

The QLD Civil Liability Act specifies that an apology is an expression of sympathy or regret, or of a general sense of benevolence or compassion, in connection with any matter, whether or not it admits or implies an admission of fault in relation to the matter. The QLD Civil Liability Act expressly states that an apology:

- does not constitute an express or implied admission of fault or liability by the person in connection with the matter
- is not relevant to the determination of fault or liability in connection with that matter, and
- is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

Note that there are some exceptions to this, such as in cases of defamation, unlawful sexual misconduct and unlawful intentional acts causing a person injury.

2.5.5 South Australia

The Volunteers Act is silent on the effect of an apology, but under the Civil Liability Act 1936 (SA) (the Civil Liability Act), a person may make an apology to another person about an incident without fearing it will be construed as an admission of liability in a claim or proceeding arising out of the incident.

The Civil Liability Act specifies that an apology is an expression of sympathy or regret, or a general sense of benevolence or compassion, whether or not the apology admits or implies an admission of fault in connection with the matter. The Civil Liability Act expressly states that an apology:

- does not constitute an express or implied admission of fault or liability by the person in connection with the matter
- is not relevant to the determination of fault or liability in connection with that matter, and
- is not admissible in any civil proceedings as evidence of the fault or liability of the person in connection with that matter.

Note that an apology may have an effect on liability in respect of defamation.

2.5.6 Tasmania

The TAS Civil Liability Act specifies that an apology is an expression of sympathy or regret, or of a general sense of benevolence or compassion by a person that does not contain an admission of fault. In a civil proceeding of any kind to which the TAS Civil Liability Act applies, an apology:

- does not constitute an express or implied admission of fault or liability by the person in connection with the matter, and
- is not relevant to the determination of fault or liability in connection with that matter.

Evidence of an apology made by or on behalf of a person is not admissible in any civil proceeding as evidence of the fault or liability of the person.
2.5.7 Victoria

The Wrongs Act specifies that an apology is an expression of sorrow, regret or sympathy that does not contain a clear acknowledgement of fault. In a civil proceeding where death or injury is an issue or relevant to an issue of fact or law, an apology does not constitute:

- an admission of liability for the death or injury, or
- an admission of unprofessional conduct, carelessness, incompetence or unsatisfactory professional performance, however expressed, for the purposes of any Act regulating the practice or conduct of a profession or occupation.

An apology is not an admission of liability whether or not it:

- was made in writing or orally, or
- is made before or after the civil proceeding was in contemplation or commenced.

Note that the above only applies in cases of personal injury or death, or where death or injury is relevant to the issues in the case, and not to civil liability generally (i.e. other types of damage or loss).

2.5.8 Western Australia

The Protection Act specifies that an apology is an expression of sorrow, regret or sympathy by a person that does not contain an acknowledgement of fault by that person. In a civil proceeding of any kind to which the Civil Liability Act 2002 (WA) applies, an apology:

- does not constitute an express or implied admission of fault or liability by the person in connection with that incident, and
- is not relevant to the determination of fault or liability in connection with that incident.
3. Health and safety in the workplace

Overview

Not-for-profit community organisations are required by law to ensure they provide a safe workplace for their employees and volunteers. This Section of Part 3 of the Guide will provide people who are involved in not-for-profit community organisations with a basic understanding of work health and safety law as it relates to volunteers.

EXAMPLES OF HEALTH & SAFETY OF VOLUNTEERS IN THE WORKPLACE

A volunteer drives a client to an appointment – it is important to ensure the vehicle is road-worthy, has appropriate insurance and the volunteer has been trained in proper lifting and handling techniques if the client requires assistance in and out of the vehicle. The volunteer may also need training in relation to dealing with medical emergencies that may arise while transporting the client.

A volunteer collects roadside donations – the safety risks for volunteer collectors include injuries caused by vehicles, tripping or slipping, sunburn, heat exhaustion, fatigue and verbal abuse which may potentially result in psychological harm. The organisation should provide a comprehensive briefing about the potential safety risks and strategies for their avoidance.

Different laws exist in each state and territory. New South Wales, South Australia, Queensland, the Northern Territory and Tasmania have ‘harmonised’ their work health and safety laws by enacting similar legislation, based on an agreed ‘model’ Work Health and Safety Act (Model Laws). This means that in most states and territories and at the Commonwealth level, work health and safety laws impose similar obligations. The harmonised work health and safety laws (Harmonised WHS Laws, or WHS Law) are considered in Section 3.2 of this Part.

Victoria and Western Australia have not adopted the Model Laws and have retained their own legislation in Victoria, the Occupational Health and Safety Act and Regulations (Victorian OHS Law, or OHS Law) and in Western Australia the Occupational Safety and Health Act and Regulations (Western Australian OSH Law, or OSH Law). The Victorian and Western Australian laws are considered in Section 3.3 of this Part.

If either the Harmonised WHS Laws, Victorian OHS Laws or Western Australian OSH laws apply to your organisation, then compliance with the relevant laws is important. If your not-for-profit community organisation does not comply with these laws it risks substantial fines. Directors and officers risk further fines and imprisonment if they do not exercise due diligence in relation to work health and safety of volunteers.

Alongside legislation, there are also common law duties to provide employees with a safe workplace. Under the common law, all employers have a legal duty to take reasonable care to avoid exposing employees to reasonably foreseeable risks of injury. These obligations are not exhaustively covered in this Part and independent advice should be sought in relation to a question about these common law duties.
Volunteering Australia’s National Standards for Volunteer Involvement, Standard 6:

Workplace safety and wellbeing: “The health, safety and wellbeing of volunteers is protected in the workplace” recommends that:

6.1 Effective working relationships with employees, and between volunteers, are facilitated by the organisation
6.2 Processes are in place to protect the health and safety of volunteers in their capacity as volunteers
6.3 Volunteers have access to complaints and grievance procedures

3.1 Harmonised WHS Laws

This section of Part 3 is intended for not-for-profit community organisations in Queensland, New South Wales, Australian Capital Territory, South Australia, Northern Territory and Tasmania.

To work out whether and how the Harmonised WHS Laws apply to your volunteers, organisations in these states and territories will need to:

1. work out whether the Harmonised WHS Laws apply to your organisation
2. consider who holds a duty under the Harmonised WHS Law
3. consider the two sides to safety of volunteers under the Harmonised WHS Laws
4. understand with the key WHS Law duties, and
5. understand who may be liable, that is legally responsible, if there is a breach of the WHS Law duties.

CAUTION

Despite harmonisation of WHS laws in most Australian states and territories, there remain some differences between the application of the WHS Laws in each jurisdiction, so it is very important to check the laws in each state or territory that your organisation operates in (see table below). For a summary of the key differences between each state and territory see Not-for-profit Law’s guide ‘Community organisations and work health and safety laws’ available at [https://www.nfplaw.org.au/OHS](https://www.nfplaw.org.au/OHS)

The table below contains the details of the state and territory legislation that comprises the Harmonised WHS Laws, together with the relevant regulators. Also included in the table is the Commonwealth legislation, which generally applies to Commonwealth government employers and authorities.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Legislation</th>
<th>Regulations</th>
<th>Regulator</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Work Health and Safety Act 2012 (Tas)</td>
<td>Work Health and Safety Regulations 2012 (Tas)</td>
<td>WorkSafe Tasmania</td>
</tr>
<tr>
<td>----------------</td>
<td>--------------------------------------</td>
<td>-----------------------------------------------</td>
<td>-------------------</td>
</tr>
<tr>
<td>Tasmania</td>
<td>Work Health and Safety Act 2012 (Tas)</td>
<td>Work Health and Safety Regulations 2012 (Tas)</td>
<td>NT WorkSafe</td>
</tr>
</tbody>
</table>

**RELATED RESOURCES**

In this Section of Part 3 of the Guide we only consider the Harmonised WHS Laws as they relate to volunteers. For more information on how the Harmonised WHS Laws apply to your organisation more broadly (for example to employees), see Not-for-profit Law’s guide ‘Community organisations and work health and safety laws’ available at https://www.nfplaw.org.au/OHS

3.1.1 Do the Harmonised WHS Laws apply to your not-for-profit organisation?

To work out whether the Harmonised WHS Laws apply to your organisation, you will need to consider whether your organisation meets the definition of a ‘Person conducting a business or undertaking’ and that your organisation does not meet the definition of a ‘volunteer association’.

If the Harmonised WHS Laws apply to your organisation, it will have duties under WHS Law. These duties are discussed in greater detail below.

3.1.1.1 Does your organisation fit within the definition of a ‘Person conducting a business or undertaking’?

The WHS Laws apply to a Person conducting a business or undertaking (PCBU). Organisations should consider whether they fall within the definition of a PCBU for the purpose of the WHS Laws to determine whether they will need to comply with the WHS Laws.

The WHS Laws do not define what a ‘business or undertaking’ is. A ‘business or undertaking’ will typically involve some sort of organised operation or enterprise that is ongoing in nature.
An organisation will be considered to be conducting a business or undertaking whether or not that business/undertaking is:

- conducted for profit or gain
- conducted by an individual or a group of people, or
- structured as a partnership, incorporated association (such as a company limited by guarantee, or state based incorporated association) or unincorporated association.

The definition of a ‘business or undertaking’ is very broad and may capture many not-for-profit organisations.

**NOTE**

Both unincorporated and incorporated organisations can be PCBUs. More information about the difference in liability (legal responsibility) between these two types of organisational structures can be found below.

For more information on what it means to be ‘unincorporated’ see Not-for-profit Law’s factsheet ‘What is ‘incorporation’ and does our group need to incorporate?’ available at [https://www.nfplaw.org.au/gettingstarted](https://www.nfplaw.org.au/gettingstarted)

### 3.1.1.2 Is your organisation a ‘volunteer association’?

The Harmonised WHS Laws apply to all community organisations that have employees. However, they do not apply to an organisation which only engages volunteers (i.e. a ‘volunteer association’).

**A volunteer association is defined as:**

“a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to vary out work for the volunteer association.”

A ‘volunteer association’ is taken not to be conducting a business or undertaking and therefore is not subject to the requirements of the WHS Laws.

This means that only not-for-profit community groups which consist solely of volunteers (and not employees or contractors) are exempt from WHS Laws. If your organisation employs anybody (whether casually, part-time or as a contractor) it is not a volunteer association and must comply with WHS Laws.

It is important to note that payments that are made to volunteers for direct out-of-pocket expenses (such as travel and meals) when carrying out volunteer work will not be regarded as wages or salary. However, if other payments for carrying out volunteer work are made they may constitute a wage or salary and mean that the person is being ‘employed’ by the organisation.

**NOTE**

Even though a ‘volunteer association’ is taken not to be a person conducting a business or undertaking under the harmonised WHS laws, volunteers working for volunteer associations still have duties and obligations as ‘workers’ under the legislation, see below.
3.1.1.3 What if our organisation does not fit into the definition of PCBU or is a volunteer association?

If your community organisation does not fit into the definition of PCBU or is a volunteer association, this does not mean you can ignore health and safety altogether. Your organisation may not have to comply with WHS 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.

Remember that under the common law of negligence (established by the courts), not-for-profit organisations owe a duty of care to their volunteers to take reasonable steps to avoid foreseeable harm, injury or loss. This is discussed above under ‘Negligence’ in Section 1 of this Part. If you are unsure about how these obligations might apply to your organisation, you should seek independent legal advice.

3.1.2 Who holds a duty under the Harmonised WHS Laws?

The duty owed by each person is different, and the Harmonised Laws are quite prescriptive in what the duty requires. See the following table for an overview of the different duties.

<table>
<thead>
<tr>
<th>Duty holder</th>
<th>Duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>PCBU</td>
<td>The PCBU has a duty to ensure, so far as is reasonably practicable, the health and safety of workers and other people who might be affected by the work. This includes eliminating, or minimising as far as reasonably practicable, any risks to health and safety.</td>
</tr>
<tr>
<td>Officer</td>
<td>Officers have a duty to exercise due diligence to ensure that the PCBU complies with its WHS duties. The Harmonised Law outlines particular actions an officer should take to fulfil the duty to exercise due diligence. Officers can be prosecuted for breaches of the Harmonised Law.</td>
</tr>
<tr>
<td>Workers (volunteers)</td>
<td>Workers have a duty to take reasonable care for their own health and safety, and the health and safety of anyone who might be affected by their actions or omissions. Workers also have a duty to comply, so far as they reasonably can, with any reasonable instruction given by the PCBU to allow it to comply with the Harmonised Law and to cooperate with any reasonable policy or procedure of the PCBU which relates to work health and safety and that has been notified to workers.</td>
</tr>
<tr>
<td>Other persons</td>
<td>Other persons have a duty to take reasonable care for their own health and safety, take reasonable care that their acts or omissions do not adversely affect the health or safety of other persons and, so far as they reasonably can, comply with any reasonable instruction given by the PCBU to allow the person to comply with the Harmonised Law</td>
</tr>
</tbody>
</table>

3.1.3 Volunteers and the two sides to safety under Harmonised WHS Laws

As discussed above, under the Harmonised WHS Laws, volunteers are classified as ‘workers’ and accordingly are entitled to certain protections and have certain obligations.
This means that when engaging volunteers in your organisation, your community organisation will need to consider the two sides to safety in the workplace:

- your obligation to ensure, so far as is reasonably practicable, the health and safety of volunteers carrying out work as part of the organisation, and

- the volunteer’s obligation to take reasonable care for his or her own health and safety, take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons and to comply and co-operate with reasonable instruction, policy and procedure relating to health and safety.

A volunteer’s obligation to take reasonable care for their own health and safety can extend to a volunteer working from their own home.

**TIP**

To help volunteers comply with their obligation to take reasonable care for their own health and safety, it is a good idea to include information about this obligation in any volunteer training, induction and policies.

Some practical steps volunteers can take to ensure they are meeting their duty include:

- understanding and complying with WHS policies and procedures
- engage with the organisation on WHS issues, and
- take proactive steps to perform work safely and make sure other workers are performing their work safely.

### NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

*Volunteering Australia’s National Standards for Volunteer Involvement, Standard 5: Support and Development* “Volunteers understand their roles and gain knowledge, skills and feedback needed to safely and effectively carry out their duties” recommends that:

5.1 Volunteers are provided with orientation relevant to their role and responsibility

5.2 Volunteers’ knowledge and skill needs relevant to their roles are identified, and training and development opportunities are provided to meet these needs

5.3 Volunteers are provided with supervision and support that enables them to undertake their roles and responsibilities.

Providing volunteers with support and development so that they understand their safety obligations and are adequately supervised is one way to help organisations meet their safety obligations under work health and safety law.

### EXAMPLE – ORGANISATION’S OBLIGATIONS TO OTHERS UNDER WHS LAWS

Natalie is a volunteer patient transport driver for a not-for-profit organisation which transports clients to and from medical appointments and on outings to do their shopping. Natalie has recently separated from her husband of 20 years. She generally suffers from anxiety and is not coping well with the separation. She has confided in her supervisor about her increased intake of alcohol since the separation. Natalie’s supervisor has noticed that Natalie sometimes appears to be drowsy when she reports for volunteering duties.

**NOTE: DEFINITION OF VOLUNTEER**

Under the Harmonised WHS Laws, a volunteer is classified as a ‘worker’. A volunteer means a person who is acting on a voluntary basis (irrespective of whether the person receives out-of-pocket expenses).
Natalie’s supervisor recognises that, under WHS Laws, the organisation has a duty to its clients and the general public to ensure that their health and safety is not impacted by Natalie’s volunteer activities and so consults the organisation’s drug and alcohol policy. In accordance with the policy, Natalie’s supervisor informs Natalie that because she appears to be drowsy when reporting for her duties, she has a reasonable suspicion that Natalie may sometimes be intoxicated. Natalie confesses that she often “has a few too many” the night before working. Following further discussion, Natalie’s supervisor informs Natalie that, to ensure her health and safety, as well as that of others, Natalie will be required to undertake a breath test prior to commencing each shift for at least the next 3 months.

3.1.4 If the Harmonised WHS Laws apply to our organisation, what are the specific duties?

The Harmonised WHS Laws impose a number of duties on organisations, which are intended to protect the health and safety of workers.

This section focuses on three of these legal duties as they relate to volunteers:

- the primary duty of care to ensure the health and safety of workers (which includes volunteers)
- the duty to ‘consult’ with workers about safety (which includes volunteers), and
- the duty to notify the relevant regulator immediately of notifiable incidents and duty to preserve incident sites.

These are not the only relevant duties for organisations that are covered by the Harmonised WHS Laws. Organisations should read Not-for-profit Law’s guide ‘Community organisations and work health and safety laws’ available at https://www.nfplaw.org.au/OHS for a more detailed summary of the legal duties they are obligated to fulfil under WHS Laws.

NOTE – THE MEANING OF “REASONABLY PRACTICABLE”

Where a duty is imposed on an organisation to ensure health and safety this will require the organisation to eliminate (or minimise) risks to health and safety, so far as reasonably practicable. Reasonably practicable means that something is reasonably able to be done, taking into account:

- the likelihood of the hazard or the risk occurring
- the degree of harm that might result from the hazard or the risk
- what the person concerned knows, or out reasonably to know, about the hazard or risk, and ways of eliminating or minimising the risk
- the availability and suitability of ways to eliminate or minimise the risk, and
- after assessing the extent of the risk and the available ways of eliminating or minimising the risk, the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

For more information about how to determine if something is ‘reasonably practicable’ see Not-for-profit Law’s guide ‘Community organisations and work health and safety laws’ available at www.nfplaw.org.au/OHS

3.1.4.1 Primary duty of care to ensure the health and safety of workers

Your organisation must ensure, as far as reasonably practicable, the health and safety of workers – which includes volunteers.
In addition to volunteers, organisations must also ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the organisation (which may include work carried out by volunteers). Other persons may include clients, customers, tradespeople, and suppliers who visit the workplace.

A ‘workplace’ is broadly defined under WHS Laws. When your organisation considers the other persons at the workplace to whom it may owe a duty, be sure to think of all places that will be considered to be ‘workplaces’ for your organisation under WHS Laws, and not just your office or site.

Some activities may not be considered ‘work’ under WHS Law, if you are unsure if your activity is covered by WHS Law, you should seek legal advice.

In determining what your organisation is required to do to keep volunteers safe, your organisation should consider:

- the type of work being carried out
- any risks associated with the work and the likelihood of an injury or illness
- what can be done to eliminate or minimise those risks, and
- the environment in which the work is being undertaken.

### TIP – YOUR ORGANISATION MAY WANT TO PROVIDE VOLUNTEERS WITH:

- training on working safely
- protective equipment
- first aid training
- first aid facilities, and
- training on incident response procedures (e.g. fire drills etc.)

### EXAMPLE

A volunteer drives clients to and from medical appointments in his own car. There is a risk the volunteer could be involved in a car accident while driving. There is no way for the organisation to completely eliminate the risk. However, the organisation can minimise the risk by:

- ensuring that the car is insured, well maintained and less than 10 years old, and
- providing training to volunteer drivers on safe driving.

### 3.1.4.2 The duty to ‘consult’ with volunteers about safety

Your community organisation has a duty to consult with workers (which includes volunteers), as far as reasonably practicable, about matters relating to work health or safety that affect them. Workers must be made aware about potential hazards associated with their work and how the organisation endeavours to protect them from such harm.
There is no 'one size fits all' approach to consulting with workers as this will depend on the size of the organisation, the type of work carried out and the length of the worker's engagement. Consultation with workers could be carried out by:

- providing newsletters by mail or email which provide information on health and safety or updates in procedures
- having a point of contact for volunteers (e.g. an email address) to voice concerns or provide suggestions regarding health and safety, and
- holding health and safety meetings.

Whatever approach is adopted, your community organisation should talk regularly with workers about doing their work safely. The views of the workers should be taken into account and workers should be advised of the outcome of consultations in a timely matter. Workers should also be made aware of who to talk to about a specific incident of concern relating to work health and safety.

3.1.4.3 The duty to notify the regulator immediately of notifiable incidents and the duty to preserve incident sites

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 for the reporting of some types of incidents.

Under the Harmonised WHS Laws, some incidents that occur in the workplace require a special type of response by an organisation. This ‘special response’ includes:

- immediate notification to the regulator in your state or territory for ‘notifiable incidents’ (such as death, serious injury or a dangerous incident), and
- preservation of incident sites where serious workplace incidents have occurred (to allow inspection of the site, and a full investigation to occur if required).

These duties extend to incidents that occur to volunteers (and any other person, including contractors or clients) while at the workplace. Remember, a ‘workplace’ is broadly defined under WHS Laws. Be sure to think of all places that will be considered to be ‘workplaces’ for your organisation under WHS Laws, and not just your office or site.

Only incidents related to work or a workplace are notifiable. For example, the following would not be a notifiable incident:

- a volunteer suffers a heart attack while at work which is unrelated to work or the workplace
- a volunteer driving to work is injured in a car accident (where driving is not part of their work), or
- a volunteer with a known history of epilepsy has a seizure at work.

Include notices around your workplace about incident procedures and who to contact when an incident occurs. Your organisation should hold regular training for volunteers on these issues as well.
There are significant penalties for employers who fail to follow the correct procedures after a notifiable incident. Organisations should read Part 5 of Not-for-profit Law's guide ‘Community organisations and work health and safety laws’ available at https://www.nfplaw.org.au/OHS and familiarise themselves with:

- what constitutes a ‘notifiable incident’ under the Harmonised WHS Laws
- when your organisation must notify the relevant state or territory regulator and the notification procedure you must follow
- when and how your organisation may be required to preserve an ‘incident site’
- your record keeping obligations, and
- the steps you should take after an incident occurs to prevent a similar incident from occurring in the future.

The best and most appropriate response will largely depend on the nature of the incident. Notifiable incidents are just one type of workplace incident that organisations may need to respond to. Organisations should refer to Not-for-profit Law’s guide ‘Community organisations and work health and safety laws’ available at for tips on how to respond to a workplace incident.

Your community organisation may also wish to review its approach to risk management, as well as review the appropriate insurance options. See Section 4 of Part 3 of this Guide and Not-for-profit Law’s separate guide to risk management and insurance which is located at www.nfplaw.org.au/insurance

### 3.1.5 Who may be legally responsible under WHS laws?

There is a chance that your organisation, its directors and officers (who will often be volunteers in community organisations) could be personally liable (legally responsible) for failure to comply with WHS Laws. The state regulators are able to prosecute in relation to WHS offences.

### 3.1.6 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 a separate person for the purposes of the WHS Laws and can be found guilty of breaches of WHS legislation.

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

Not-for-profit community organisations can be prosecuted as severely as commercial enterprises. The regulator may also prosecute the organisation’s directors and officers personally (see below for more information on directors and officers of a community organisation).

**Unincorporated community organisations**

If you meet the definition of PCBU and you are not a volunteer association, it does not matter that you are an unincorporated community organisation - the WHS Laws will still apply to your organisation.
If your community organisation is unincorporated however, it is not recognised by law and cannot itself be prosecuted for breaches of the WHS Laws.

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

NOTE

‘Officers’ of any PCBU who are ‘volunteers’ cannot be prosecuted for a breach of the ‘officer duties’. They can, however, be prosecuted as ‘workers’ or ‘other persons’ should they breach the obligations owed by those types of duty holders.

3.1.7 Liability of directors and officers

Who is an officer?

Under the WHS Laws, officers of an organisation may include:

- a director, committee or board member of the organisation (including the secretary)
- a person who makes decisions, or participates in making decisions, that affect the whole or a substantial part of the operations of an organisation (e.g. a CEO)
- a person who has the capacity to significantly affect the organisation’s financial standing
- a person who commonly instructs the committee of management on how to perform its functions, and
- various people who may be involved in an organisation in positions of responsibility such as a receiver, administrator, liquidator or trustee of an organisation.

Volunteer director or officer

A volunteer director or officer is expected to comply with the duties in WHS Law but cannot be prosecuted for failing to comply with those duties. This immunity from prosecution under WHS Law has been designed to ensure that people are not discouraged from taking up voluntary positions in community organisations. However, paid directors have no such immunity and can be personally liable.

A volunteer director or officer also has general work health and safety obligations as a worker under the WHS Law and can be prosecuted for a breach of these duties (see discussion below).

Paid director or officer

An officer of an organisation (whether incorporated or unincorporated) may be found personally liable for breach of the WHS Law 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 exercise due diligence (discussed below) to ensure that the organisation complies with its duties or obligations under the WHS Law.
3.1.8 Liability of volunteers as workers

Workers (which includes volunteers) have a duty to take reasonable care for their own health and safety and for the health and safety of others to ensure they are not adversely affected by their actions while at work.

Workers must also comply with the reasonable instructions given by the organisation in relation to compliance with the WHS Act and must cooperate with any reasonable WHS policies and procedures of the organisation.

Workers in an organisation may also be personally liable if they do not comply with the duties that apply to ‘workers’ under the WHS Law. Regulators can prosecute workers for an offence in respect of breaching their duties.

NOTE

Fines and prosecutions of workers are extremely rare, and there is currently no record of a volunteer being fined or prosecuted under the Harmonised Laws.

3.2 Victorian OHS Laws

This section of Part 3 will provide people who are involved in not-for-profit community organisations in Victoria with a basic understanding of OHS Law as it relates to volunteers.

To work out whether and how the Victorian OHS Laws apply to your volunteers, your organisation will need to:

1. work out whether the Victoria OHS Laws apply to your organisation
2. consider who holds a duty under Victorian OHS Laws
3. consider the two sides to safety of volunteers under the Victorian OHS Laws
4. familiarise yourself with the key OHS Law duties that relate to volunteers, and
5. understand who may be liable, that is legally responsible, if there is a breach of an OHS Law duty.

RELATED RESOURCES

In this Section of Part 3 of the Guide we only consider the Victorian OHS Laws as they relate to volunteers. For more information on how Victorian OHS Laws apply to your organisation more broadly (for example to employees), see Not-for-profit Law’s guide ‘Occupational health and safety laws’ available at https://www.nfplaw.org.au/OHS.
3.2.1 Do the Victorian OHS Laws apply to your not-for-profit organisation?

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’.

If the Victorian OHS Laws apply to your organisation, you are required to meet a number of obligations under the Victorian OHS laws discussed below.

3.2.1.1 Is your 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.

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 Laws and should to comply with all of the ‘employer duties’, and
- it is not relevant if your organisation is an unincorporated entity – the OHS Laws also apply to unincorporated bodies who are ‘employers’, and a breach of the OHS Laws could mean a committee member is personally liable (see Section 3.3.3 for more detail).

NOTE

Both unincorporated and incorporated organisations can be ‘an employer’.

More information about the difference in liability (legal responsibility) between these two types of organisational structures can be found below.

For more information on what it means to be ‘unincorporated’ see Not-for-profit Law’s factsheet ‘What is ‘incorporation’ and does our group need to incorporate?’ available at https://www.nfplaw.org.au/gettingstarted.

3.2.1.2 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.

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.

3.2.1.3 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 organisation, the Victorian OHS Laws are unlikely to apply.

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.

Remember that under the common law of negligence (established by the courts), not-for-profit organisations owe a duty of care to their volunteers to take reasonable steps to avoid foreseeable harm, injury or loss. This is discussed above under ‘Negligence’ in Section 1 of this Part. If you are unsure about how these obligations might apply to your organisation, you should seek independent legal advice.
3.2.2 Who holds a duty under Victorian OHS Laws?

The duty owed by each person is different, and the OHS Laws are quite prescriptive in what the duty requires. See the following table for an overview of the different duties.

<table>
<thead>
<tr>
<th>Duty holder</th>
<th>Duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer</td>
<td>Employers owe a duty to employees, and other persons (including volunteers) who may be affected by the work or activities of the organisation, to ensure so far as is reasonably practicable that employees and other persons are not exposed to risks to their health and safety arising from the organisation’s activities.</td>
</tr>
<tr>
<td>Persons who manage or control workplaces</td>
<td>Persons who control or manage a workplace must ensure, so far as is reasonably practicable, that the workplace and the means of entering and leaving it are safe and without risks. A breach of this duty is an offence, however, volunteers cannot be fined or prosecuted for a breach of this duty.</td>
</tr>
<tr>
<td>Any person at a workplace</td>
<td>Any person at a workplace, including volunteers, must not recklessly endanger another person in the workplace. A breach of this duty is an offence under the Victorian OHS Laws.</td>
</tr>
</tbody>
</table>

3.2.3 Volunteers and the two sides to safety under OHS Laws

As discussed above, under the OHS Laws, any person at a workplace can be entitled to certain protections and have certain obligations.

This means that when engaging volunteers in your organisation, your community organisation will need to consider the two sides to safety in the workplace:

- your obligation to ensure, so far as is reasonably practicable, that volunteers are not exposed to risks to their health and safety arising from the organisation’s activities, and
- the volunteer’s obligation to ensure it does not recklessly endanger another person in the workplace.

TIP

To help volunteers comply with their obligation to take reasonable care for their own health and safety, it is a good idea to include information about this obligation in any volunteer training, induction and policies. Some practical steps volunteers can take to ensure they are meeting their duty include:

- understanding and complying with OHS policies and procedures
- engage with the organisation on OHS issues, and
- take proactive steps to perform work safely and make sure other workers are performing their work safely.

NOTE - DEFINITION OF VOLUNTEER

Under the Victorian OHS Laws, a volunteer is a person who is acting on a voluntary basis i.e. not being paid for their work. A person will continue to be considered a volunteer despite receiving payment of out-of-pocket expenses from the organisation.
3.2.4 If the Victorian OHS Laws do apply to our organisation, what are the specific duties?

Most of the employer's obligations in the Victorian OHS Law relate to 'employees'. Volunteers are not included in the definition of 'employees'. However, there are some obligations to people other than the employer's employees – such as volunteers.

In this Section of Part 3 of the Guide we have focused on four key Victorian OHS Law duties that relate to volunteers:

- the duty not to expose other persons to risk
- the duty to keep the workplace safe and without risks to health
- the duty not to recklessly endanger persons at workplaces, and
- the duty to notify regulator immediately of notifiable incidents and duty to preserve incident sites

Remember, these are not the only relevant duties organisations that are covered by the Victorian OHS Laws. Organisations should read Not-for-profit Law’s Guide ‘Occupational Health and Safety’ available at https://www.nfplaw.org.au/OHS for a more detailed summary of all of the legal duties they are obligated to fulfil under Victoria OHS Law.

NOTE – THE MEANING OF “REASONABLY PRACTICABLE”

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, so far as is practicable, provide and maintain a safe working environment in which the employees are not exposed to hazards. If something is practicable, it is ‘reasonably practicable’, taking into account:

- the severity of any injury or harm to health that may occur
- the degree of risk of that injury or harm occurring
- how much is known about the risk of injury or harm and the ways of removing or controlling the risk, and
- the availability, suitability and cost of the means of removing or controlling the risk.

In order to meet the requisite standard of care and control over OHS risks, it is recommended that duty-holders undertake the following four-stage process 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 and minimise the level of the risks, and
4. implement those control measures and monitor and review those control measures

3.2.4.1 Duty not to expose other persons to risk

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).

Employers owe this duty to everyone, and therefore the duty 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. A volunteer recklessly caused 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.

**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.
3.2.4.2 Duty to keep the workplace safe and without risks to health

All community organisations that are employers and/or control or manage a workplace to any extent must comply with this 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 of an entity even when it is not the owner of the premises. Accordingly, a number of parties who jointly occupy premises might owe concurrent duties under this section.

This duty is not limited to people employed in 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 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.

3.2.4.3 Duty not to recklessly endanger persons at workplaces

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 the enjoyment of life or ability to work in the future).

NOTE

The duty not to recklessly endanger persons at workplaces is an example of an obligation that volunteers must also comply with. It is a good idea to include this duty in any volunteer training, induction and policies.

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**

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 OHS Law in these circumstances.

3.2.4.4 The duty to notify regulator immediately of notifiable incidents and duty to preserve incident sites

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 for the reporting of some types of incidents.

Under Victorian OHS Laws, there are some incidents that require a special type of response:

- notification of incidents that occur in the workplace to the Victorian WorkCover Authority that lead to ‘serious’ injury, and
- notification of 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.

The Victorian OHS laws require that these 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 WorkSafe inspector arrives at the workplace, unless you have been directed otherwise by WorkSafe.

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 (i.e. the community organisation). Your community organisation should have a clear policy that covers processes for incident notification, either as part of its OHS policy or a separate incident reporting policy.

This duty is owed to all employees, volunteers and members of the general public who are seriously injured or affected by a workplace incident.

A ‘workplace’ will include any place, whether or not a building, where volunteers work. This could include sporting fields, vehicles and any other places that volunteers of your community organisation undertake their duties. Serious incidents occurring in these places may require notification to the Victorian WorkCover Authority by your organisation.

**RELATED RESOURCES**


- what constitutes a ‘serious injury’ under Victorian OHS Laws
- when your organisation may have to report incidents that expose a person (which includes volunteers) who are in the vicinity to an immediate health or safety risk or dangerous occurrence
- when your organisation must notify the Victorian WorkCover Authority and the notification procedure you must follow
- when and how your organisation may be required to preserve an ‘incident site’
- your record keeping obligations, and
- the steps you should take after an incident occurs to prevent a similar incident from occurring in the future.

**NOTE**

The best and most appropriate response will largely depend on the nature of the incident. Notifiable incidents are just one type of workplace incident that organisations may need to respond to. Organisations should refer to Not-for-profit Law’s Guide ‘Occupational health and safety laws’ available at for tips on how to respond to a workplace incident more broadly.

Your community organisation may also wish to review its approach to risk management, as well as review the appropriate insurance options. See Section 4 of Part 3 of this Guide and Not-for-profit Law’s separate guide to risk management and insurance which is located at www.nfplaw.org.au/insurance.

**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 is enforceable in a court - they are generally 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)

3.2.5 Who may be legally responsible under Victorian OHS Laws?

There is a possibility that both your organisation and its individual officers (who will often be volunteers in community organisations) could be personally liable (legally responsible) 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.

3.2.5.1 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 a separate person for the purposes of the OHS Laws and can be found guilty of breaches of OHS legislation.

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.

Not-for-profit community organisations can be prosecuted as severely as commercial enterprises. The regulator may also prosecute the organisation’s directors and officers personally (see below for more information on directors and 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’ 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 adequate care to prevent or report workplace injuries.

3.2.5.2 Liability of directors and officers

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.

Volunteer directors and officers

A volunteer director or officer is expected to comply with the duties in OHS legislation but 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. This immunity from prosecution under the Act has been designed to ensure that people are not discouraged from taking up voluntary positions in community organisations.

Despite this protection, a volunteer director or officer 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. Further, 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.

**Paid directors and 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.

### 3.3 Western Australia OSH Laws

This section of Part 3 of the Guide will provide people who are involved in not-for-profit community organisations in Western Australia with a basic understanding of OSH Law as it relates to volunteers.

To work out whether and how the Western Australia OSH Laws apply to your volunteers, your organisation will need to:

1. Work out whether the OSH Laws apply to your organisation
2. Familiarise yourself with the key OSH Law duties that relate to volunteers
3. Understand who may be liable, that is legally responsible, if there is a breach of an OSH Law duty

#### CAUTION

**Current Western Australia OSH Law**

All Australian states/territories except for Western Australia and Victoria have ‘harmonised’ their workplace health and safety law by adopting ‘model’ legislation.

**Proposed amendments to Western Australia OSH Law**

Western Australia may adopt the ‘model’ OSH laws in the future. A bill, the *Work Health and Safety Bill 2014* (WA) is currently before Parliament. If WA does adopt the model laws, WA’s law will be ‘harmonised’ with the law in all other states except Victoria. However, the proposed bill specifically excludes ‘volunteers’ from the definition of ‘workers’, unlike the other ‘harmonised’ law in other states.

Your organisation should remain aware of these proposed changes and the status of the Bill to ensure that you are able to comply with the new laws if and when they pass.

Subscribe to Not-for-profit Law’s E-Newsletter Updates to keep informed about any changes.

#### RELATED RESOURCES

In this Section of Part 3 of the Guide we only consider the Western Australia OSH Laws as they relate to volunteers. For more information on how Western Australia OSH Law applies to your organisation more broadly (for example to employees), see Not-for-profit Law’s guide ‘Occupational safety and health laws’ available at [https://www.nfplaw.org.au/OHS](https://www.nfplaw.org.au/OHS)
3.3.1 Do the Western Australia OSH Laws apply to your not-for-profit organisation?

The OSH 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 OSH Laws apply to your community organisation, you will need to consider whether your organisation:

- is an ‘employer’, and/or
- is an organisation operating in, or operating its own ‘workplace’.

If either of the above applies to your organisation, the OSH Laws are likely to apply.

If the Western Australian OSH Laws apply to your organisation, you are required to meet a number of obligations under the OSH laws, discussed below.

3.3.1.1 Is our community organisation an ‘employer’?

The OSH Laws apply to all ‘employers’ in Western Australia, 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 apprentices under a contract of training (i.e. has at least one ‘apprentice’).

In many cases, the OSH Laws deem consultants, contractors, subcontractors and labour-hire workers that are engaged to perform work in your business to be your employees, extending the scope of the organisations that can be considered an ‘employer’ under the OSH Laws. If your organisation has no employees but does use contractors, subcontractors or labour-hire workers, it may need to seek legal advice about whether OSH Laws apply.

Your organisation will not be an employer if it operates using only assistance provided by volunteers who do not have a contract of employment or training or a contract as an independent contractor.

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 OSH Laws and will need to comply with all of the ‘employer duties’.

3.3.1.2 Does our community organisation have, to any extent, control of a workplace?

If your community organisation is not an ‘employer’, your organisation may still be required to comply with Western Australian OSH Laws if it has, ‘to any extent, control of a workplace’.

Under OSH Laws, a ‘workplace’ is broadly defined as:

“a place, whether or not an aircraft, ship, vehicle, building or other structure, where ‘employees’ or ‘self-employed persons’ work.”

If your community organisation has, to any extent, control of a place where employees or self-employed persons work, then your organisation may owe a duty of care to ensure that the workplace (as well as access to and egress (exit) from the workplace) is safe and without risks to the safety and health of people in the vicinity. The various duties owed within a workplace are listed below.
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 have ‘control’ of a workplace. If the place at which the community organisation carries out its work has contractors or other self-employed persons attending the workplace from time-to-time, then this place may be a ‘workplace’ for the purposes of the Western Australian OSH Laws, and your organisation may owe a duty of care in relation to that workplace.

**CAUTION**

It does not matter that your organisation does not employ contractors/self-employed persons attending the workplace. All that is required for your organisation to owe duties under the OSH Laws is for the organisation to have a degree of control over the place where the contractors/self-employed persons carry out work.

**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, to any extent, control of the centre will still be required to comply with the ‘workplace’ duties in the OSH Law.

**NOTE: UNINCORPORATED BODIES**

It is not relevant if your organisation is an unincorporated entity. If your organisation meets the requirements under the OSH Laws (i.e your organisation operates in or is operating its own workplace) the OSH Law may apply to your organisation, and a breach of the OSH Laws could mean a committee member is personally liable.

More information about the difference in liability (legal responsibility) between incorporated associations and unincorporated associations can be found below. For more information on what it means to be ‘unincorporated’ see Not-for-profit Law’s factsheet ‘What is ‘incorporation’ and does our group need to incorporate?’ available at https://www.nfplaw.org.au/gettingstarted

3.3.1.3 What if our organisation does not employ people and does not have, to any extent, control of a workplace?

If your community organisation is not an employer and the people involved in your organisation have no contact with a ‘workplace’ that your community organisation has, to any extent, control of, the Western Australian OSH Laws are unlikely to apply.
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 OSH 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.

Remember that under the common law of negligence (established by the courts), not-for-profit organisations owe a duty of care to their volunteers to take reasonable steps to avoid foreseeable harm, injury or loss. This is discussed above under ‘Negligence’ in Section 3.1 of this Part. If you are unsure about how these obligations might apply to your organisation, you should seek independent legal advice.

3.3.2 Who holds the duty under Western Australian OSH Laws?

The duty owed by each person is different, and the OSH Laws are quite prescriptive in what the duty requires. See the following table for an overview of the different duties.

<table>
<thead>
<tr>
<th>Duty holder</th>
<th>Duty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employer</td>
<td>Employers have a duty to ensure, so far as is reasonably practicable, the health and safety of any person (including volunteers) is not adversely affected as a result of the organisation’s activities.</td>
</tr>
<tr>
<td>Persons who manage or control a workplace</td>
<td>Persons who manage or control a workplace where non-employees (including volunteers) are likely to be in the course of their work, must take reasonably practicable measures to ensure that the workplace, and the entry and exits of the workplace, are free from hazards.</td>
</tr>
</tbody>
</table>

3.3.3 If the Western Australian OSH Laws do apply to our organisation, what are the specific duties?

Most of the employer's obligations in the Western Australian OSH Law relate to 'employees'. Volunteers are not included in the definition of 'employees'. However, there are some obligations to people other than employees, including volunteers.

In this Section of Part 3 of the Guide we have focused on three key OSH Law duties that relate to volunteers:

- the duty not to adversely affect the safety and health of other persons
- the duty to notify of deaths, injuries and diseases, and
- the duty to ensure that persons at the workplace are not exposed to hazards.

These are not the only relevant duties organisations that are covered by the Western Australian OSH Laws. Organisations should read Not-for-profit Law’s guide ‘Occupational safety and health laws’ for a more detailed summary of all of the legal duties they are obligated to fulfil under Western Australia OSH Law.
NOTE – DEFINITION OF ‘REASONABLY PRACTICABLE’

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 certain risks or hazards are eliminated or reduced so far as is reasonably practicable’.

This standard of care requires the employer to, so far as is practicable, provide and maintain a safe working environment in which the employees are not exposed to hazards. If something is practicable, it is ‘reasonably practicable’, taking into account:

- the severity of any injury or harm to health that may occur
- the degree of risk of that injury or harm occurring
- how much is known about the risk of injury or harm and the ways of removing or controlling the risk, and
- the availability, suitability and cost of the means of removing or controlling the 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.

In order to meet the requisite standard of care and control over OSH risks, it is recommended that duty-holders undertake the following four-stage process 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 and minimise the level of the risks, and
4. implement those control measures and monitor and review those control measures.

For more information about how to determine if something is ‘reasonably practicable’ see Part 4 of Not-for-profit Law’s guide ‘Occupational safety and health laws’ available at https://www.nfplaw.org.au/OHS

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 OSH Law to claim, “We are a not-for-profit group and we couldn’t afford to reduce that risk.”

To reduce your chance of being found guilty for a breach of the OSH Laws, your organisation needs to be able to show (documented proof is best) that it has identified and considered risks and has taken 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 OSH duties.
3.3.4 Duty not to adversely affect the safety and health of other persons

Community organisations who are employers must, so far as reasonably practicable, ensure that the safety and health of other persons are not adversely affected as a result of work undertaken by the employer or any employee of the employer. 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).

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 barbecue. 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.

EXAMPLE

A council allows volunteer members of a cricket club to remove cement render and sheeting from the walls of its premises. Members of the club are exposed to asbestos in the process. Prior to conducting the work, the council fails to make enquiries as to the presence of asbestos in the walls of its buildings. The council has failed to ensure that people (volunteer members of a community organisation) are not adversely affected by a hazard arising from the work it is undertaking.

3.3.5 Duty to notify of deaths, injuries and diseases

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

This duty creates an obligation on employers to immediately notify WorkSafe WA of deaths and some injuries or diseases at the workplace.

All community organisations that are employers 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 (who is likely to be the community organisation itself).

This duty is owed volunteers (amongst others) who are seriously injured by a workplace incident. A ‘workplace’ will include any place, whether or not a building, where employees work. This could
include sporting fields, vehicles and any other place that employees of your community organisation undertake their duties.

**RELATED RESOURCES**

There are penalties for employers who fail to follow the correct reporting procedures. Organisations should read Part 5 of Not-for-profit Law's guide 'Occupational safety and health laws' and familiarise themselves with:

- What types of incidents are reportable.
- When your organisation must notify WorkSafe WA and the notification procedure you must follow.
- Your record keeping obligations.
- The steps you should take after an incident occurs to prevent a similar incident from occurring in the future.

**NOTE**

The best and most appropriate response will largely depend on the nature of the incident. Notifiable incidents are just one type of workplace incident that organisations may need to respond to. Organisations should refer to Not-for-profit Law’s ‘Community organisations and work health and safety laws’ at for tips on how to respond to a workplace incident more broadly.

Your community organisation may also wish to review its approach to risk management, as well as review the appropriate insurance options. See Section 4 of Part 3 of this Guide and Not-for-profit Law’s separate guide to risk management and insurance which is located at www.nfplaw.org.au/insurance

### 3.3.6 Duty to ensure that persons at the workplace are not exposed to hazards

All community organisations that have, to any extent, control of a workplace must comply with this 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 such that persons are not exposed to hazards.

This duty applies to any community organisation that has, to any extent, control of the workplace, which means that your organisation may be responsible to ensure that any place used by the organisation to conduct its affairs is safe, even when it is not the owner of the premises. This means that a number of parties who jointly have, to any extent, control of a premises might owe concurrent duties under this section.

This duty is not limited to people employed at the workplace, it also extends to any person who is at the workplace or uses the entrance to and exit from the premises. 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 as it had control of the workplace and the means of entering it at the time, even though it does not own the premises.
3.3.7 Who may be legally responsible under Western Australian OSH Laws?

There is a possibility that your organisation and its officers could be liable for failure to comply with Western Australian OSH Laws. WorkSafe WA is able to prosecute the organisation, its officers, or in some circumstances, both of these.

3.3.8 Liability of the community organisation

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

The WA OSH regulator, WorkSafe WA, may prosecute not-for-profit organisations in the same way it would commercial enterprises.

Your community organisation’s officers and employees could also be prosecuted separately if they breach their duties under OSH Laws (see below).

Unincorporated community organisations

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

However, as with an incorporated organisation, the officers, employees 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.

3.3.9 Liability of officers (including volunteer officers)

An ‘officer’ of a community organisation may include:

- a director of the organisation
- a manager, or
- the organisation’s secretary

The OSH Laws do not specifically exclude volunteers from being an officer.

If an incorporated community organisation is found guilty of an offence under the OSH Laws, an officer (paid or volunteer) of that community organisation may also be found guilty of the offence if it is proven that the offence:

- occurred with the consent of the volunteer officer (whether the consent is express approval or just intentionally allowing something to happen by not saying or doing anything), or
- was attributable to any neglect by the volunteer officer.
4. Safety of children

Overview

When you work with children, you have a legal responsibility to ensure their physical, mental and emotional safety. In addition to the duty of care your community organisation owes to volunteers and to members of the public, you should consider the special responsibilities you may have in relation to children that your organisation comes into contact with when providing services, or when they are volunteers for your organisation.

Victoria is the only state to adopt specific 'child safe standards', however, there are a number of nationally agreed frameworks for child protection generally. This guide briefly discusses different legal obligations in relation to volunteers working with children.

The Royal Commission into Institutional Child Abuse (Royal Commission) recommended in its 2017 final report that all institutions should uphold the rights of the child and all institutions should act with the best interests of the child as a primary consideration. In order to achieve this, it was suggested that institutions should implement the Child Safe Standards identified by the Royal Commission.

The Royal Commission Child Safe Standards are:

- Child Safety is embedded in institutional leadership, governance and culture
- Children participate in decisions affecting them and are taken seriously
- Families and communities are informed and involved
- Equity is upheld, and diverse needs are taken into account
- People working with children are suitable and supported
- Processes to respond to complaints of child sexual abuse are child focused
- Staff (and volunteers) are equipped with the knowledge, skills and awareness to keep children safe through continual education and training
- Physical and online environments minimise the opportunity for abuse to occur
- Implementation of the Child Safe Standards is continuously reviewed and improved
- Policies and procedures document how the institution is child safe


4.1 Safety laws, child safety and your duty of care

As discussed above, when considering safety, there are two primary sources of law that your organisation will need to be aware of – negligence laws and work health and safety (or occupational health and safety) laws.
A community organisation may owe children a duty of care under the common law (i.e. judge-made law) of negligence or under the negligence legislation. In addition to its duty of care to ensure child safety, your organisation may also owe obligations under work health and safety laws - Harmonised Laws, WA OSH Laws or Victorian OHS Laws. These laws are discussed in detail above.

If you are dealing with children, you should consider any special measures you may need to take to meet these obligations under negligence laws or the work health and safety laws. In NSW and Victoria there are specific negligence laws aimed at protecting children from child abuse (see below).

Generally speaking, under negligence law, fulfilling your legal responsibility to children requires you to meet the standard expected of a reasonably competent and prudent organisation, in the same position and with the same knowledge.

In certain circumstances, your organisation may also be held legally responsible (i.e. liable) for the actions of its volunteers, where harm has been caused to someone else, such as a child.

It is important to note that the standard of care expected in relation to children may be generally higher than that owed to others.

Generally speaking under work health and safety laws, fulfilling your legal responsibility to children may mean ensuring, as far as reasonably practicable, that the health and safety of children (either volunteers, or children with whom volunteers interact) involved with your organisations is protected.

It is crucial that your organisation has undertaken a careful risk assessment of the activities involving and interactions it has with children, in order to determine whether it needs to implement any further safeguards and processes to help ensure their safety. One important safeguard to put in place is comprehensive induction and training of workers and volunteers.

**INDUCTION AND TRAINING**

During induction and training make sure volunteers involved in your organisation understands all the policies you have in relation to child safety, and why they exist. To ensure this:

- **highlight policies that are particularly relevant to children, such as social media, privacy, IT, and appropriate workplace behaviour policies**

- **explain the importance of a safe workplace and provide training on how to avoid harmful situations, where possible, and point out any special safety requirements in relation to children**

- **set out the reporting lines and process for addressing complaints and concerns about child safety**

- **outline any reporting requirements for child safety that apply to your workers (see discussion below) and the process for reporting within your organisation, and**

- **foster a culture of open communication by encouraging the people within your organisation to express any concerns regarding child safety**
4.1.1 Negligence laws and child abuse

NSW and Victoria have introduced amendments aimed at protecting young people from child abuse. In both jurisdictions, organisations now have a legal duty to take steps to prevent volunteers from perpetrating child abuse.

Under recent changes to the Wrongs Act 1958 (Vic), community organisations that exercise care, supervision or authority over a child (whether or not this is a part of its primary functions or activities), now owe a duty to take reasonable care to prevent the sexual or physical abuse of a child by an individual associated with the organisation (e.g. an officer, office holder, employee, owner, volunteer or contractor). Under the new laws, the ‘onus of proof’ is reversed, which means that the organisation will have to prove it took reasonable precautions to prevent the abuse in question from happening. Reasonable precautions could include implementing policies, procedures and safe guards (such as appropriate screening processes) to ensure the prevention of child abuse.

The new laws were introduced as a response to the key recommendations in the Victorian Government’s Betrayal of Trust report, (which was the result of the Government’s inquiry into the handling of child abuse by religious and other non-government organisations).

Under recent changes to the Civil Liability Act 2002 (NSW), community organisations that exercise care, supervision or authority over a child (including where they purport to do so, are obliged under law to do so and whether or not they delegate this responsibility to another organisation in whole or in part), now owe a duty to take reasonable precautions to prevent child abuse (physical or sexual) by an individual associated with the organisation (e.g. an officer, office holder, employee, owner, volunteer or contractor). Under the new laws, the ‘onus of proof’ is reversed, which means that these organisation will have to prove they took reasonable precautions to prevent the abuse in question from happening. Under the new laws, organisations can be found ‘vicariously liable’ (that is, legally responsible) if an employee, or a person ‘akin to an employee’ perpetrates child abuse in the connection with a role performed for the organisation.

The new laws were introduced as a response to the Royal Commission into Institutional Responses to Child Sexual Abuse.

4.2 Screening checks

There are many circumstances where organisations will need to screen their volunteers because they are working with children.

Screening checks (including Working with Children Checks, police checks, reference and other background checks) are an important consideration, especially for organisations involving youth
volunteers. As children are considered more vulnerable than others working in your organisation, a higher duty of care in respect of their safety may be owed.

Your organisation will need to think carefully about who will need Working with Children Checks. Chapter 5 of this Guide goes through the requirements in further detail.

4.3 Victorian Child Safe Standards

Victoria has introduced compulsory minimum Child Safe Standards (Standards) that form part of the Victorian Government’s response to the Betrayal of Trust Inquiry. The Standards are aimed at assisting organisations providing services to children to:

- create and ensure child safe environments
- reduce and remove risks of child abuse
- encourage reporting of any suspected child abuse, and
- improve responses to any allegations of child abuse.

All Victorian organisations that provide services to children must comply with the Standards as of 1 January 2017. The specific organisations that are required to comply are listed in Schedule 1 and Schedule 2 of the Child Wellbeing and Safety Act 2005 (Vic) and include organisations that exercise care, supervision or authority over children, whether as part of its primary function or not.

Compliance is a legal requirement under the Child Wellbeing and Safety Act 2005 (Vic). The Victorian Commission for Children and Young People is the oversight body for the Standards and is working with these organisations to build their capacity to meet the new requirements.

THE STANDARDS

In complying with the Standards, an organisation must include the following principles as part of its response to each Standard:

- promoting the cultural safety of Aboriginal children
- promoting the cultural safety of children from culturally and/or linguistically diverse backgrounds, and
- promoting the safety of children with a disability.

To create and maintain a child safe organisation, an organisation to which the Standards apply must have:

Standard 1: Strategies to embed an organisational culture of child safety, including through effective leadership arrangements.

Standard 2: A child-safe policy or statement of commitment to child safety.

Standard 3: A code of conduct that establishes clear expectations for appropriate behaviour with children.

Standard 4: Screening, supervision, training and other human resources practices that reduce the risk of child abuse by new and existing personnel.

Standard 5: Processes for responding to and reporting suspected child abuse.
Standard 6: Strategies to identify and reduce or remove risks of child abuse.
Standard 7: Strategies to promote the participation and empowerment of children.

TIP

Even if not legally required to comply with the Standards, if your organisation interacts with children, we suggest that you use these Standards as a guide for the creation of a child safe environment and work towards compliance, so you can be satisfied that you are taking all reasonable steps to protect children from risks to their health and safety. For organisations in NSW and Victoria, complying with these standards may assist with taking “reasonable precautions” to prevent an individual associated with the organisation from perpetrating child abuse.

CASE STUDY

The national Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) found that to keep children safe, an organisation must create and maintain a protective environment that minimises rather than accentuates the risk of abuse. The Royal Commission critically analysed the system errors, failures and oversights of a particular organisation to demonstrate certain ‘unacceptable’ actions of a child safe organisation, including but not limited to:

- a failure to adhere to appropriate background checking procedures
- a failure to implement child protection policies
- the absence of an effective confidential reporting system and, and
- a failure to provide staff with effective training in child protection matters.

TIP

It is important that if your service engages or works with children, all those that work in your organisation (including volunteers) are aware of their reporting obligations and any potential consequences for failing to meet them. Reporting obligations should form a part of your organisation’s standard induction, training and ongoing professional development processes, with written policies and procedures in place.

4.4 Insurance and child safety

Even if your community organisation puts in place measures to avoid or minimise risk in relation to the safety and well-being of children, your community organisation may still want to take out insurance to cover against possible harms to children. For example, your community organisation may take out a volunteer personal accident insurance policy that covers volunteers under the age of 18 (if the organisation has child volunteers) or public liability insurance that covers injury to children.

CAUTION

Not all insurers, or insurance policies will cover volunteers under the age of 18. If you are concerned, make sure that you speak to your insurer.
It is essential that your community organisation is aware of what is covered by the insurance policy and any exclusions that apply. In order for your organisation to satisfy itself of the coverage it holds, we suggest that you review your current policies and if in doubt, ask your insurer the following questions:

- does the policy have any age limits that may affect a claim?
- are actions of children themselves covered?
- are injuries sustained by children covered?
- are there any particular reporting, recordkeeping or other requirements in respect of claims involving children?

4.5 Litigation involving children

Typically, an action can be brought against a person or entity within 6 years of the cause of action occurring (e.g. a breach of contract or an act of negligence). Therefore, any legal documents that may be relevant if legal action was to be taken (but is not actual or threatened), for example, contracts should be kept for 6 years.

However, where a claim involves a child, the situation is different, and your organisation should keep records for a lot longer than 6 years.

As of October 2018, each state and territory has either passed laws or is considering passing laws which remove the limitation period for bringing a claim for personal injury resulting from child sexual abuse. This means a person can bring a claim at any point in their lifetime, regardless of how long ago the act causing the harm took place.

Also, generally a person under 18 years of age can bring a claim for personal injury (not relating to child sexual abuse) within:

- 12 years from the date of the act causing injury, or
- 6 years of the ‘discoverable date’ - the first day it is known or should have been known that injury has occurred, and it was caused by the fault of the defendant to the claim (whichever is latest).

If the injured child was not in the care of a competent parent or guardian, the limitation period can be extended further.

CASE STUDY

A number of case studies provided by the Royal Commission demonstrate the long-term consequences of an institution’s failure to adequately keep documents and records. The destruction of critical documents or lack of consistent record-keeping meant that in many circumstances, schools and other institutions they were unable to confirm whether and to what extent investigations in response to allegations of abuse had been undertaken, and if so, the relevant outcomes. Further, institutions were unable to connect various pieces of information concerning an offender’s behaviour and could not respond adequately to subsequent concerns, years on. Similarly, many young victims were unable to obtain answers as to the circumstances of the abuse they suffered.
5. Managing risk

Overview

As discussed, your organisation could potentially be liable for the actions of its volunteers and for any injuries that its volunteers experience as a result of their volunteering under both negligence laws and work health and safety laws. While claims against community organisations are relatively uncommon, your organisation should look to operate in a way that reduces the risk of damage (including personal injury, financial loss or property damage).

Thinking about risks, insurance and related legal issues does not have to be a scary or negative process. There are some risks associated with the activities undertaken in all community organisations – including ensuring the safety of volunteers and the safety of the people your volunteers interact with.

If your community organisation understands these risks, there are many things that the people involved in your community organisation can do to eliminate risks or minimise the chance of them occurring – this is sometimes referred to as a ‘risk management strategy’.

Where the potential risks can’t be avoided, your community organisation can look at the insurance options that may be available to protect against those risks. Essentially, insurance is a way of managing risks your organisation can’t avoid or minimise, by paying another party (the insurer) to bear the costs if certain risks eventuate.

5.1 Risk management strategies

TIP

Your organisation may wish to think about including ‘Risk Management’ as a standard agenda item at meetings (ie. meetings of the governing body of your organisation as well as meetings of the staff or volunteers). This does not have to be a long discussion. It may just be a chance for your organisation to discuss ongoing risks and whether the measures your organisation has put in place to manage them are working. It may also be a chance to think about whether new risks have arisen which need to be dealt with by your organisation. For larger organisations, you may wish to have a risk management sub-committee of your board or committee of management.

As a part of your risk management strategy, we suggest that your organisation:

✔ creates a safe physical environment and has appropriate safety policies and training in place
✔ follows a volunteer induction process
✔ understands obligations you may be under to undertake background checks on the people involved in your organisation, such as Working with Children Checks
✔ ensures safe procedures when providing goods or services to the public
✔ implements staff and volunteer safety guidelines, which include incident reporting procedures
✓ creates safety instruction manuals (where appropriate)
✓ consults with your volunteers about these safety guidelines and the importance of them sticking to their authorised duties (you can include this in their volunteer agreement and discuss these issues in their induction)
✓ provides your volunteers with copies of written policies and/or instruction manuals
✓ conducts regular training, including refresher training, on safety issues
✓ undertakes regular risk assessments to identify potential risks to health and safety and takes steps to eliminate these risks. Ideally, these risk assessments will be for each different activity undertaken by volunteers and each site where volunteers undertake work. If the work or site changes, any new risks associated with the change should be considered
✓ clearly defines the role and tasks of your volunteers in a written document (volunteer position description) and specifies any prohibited actions (e.g. giving clients medical advice)
✓ reviews your insurance policies to make sure they adequately cover injuries to and actions of your volunteers, and
✓ from time to time, checks that the above processes are being implemented. Are your volunteers following these processes? Are these processes being enforced?

FURTHER READING
Safe Work Australia (the national WHS policy body) has published resources relating to work health and safety of volunteers, including an Essential Guide to Work Health and Safety for Volunteers and an Essential Guide to Work Health and Safety for Organisations that Engage Volunteers.
Some of the state and territory based regulators have published resources relating to workplace safety and minimising risk listed below in our Resources section.

RELATED RESOURCES
The above checklist contains some of the risk management strategies your organisation could implement. We strongly recommend reading this alongside Not-for-profit Law’s Insurance and Risk Management Guide available at https://www.nfplaw.org.au/riskinsurance
For a Sample Volunteer Position Description, go to Part 5 of this Guide.
For a checklist covering what to do when an incident or accident happens in your organisation, go to our Not-for-profit Law Incident and Accidents checklist at www.nfplaw.org.au/negligence.

NOTE – SPONTANEOUS VOLUNTEERS
Spontaneous offers of assistance and volunteering may arise following an emergency, crisis or issue resulting in significant media coverage. The community response may include donations of goods or money, or offers of physical assistance through volunteering. Individuals may also offer to volunteer on a one-off basis at an event or for a short period of time when the needs of the organisation are high. Spontaneous volunteers may create challenges for organisations, especially where organisations are already managing
significant workloads due to an emergency or other incident, for example: managing the scale of volunteers at any given time and their respective roles, performing appropriate screening and other background checks in a short time frame, ensuring volunteers have the skills, training or experience to perform the role, and difficulty in administering adequate training, safety procedures, guidance and supervision to manage workplace risks.

TIP – SPONTANEOUS VOLUNTEERS

We recommend that your organisation reviews its insurance policies to ensure that coverage extends to its spontaneous volunteers. See below for more information about insurance considerations.

We also recommend that you organisation develop a specific policy on whether or not it will use spontaneous volunteers, and if it is open to using spontaneous volunteers, the policy should cover:

- the circumstances where using spontaneous volunteers would be appropriate
- the minimum induction required for spontaneous volunteers, and
- any special risk management protocols to be followed (for example, ensuring that spontaneous volunteers wear identifying information that distinguishes them from fully inducted regular volunteers, and requiring the spontaneous volunteer to sign a declaration about their fitness to volunteer, and a waiver of liability)

5.2 Insurance

Insurance is a way of managing risks your organisation can’t avoid or minimise, by paying another party (the insurer) to bear the costs if certain risks eventuate.

Volunteers will often fall between the gaps in an organisation’s insurance policy when they suffer injuries in their role unless the organisation holds specific insurance for this purpose – such as volunteer personal accident insurance (this is discussed in greater detail below).

Common types of insurance for community organisations include:

<table>
<thead>
<tr>
<th>Protects:</th>
<th>Type of insurance:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Volunteers</td>
<td>Volunteer personal accident insurance</td>
</tr>
<tr>
<td>Volunteer committee members or directors</td>
<td>Directors’ and officers’ liability insurance</td>
</tr>
<tr>
<td>Members of the public</td>
<td>Public liability insurance</td>
</tr>
<tr>
<td>Experts or advisors</td>
<td>Professional indemnity insurance</td>
</tr>
<tr>
<td>Property and assets</td>
<td>Building and contents/occupiers/fraud insurance</td>
</tr>
<tr>
<td>Vehicles</td>
<td>Motor vehicle insurance</td>
</tr>
</tbody>
</table>

Your organisation should ensure it has adequate and sufficient insurance coverage to protect you from liability. You cannot be certain of avoiding liabilities, but you can be certain of having appropriate insurance cover. In the event that your organisation is unsure as to the type or extent of cover required, you should contact an insurance broker. Alternatively, you may wish to refer to the Insurance Resources, set out below.
An insurance policy is a contract – a legally binding document between you and the insurance company. This means that your organisation will have to do certain things – for example, provide full and accurate information, notify of incidents – to make sure the contract is and remains valid. Make sure you understand the terms and conditions of the policy so that you know what these obligations are.

If you think your organisation may be exposed to legal action you should notify your insurer and also seek legal advice as soon as possible about its potential liability (if the action is covered by your insurer, they may do this on your behalf).

**CAUTION**

Insurance should not be the cornerstone of your organisation’s risk management strategy. Ultimately, it should be relied upon as a matter of last resort and other measures should be implemented with the goal of never having to make a claim. Insurance can cover any costs arising from a claim, but it cannot restore any damage caused to your organisation’s reputation or culture.

**TIP**

- When your organisation signs an agreement with another party, check whether there is any requirement to take out particular insurance. This is reasonably common, particularly in agreements to provide services.
- Insurance is often a complex issue for community organisations, and it is recommended that you contact an insurance broker who has experience in arranging insurance for organisations like yours to ensure the insurance you take out is suited to your particular needs.

**RELATED RESOURCES**


### 5.2.1 Volunteer personal accident insurance

Volunteers often fall between the gaps as they are not covered by an organisation’s insurance policies when they suffer injuries in their role unless the organisation holds specific insurance for this purpose – such as volunteer personal accident insurance.

It is important to remember that:

- workers’ compensation insurance does not cover volunteers (except in rare circumstances), and
- public liability insurance will usually cover injuries a volunteer causes to others but may not cover injuries caused to volunteers.
Volunteer personal accident insurance will cover members and volunteers of a community organisation for expenses incurred in the event of accidental injury, disability or death which occurs while the volunteer is doing work for the community organisation. The insurance is usually (but not always) extended to include cover for loss of income if the volunteer is unable to work as a result of an injury sustained when volunteering for the community organisation.

Unlike workers compensation, it is not compulsory for a community organisation to take out personal accident insurance for volunteers. However, because volunteers are a central part of many not-for-profit community organisations, it is useful to ensure that both the organisation and the volunteers are protected in the event of an accident.

SCENARIO
A volunteer serving food at a local fundraiser does not properly cook the chicken, which results in a significant number of people contracting food poisoning and ending up in hospital, including the volunteer. The organisation’s public liability insurance will cover members of the public who attended the fundraiser, but not the volunteer.

TIPS
- check your organisation’s existing insurance policies to find out whether your volunteers are covered. If in doubt, pick up the phone to your insurer.
- consider taking out a volunteer personal accident insurance policy to make sure your volunteers are covered for any injuries they sustain while volunteering.
- check age limits under your policies and, if necessary, negotiate with your insurer to extend coverage to all of your volunteers.
- let all volunteers know what they are covered for and what they are not and the process for making a claim. If there are any extra costs payable, make sure you are clear about whether the organisation or individual will have to pay.

5.2.2 Workers Compensation

Workers compensation is a form of insurance payment to employees if they are injured at work or become sick due to their work. In all states and territories, volunteers will not be considered 'workers' for the purposes of workers compensation unless they are a part of special prescribed class in that jurisdiction. Where volunteers can be covered by workers compensation, it is often voluntary for the organisation to take out workers compensation on behalf of their volunteers (unlike employees where it is compulsory).

It is also important to note that while workers compensation legislation may not apply to volunteers for the purposes of receiving workers compensation, it does create obligations for officers of an organisation including volunteer officers. In most workers compensation legislation, the provisions do not exclude directors, officers or committee members because they are unpaid. These obligations may include

- ensuring workers are insured when required
- not charging a worker for compensation or damages for an injury, and
• assisting with a worker’s rehabilitation and return to work.

Where volunteer emergency service workers are covered by workers compensation that compensation is liable to be paid by the relevant state or territory regardless of whether they are a part of a community organisation.

In the case of religious ministers, the responsibility for workers compensation falls upon the religious body.

The following is an overview of the volunteer provisions in each state and territory.

5.2.2.1 Australian Capital Territory

Workers compensation in the ACT is covered under the Workers Compensation Act 1951 (ACT). For the purposes of the ACT legislation certain volunteers can be considered 'workers'. If your volunteers are covered by any of the below categories, it is compulsory for a community organisation to take out workers compensation on their behalf.

• a trainee: being a person engaged under an arrangement by which training and on-the-job experience is provided, but not arranged or facilitated by an educational institution, and the trainee must not be an adult with a disability for whom the arrangement is arranged by a disability employment service provider

• a religious worker, being a person declared by the Minister

• a commercial voluntary worker, being a person who works voluntarily for a business or enterprise that operates for the financial benefit of the person carrying on the enterprise, or is the person is a corporation, for the financial benefit of the corporation’s members (this excludes not-for-profits), or

• a public interest voluntary worker: being a person engaged in work that is declared by the Minister to be carried out by an entity that is in the interests of public interest.

SCENARIO

Commercial voluntary workers
The Homeless Trust is an organisation incorporated under statute whose only object is to assist the homeless in Canberra. The trust runs an opportunity shop in Tuggeranong, which earns a small profit. The shop is staffed by unpaid volunteers. The shop’s profits are used to assist the homeless. The shop is an ‘enterprise, trade or business’, but it is not carried on for the financial benefit of the trust’s members. The volunteer staff of the shop are therefore not commercial volunteers.

EXAMPLE

Public interest voluntary workers
The volunteer marshals for the annual Big Splash charity event described in that example would not be ‘commercial volunteers’. Therefore, they would not be taken to be workers. The club promoting the event would therefore not normally be required to take out compulsory workers' compensation insurance under this Act to cover the work of the marshals. However, the Big Splash is potentially very dangerous for the volunteer marshals,
as they must be present in their own boats on Lake Burley Griffin while the participants perform difficult stunts in motorboats and jet skis at high speed nearby. In previous years, volunteer marshals have been seriously injured at the event, and the Minister considers that the club did not take out adequate insurance cover for the work of the marshals. Taking these matters into account, the Minister may consider that it is necessary or desirable in the public interest that the work of the volunteer marshals be declared to be public interest voluntary work.

Source: s 19 Workers Compensation Act 1951 (ACT)

5.2.2.2 New South Wales


In NSW volunteers are only covered by workers compensation if they are emergency services workers - volunteer firefighter, or a volunteer ambulance officer.

5.2.2.3 Northern Territory

Workers compensation in the Northern Territory is covered under the Return to Work Act (NT).

Emergency services volunteers (who receive nothing more than reasonable travelling, accommodation or other out of pocket expenses) can receive workers compensation.

5.2.2.4 Queensland

Workers compensation in Queensland is covered under the Workers’ Compensation and Rehabilitation Act 2003.

In Queensland, it is not compulsory for volunteers to be insured through the workers’ compensation scheme, WorkCover. Volunteers are not ‘workers’ but volunteers may be entitled to workers’ compensation if they are:

- a voluntary emergency services or ambulance worker
- a volunteer involved in a religious, charitable or benevolent organisation, or
- a volunteer involved in a not-for-profit organisation, and
- the organisation they are engaged by has an insurance policy that covers such persons.

However, there are special rules for what specifically volunteers can be insured for and what entitlements they are allowed. If your organisation is unsure you should seek legal advice.

5.2.2.5 South Australia

Workers compensation in South Australia is covered under the Return to Work Act 2014 and the Return to Work Regulations 2015.

Volunteers are only covered by workers compensation if they are a volunteer State emergency services member, marine rescue worker, or firefighter.
5.2.2.6 Tasmania

Workers compensation in South Australia is covered under the Workers Rehabilitation and Compensation Act 1988.

Police volunteers, volunteer fire-fighters, police staff and prescribed volunteers can receive workers compensation.

5.2.2.7 Victoria

Workers compensation in Victoria is covered under the Workplace Injury Rehabilitation and Compensation Act 2013, Emergency Management Act 1986; Emergency Management Act 2013 (Vic), Sentencing Act 1991 (Vic), Police Assistance Compensation Act 1968 and the Victoria State Emergency Service Act 2005. Volunteers are only covered if they are engaged by particular government agencies or for particular government related work, such as:

- voluntary emergency and State emergency services workers
- jurors
- volunteer workers in government schools
- volunteer police workers, and
- volunteer firefighters.

5.2.2.8 Western Australia

Workers compensation is covered under the Workers’ Compensation and Injury Management Act 1981.

Volunteers are not covered by workers compensation in Western Australia.
Negligence Law: Community organisations have safety obligations under the common law (judge made law) of negligence and under the negligence provisions in state and territory legislation. These obligations extend to both the safety of the volunteer and the safety of the people that your volunteer is interacting with. If your organisation is found negligent (that is, it failed to meet its obligations) you may be liable to pay compensation (or other form of remedy). A volunteer involving organisation should understand its duty of care, and the standard of care it needs to meet so that it can protect its volunteers, the organisation and the people that the organisation interacts with.

Determining whether your volunteers are protected from liability: Each state and territory has legislation that sets out a special protection for volunteers from personal civil liability for anything done or not done in good faith when performing community work for a community organisation. A volunteer will only be protected if they satisfy all the tests under the relevant state or territory legislation (see Annexure to Part 3 of this Guide for checklists that will help organisations determine this). In all states but New South Wales and Queensland, if the volunteer is protected, the volunteer will not be personally liable to pay any compensation. Instead, if harm is caused by a volunteer, the community organisation may be liable rather than the volunteer individually. In New South Wales the organisation is protected, and in Queensland the law is unclear.

Work health and safety laws: Many community organisations (if they have at least one employee or independent contractor) will be obliged to comply with the work health and safety (or occupational health and safety) laws in their state or territory. Community organisations have an obligation to ensure, so far as reasonably practicable, the health and safety of people involved in their organisation – this extends to volunteers.

Child safety: A community organisation should consider the special responsibilities they may have in relation to children that their organisation comes into contact with – for example when providing services to children, or when a child volunteers for the organisation.

Risk management: Your organisation could potentially be liable for the actions of its volunteers and for any damage that its volunteers experience as a result of volunteering. There are many things that the people involved in your community organisation can do to eliminate risks or minimise the chance of them occurring – such as implementing a ‘risk management strategy’. Where the potential risks can’t be avoided, your community organisation can look at the insurance options that may be available to protect against those risks.
This annexure provides guidance on a community organisation’s responsibilities in regard to volunteer safety.

October 2018
Victoria

**Checklist:** Are our volunteers protected against personal liability under the Victorian Wrongs Act?
Overview

This checklist is designed to provide a simple guide to assist Victorian community organisations to determine if its volunteers are protected under the provisions of the Wrongs Act 1958 (Vic) (the Wrongs Act). This checklist will also assist Victorian community organisations to understand when they could be held liable (legally responsible) for the actions of their volunteers.

How to use this checklist

There are a number of threshold requirements to be met before a volunteer may gain the benefit of the protection set out in the Wrongs Act. These requirements, along with some questions to help your organisation assess whether a volunteer may be covered by the protection, are set out below.

Start by answering the questions in Section A, B and C and you will either be directed to Section D ‘Your volunteers are likely protected, what does this mean’ or Section E ‘Your volunteers may not be protected, what does this mean’. It is recommended that you seek legal advice about how the Wrongs Act applies to your particular organisation before acting on the content of this publication.

Section A: Do your volunteers meet the requirements for protection?

Question 1: Has the community work been undertaken by a ‘volunteer’?

The Wrongs Act defines a ‘volunteer’ as an individual who provides a service in relation to community work on a voluntary basis.

The Act says that a person is considered to work on a voluntary basis if he or she receives:
- no remuneration for the work other than:
  - remuneration that would have been received whether or not they did that work (for example, a person who is in paid employment with another organisation, but is released from that employment to undertake voluntary work)
  - reimbursement for out-of-pocket expenses, or
- remuneration for the work not greater than the amount prescribed by the regulations of the Wrongs Act – there is no amount prescribed by regulation as at October 2018.

A volunteer who is paid by their regular employer while they do volunteer work for a community organisation (e.g. through a corporate volunteer program) is still considered to be a volunteer for the purposes of the Wrongs Act and a community organisation could be held legally responsible for that volunteer’s actions in civil proceedings.

There are a number of other people who are specifically excluded from the definition of a ‘volunteer’, such as members of the Country Fire Authority or some Emergency Services personnel, because they are already given immunity from liability under other Victorian laws.

**EXAMPLE**

Fred is employed by B Pty Ltd as a gardener. B Pty Ltd encourages its staff to volunteer their services to Community House Inc (a Victorian incorporated association), which is adjacent to their business premises. B Pty Ltd allows their staff to volunteer for one day a month at Community House Inc on full pay. Fred, as part of the scheme, tends the Community House’s garden one day each month while being paid by his employer. Fred is still regarded as a volunteer for the purposes of the Wrongs Act while performing services for Community House Inc. Although he is paid by his employer while he is volunteering at Community House Inc, he would have received this remuneration whether or not he was volunteering.

**QUESTION 1: CHECK LIST**

To be entitled to protection the work must be performed by someone who satisfies the legal definition of ‘volunteer’. Was the community work done on a voluntary basis?

☐ Yes- go to Question 2
☐ No - go to Section E

**Question 2: Is your organisation a ‘community organisation’?**

In order for the volunteer to be entitled to the protection, your organisation must meet the definition of ‘community organisation’ in the Wrongs Act.

Your organisation will meet the definition if it organises the doing of community work by volunteers (see question 3) and it fits into one of the categories listed in the checklist for Question 2 below.
CAUTION

The volunteer protection provisions of Victoria’s Wrongs Act do not apply to unincorporated community groups. This means volunteers who are involved in an unincorporated community group will be liable for their own actions.

RELATED RESOURCES

For more information on the difference between unincorporated and incorporated community groups see Not-for-profit Law’s factsheet ‘What is incorporation’ and does our group need to incorporate?’ available at https://www.nfplaw.org.au/incorporationdecision

QUESTION 2: CHECK LIST

Does your organisation fit into one of the following categories?

☐ an incorporated association under the Associations Incorporation Reform Act 2012 (Vic)
☐ a municipal council or other incorporated local government body
☐ any body corporate (such as a company limited by guarantee)
☐ any public entity or public service body within the meaning of the Public Administration Act 2004 (Vic) or other person or body acting on behalf of the State

If ANY apply go to Question 3
If NONE apply go to Section E

Question 3 - Is the volunteer providing a service in relation to ‘community work’?

The protection under the Wrongs Act applies to a volunteer when he or she is undertaking ‘community work’, i.e. the focus is on the purpose of the activity the volunteer is performing, not the overall purpose of the organisation. Whether a volunteer is performing ‘community work’ will depend on what work the volunteer is actually doing, rather than the objects of the organisation they are doing the work for.

Community work is broadly defined as work for any of the purposes in the below checklist. The volunteer protection only applies in relation to a service provided by the volunteer, not the provision of goods (e.g. donation to an op shop or clothing for school children).

The Wrongs Act regulations can declare that certain work is not community work even if it fits into the categories above, but no work has been declared at October 2018.
CAUTION

Some of the fields of community work set out below have a technical legal meaning (e.g. charitable purposes). You may need to seek legal advice about whether the work falls into one of these categories. For further information on what types of activities may be considered to be charitable, refer to Not-for-profit Law’s page on registering as a charity at www.nfplaw.org.au/charity.

QUESTION 3: CHECK LIST

Community work is not performed for private financial gain and is done for one or more of the following purposes:

☐ religious, educational, charitable or benevolent purposes
☐ promoting or encouraging literature, science or the arts
☐ sport, recreation, tourism or amusement
☐ conserving or protecting the environment
☐ establishing, carrying on or improving a community, social or cultural centre
☐ a political purpose, or
☐ promoting the common interests of the community generally or a particular section of the community

If ANY apply go to Question 4

Question 4: Has the community work been ‘organised’ by a community organisation?

A volunteer is protected if the community work undertaken is ‘organised’ by the community organisation. The definition of ‘organise’ includes ‘to direct and supervise’, but this is non-exhaustive and may extend to situations where there are no specific directions or supervision given, for example, where volunteers are given a general discretion to organise a fundraising event. However, the protection does not extend to spontaneous acts of volunteers or activities the organisation has not authorised (see Section C below).

For example, if your organisation trains a person to use a machine and directs that person to use it, he/she will be performing work organised by your organisation. A person who starts working without approval or direction from your organisation would not be performing work organised by your organisation.
Section B: Has civil liability been incurred?

Question 5: Was the liability incurred because of a criminal offence?

The protection is only afforded for civil liabilities. A volunteer will not be protected from liability for criminal actions (offences by a person against the state) while volunteering. This includes traffic infringements as well as more serious crimes. For example, if a volunteer physically assaults someone while they are volunteering, this may result in criminal charges and possible criminal compensation. The Wrongs Act won’t protect the volunteer from criminal liability in this situation.

Question 6: Is the civil liability included in the protection provisions?

A volunteer will not be protected under the Wrongs Act in certain civil proceedings:

- if the volunteer is sued for defamation, or
- if the volunteer has a car accident while volunteering. In this case, any liability for compensation for personal injury to third parties under the Transport Accident Act 1986 (Vic) is excluded (as this is covered by the compulsory third party insurance that is included in the registration costs of a vehicle).
A volunteer is not automatically protected by meeting the threshold requirements of the legislation outlined in Section A and B. There are specific situations where the protection will not apply. These situations are listed below.

**Question 7: Is the volunteer performing community work as a part of a court order or fine repayment scheme?**

A person doing work under court-ordered volunteering is not a volunteer under the Wrongs Act definition. Although work under a fine repayment scheme is not specifically excluded by the Act, it is unlikely that such work would be considered ‘voluntary’ as the participant will receive a benefit in the form of their debt being cancelled or reduced.

**QUESTION 7: CHECK LIST**

Is the volunteer performing the community work doing so under a court order or fine repayment scheme?

- Yes – go to Section E
- No – go to Question 8

**Question 8: Were the volunteer’s actions (or failure to act) done in ‘good faith’?**

The volunteer’s actions (or failure to act) must have been done in ‘good faith’. To act in good faith has been defined as acting honestly and without fraud. Where a volunteer endeavours to act in the best
interests of the community organisation and is not involved in any dishonest or fraudulent behaviour, the volunteer is taken to be acting in good faith. The volunteer protection only applies in relation to a service provided by the volunteer, not the provision of goods (e.g. donation to an op shop or clothing for school children).

**EXAMPLE**

‘In good faith’
A volunteer attends a community sports day to assist with minor first aid. A child falls and fractures their arm, and as a result of the volunteer’s care, their injury is worsened. The volunteer will be acting in good faith if they were trying to help the injured person and believed that was the correct first aid action. However, they will not be acting in good faith if they gave this assistance in order to impress their friend when they knew they had no idea of what first aid action to take.

**QUESTION 8: CHECK LIST**

At the time of the act or omission was the volunteer acting in good faith?

☐ Yes they were acting in good faith - **go to Question 9**

☐ No they were not acting in good faith- **go to Question E**

**Question 9: Does an exception apply to your organisation?**

Certain acts of the volunteer will exclude their ability to claim protection. Even if a person is a volunteer and they have been undertaking community work organised by a community organisation, there are further exceptions set out under the Wrongs Act. In general, a volunteer will **not** be protected where:

- the volunteer knew, or ought reasonably to have known, that at the relevant times they were:
  - acting outside the scope of the community work organised by the community organisation
  - acting contrary to any instructions given by the community organisation in relation to the providing of the service, or
- the volunteer’s ability to provide the service in a proper manner was, at the relevant times, significantly impaired by alcohol or drugs.

There are specific legal definitions and interpretations of many of the terms used in these exceptions (e.g. ‘ought reasonably to have known’, ‘drugs’, ‘alcohol’ and ‘significantly impaired’). If potentially relevant, your organisation may need to seek legal advice about these issues.
EXAMPLE
A person volunteers at a community sports day and is instructed to assist with refreshments only. The volunteer starts to help with marshalling participants without instruction to do so. An injury occurs as a result of the volunteer’s marshalling activities. As the volunteer was acting contrary to instructions, it is likely that an exception under the Wrongs Act applies and that the volunteer will not be protected from liability.

QUESTION 9: CHECK LIST
Did any of the following apply to the volunteer at the time of the act or omission?

☐ volunteer’s ability to exercise reasonable care and skill was significantly impaired as a result of voluntarily consuming alcohol or a drug (whether or not consumed for medication) and they failed to exercise reasonable care and skill

☐ acting outside the scope of activities authorised by the community organisation

☐ acting contrary to instructions given by the community organisation

If ANY apply go to Section E
If NONE apply go to Section D

Section D: Your volunteers are likely protected, what does this mean?

If you have answered all questions in sections A, B and C, and the answer does not result in “go to section E”, the protection under the Wrongs Act is likely to apply to volunteers engaged by your organisation. If you are in doubt, seek legal advice. The volunteer will need their own, independent legal advice in the event of legal action being commenced against them.

If your volunteers are protected this means they do not incur personal civil liability as a result of performing community work organised by or as an office holder of your community organisation. This means that if a volunteer is protected (that is, all of the tests set out above have been met) the volunteer will not be personally liable to pay any compensation to anyone whom they may have caused personal injury, property damage or financial loss as a result of their own actions or failures to act.

Instead, the liability of a protected volunteer will be transferred to the organisation the volunteer was performing the community work for, and the injured party would be able to sue the community organisation (rather than the volunteer) for any injury or loss caused by the volunteer.
Section E: Your volunteers may not be protected, what does this mean?

If your volunteers are not protected by the provisions of the Wrongs Act, your volunteers remain personally liable for their actions. They may be either sued individually or joined to an action against your community organisation, for their acts and omissions while performing community work.

**NOTE – VOLUNTEERS ARE CRITICAL TO THE WORK THAT COMMUNITY ORGANISATIONS DO**

Volunteers are a critical element to the work that many not-for-profit community organisations undertake. The circumstances that a volunteer is found to be personally liable are extremely rare, and in most instances, volunteers are found to be doing the right thing. The potential for liability should not be a reason in of itself not to engage volunteers, and what is most important is that organisations are aware of the risks and put in place measures to prevent incidents from occurring.
New South Wales

**Checklist:** Are our volunteers protected against personal liability under the NSW Civil Liability Act?
Overview

This checklist is designed to provide a simple guide to assist New South Wales community organisations to determine if its volunteers are protected under the provisions of the Civil Liability Act 2002 (NSW) (NSW Civil Liability Act). This checklist will also assist New South Wales community organisations to understand when they could be held liable (legally responsible) for the actions of its volunteers.

How to use this checklist

There are a number of threshold requirements to be met before a volunteer may gain the benefit of the protection set out in the NSW Civil Liability Act. These requirements, along with some questions to help your organisation assess whether a volunteer may be covered by the protection are set out below.

Start by answering the questions in Section A, B and C and you will either be directed to Section D ‘Your volunteers are likely protected, what does this mean’ or Section E ‘Your volunteers may not be protected, what does this mean.’ It is recommended that you seek legal advice about how the NSW Civil Liability Act applies to your particular organisation before acting on the content of this publication.

Section A: Do your volunteers meet the requirements for protection?

Question 1: Has the community work been undertaken by a ‘volunteer’?

The Civil Liability Act defines a ‘volunteer’ as a person who does ‘community work’ (discussed below) on a voluntary basis.
The Act says that a person is considered to work on a voluntary basis if he or she receives no remuneration for the work other than:

- reimbursement for reasonable out-of-pocket expenses, or
- remuneration within limits prescribed by the regulations of the Civil Liability Act – there is no amount prescribed by regulation as at July 2018.

**QUESTION 1: CHECK LIST**

To be entitled to protection the work must be performed by someone who satisfies the legal definition of ‘volunteer.’ Was the community work done on a voluntary basis?

- [ ] Yes - go to Question 2
- [ ] No - go to Section E

**Question 2: Is your organisation a ‘community organisation’?**

In order for the volunteer to be entitled to the protection, your organisation must meet the definition of ‘community organisation’ under the NSW Civil Liability Act.

Your organisation will meet the definition if it organises the doing of community work by volunteers (see Question 3), it is capable of being sued for damages in civil proceedings and it fits into one of the categories listed in the checklist for Question 2 below.

**CAUTION**

The volunteer protection provisions of the NSW Civil Liability Act do not apply to unincorporated community groups. This means volunteers who are involved in an unincorporated community group will be liable for their own actions.

**QUESTION 2: CHECK LIST**

Does your organisation fit into one of the following categories?

- [ ] a body corporate (for example, a company limited by guarantee or an incorporated association)
- [ ] a church or other religious organisation
- [ ] an authority of the State’

If ANY apply go to Question 3
If NONE apply go to Section E
Question 3: Is the work being done by the volunteer ‘community work’?

The protection under the NSW Civil Liability Act applies to a volunteer when he or she is undertaking ‘community work’, i.e. the focus is on the purpose of the activity the volunteer is performing, not the overall purpose of the organisation. Whether a volunteer is performing ‘community work’ will depend on what work the volunteer is actually doing, rather than the objects of the organisation they are doing the work for.

Community work is broadly defined as work that is not for private financial gain that is done for any of the purposes in the below checklist.

The Regulations to the NSW Civil Liability Act can also specify that certain types of work do or do not constitute community work, but there are no such regulations as at July 2018.

CAUTION

Some of the fields of community work set out below have a technical legal meaning (e.g. charitable purposes). You may need to seek legal advice about whether the work falls into one of these categories. For further information on what types of activities may be considered to be charitable, refer to Not-for-profit Law’s page on registering as a charity at www.nfplaw.org.au/charity.

QUESTION 3: CHECK LIST

The work performed by the volunteer must be ‘community work’. Community work is not performed for private financial gain and is done for one or more of the following purposes:

- [] charitable
- [] benevolent
- [] philanthropic
- [] sporting
- [] educational
- [] cultural

If ANY apply go to Question 4
If NONE apply go to Section E
Question 4: Is the volunteer an office holder or has the community work been ‘organised’ by a community organisation?

A volunteer is protected if he or she carries out the community work as an office holder of the community organisation (for example a director or secretary), or if the community work undertaken is ‘organised’ by the community organisation. The definition of ‘organise’ includes ‘to direct and supervise’, but this is non-exhaustive and may extend to situations where there are no specific directions or supervision given, for example, where volunteers are given general discretion to organise a fundraising event.

However, the protection does not extend to spontaneous acts of volunteers or activities the organisation has not authorised (see Section C below).

For example, if your organisation trains a person to use a machine and directs that person to use it, he/she will be performing work organised by your organisation. A person who starts working without approval or direction from your organisation would not be performing work organised by your organisation.

QUESTION 4: CHECK LIST

Was the work performed by the volunteer:

☐ organised, directed or supervised by the community organisation?

☐ carried out by someone acting as an office holder of the community organisation?

If ANY apply go to Question 5
If NONE apply go to Section E

Section B: Has civil liability been incurred?

Question 5: Was the liability incurred because of a criminal offence?

The protection is only afforded for civil liabilities. A volunteer will not be protected from liability for criminal actions (offences by a person against the state) while volunteering. This includes traffic infringements as well as more serious crimes. For example, if a volunteer physically assaults someone while they are volunteering, this may result in criminal charges and possible criminal compensation. The NSW Civil Liability Act won’t protect the volunteer from criminal liability in this situation.
QUESTION 5: CHECK LIST

Was the liability incurred by the volunteer for an act or omission that constitutes a civil liability (for example, negligence causing physical injury) and not an act or omission that would (on the balance of probabilities) constitute a criminal offence (for example, stealing or assault)?

☐ Yes – go to Question 6
☐ No – go to Section E

Question 6: Is the civil liability included in the protection provisions?

Certain types of civil liability are excluded from the protection provisions. A volunteer will not be protected by the NSW Civil Liability Act in certain civil proceedings:

• if the volunteer is sued for defamation
• liability that would otherwise be covered by third-party insurance under the Motor Accidents Compensation Act 1999 (NSW), such as if the volunteer has a car accident while volunteering, or
• any other personal liability that is required to be insured against by a law of the State.

QUESTION 6: CHECK LIST

Was the liability incurred by the volunteer one of the following types?

☐ Liability for defamation
☐ Liability that is required to be insured against by law (eg. insurance required as part of a professional qualification and accreditation, such as doctors, accountants, nurses, or lawyers)
☐ Liability for personal injury due to a motor vehicle accident where that liability should have been covered by third-party insurance

If ANY apply go to Section E
If NONE apply go to Section C

Section C: When does the protection not apply to volunteers?

A volunteer is not automatically protected by meeting the threshold requirements of the legislation outlined in Section A and B. There are specific situations where the protection will not apply. These situations are listed below.
Question 7: Is the volunteer performing community work as a part of a court order or fine repayment scheme?

A person doing work under court-ordered volunteering is not a volunteer under the NSW Civil Liability Act definition. Although work under a fine repayment scheme is not specifically excluded by the Act, it is unlikely that such work would be considered 'voluntary' as the participant will receive a benefit in the form of their debt being cancelled or reduced.

**QUESTION 7: CHECK LIST**

Is the volunteer performing the community work doing so under a court order or fine repayment scheme?

☐ Yes – go to Section E

☐ No – go to Question 8

**CAUTION**

Organisations working with individuals under court orders or fine repayment schemes will need to carefully manage their own risks, speak to the relevant government department and should advise the individuals to consider whether there is insurance covering their participation.

For more information, view our freely available webinar ‘Volunteers versus unpaid workers’ available for download at www.nfplaw.org.au/volunteers.

Question 8: Were the volunteer’s actions (or failure to act) done in ‘good faith’?

Certain acts of the volunteer will exclude their ability to claim protection. The volunteer’s actions (or failure to act) must have been done in ‘good faith’. To act in good faith has been defined as acting honestly and without fraud. Where a volunteer endeavours to act in the best interests of the community organisation and is not involved in any dishonest or fraudulent behaviour, the volunteer is taken to be acting in good faith.

**EXAMPLE**

‘In good faith’

A volunteer attends a community sports day to assist with minor first aid. A child falls and fractures their arm, and as a result of the volunteer’s care, their injury is worsened. The volunteer will be acting in good faith if they were trying to help the injured person and believed that was the correct first aid action. However, they will not be acting in good faith if they gave this assistance in order to impress their friend when they knew they had no idea of what first aid action to take.
Question 9: Does an exception apply?

Certain acts of the volunteer will exclude their ability to claim protection. Even if a person is a volunteer and they have been undertaking community work organised by a community organisation, the Civil Liability Act sets out a number of exceptions. In general terms, a volunteer will not be protected if:

- the volunteer knew, or ought reasonably to have known, that they were acting:
  - outside the scope of the activities authorised by the community organisation;
  - contrary to any instructions given by the community organisation; or
- the volunteer’s ability to exercise reasonable care and skill when doing the work was significantly impaired by alcohol or drugs voluntarily consumed (whether consumed for medication or not), and the volunteer failed to exercise reasonable care and skill when doing the work.

There are specific legal definitions and interpretations of many of the terms used in these exceptions (e.g. ‘ought reasonably to have known’, ‘drugs’, ‘alcohol’ and ‘significantly impaired’). If potentially relevant, your organisation may need to seek legal advice about these issues.

**EXAMPLE**

A person volunteers at a community sports day and is instructed to assist with refreshments only. The volunteer starts to help with marshalling participants without instruction to do so. An injury occurs as a result of the volunteer’s marshalling activities. As the volunteer was acting contrary to instructions, it is likely that an exception under the Civil Liability Act applies and that the volunteer will not be protected from liability.
Section D: Your volunteers are likely protected, what does this mean?

If you have answered all questions in sections A, B and C and the answer does not result in “go to Section E”, the protection under the NSW Civil Liability Act is likely to apply to volunteers engaged by your organisation. If you are in doubt, seek legal advice. The volunteer will need their own, independent legal advice in the event of legal action being commenced against them.

If your volunteers are protected this means they do not incur personal civil liability as a result of performing community work organised by or as an office holder of your community organisation.

In most other Australian states and territories, civil liability incurred by a protected volunteer is automatically transferred to the community organisation (so that the organisation itself would have to pay any compensation). In NSW, there is no such automatic transfer. The NSW Civil Liability Act operates to the effect that if a volunteer is protected under the Act, then the community organisation is also protected and does not take on the volunteer’s liability.

Even if the volunteer is protected, a community organisation in NSW may nevertheless be liable for damage caused by a volunteer who was acting in good faith if the community organisation was in breach of a ‘non-delegable duty of care’ – which is a common law duty owed by the community organisation itself, rather than the volunteer, to the person who suffered the damage. This may include providing adequate training, equipment or supervision to volunteers. So, for example, if a volunteer causes an injury to another person because the organisation failed to give the volunteer appropriate safety training, the organisation may be liable to pay compensation to the injured person.

This is a complicated area of law and your organisation should seek legal advice about any potential liability in these circumstances.

Section E: Your volunteers may not be protected, what does this mean?

If your volunteers are not protected by the provisions of the NSW Civil Liability Act, your volunteers remain personally liable for their actions. They may be either sued individually or joined to an action against your community organisation, for their acts and omissions while performing community work.

NOTE – VOLUNTEERS ARE CRITICAL TO THE WORK THAT COMMUNITY ORGANISATIONS DO

Volunteers are a critical element to the work that many not-for-profit community organisations undertake.

The circumstances that a volunteer is found to be personally liable are extremely rare, and in most instances, volunteers are found to be doing the right thing.

The potential for liability should not be a reason in of itself not to engage volunteers, and what is most important is that organisations are aware of the risks and put in place measures to prevent incidents from occurring.
Queensland

Checklist: Are our volunteers protected against personal liability under the Queensland Civil Liability Act?
Checklist: Are our volunteers protected against personal liability under the Queensland Civil Liability Act?

Overview

This checklist is designed to provide a simple guide to assist Queensland community organisations to determine if its volunteers are protected under the provisions of the Civil Liability Act 2003 (QLD) (QLD Civil Liability Act). This checklist will also assist Queensland community organisations to understand when they could be held liable (legally responsible) for the actions of its volunteers.

RELATED RESOURCES

This checklist should be read in conjunction with Part 3 of the National Volunteer Guide which contains more information about safety, negligence, risk management and your volunteers, including the circumstances in which your organisation could be legally responsible for the actions of your volunteers.

How to use this checklist

There are a number of threshold requirements to be met before a volunteer may gain the benefit of the protection set out in the QLD Civil Liability Act. These requirements, along with some questions to help your organisation assess whether a volunteer may be covered by the protection, are set out below.

Start by answering the questions in Section A, B and C and you will either be directed to Section D ‘Your volunteers are likely protected, what does this mean’ or Section E ‘Your volunteers may not be protected, what does this mean.’ It is recommended that you seek legal advice about how the QLD Civil Liability Act applies to your particular organisation before acting on the content of this publication.

Section A: Do your volunteers meet the requirements for protection?

Question 1: Has the community work been undertaken by a ‘volunteer’?

The QLD Civil Liability Act defines a ‘volunteer’ as an individual who does community work on a voluntary basis or donates food in certain circumstances. A person is considered to work on a ‘voluntary basis’ if he or she receives no remuneration for the work other than reimbursement for out-of-pocket expenses.
Fred is employed as a gardener. Fred volunteers his services to Community House Inc (a Queensland incorporated association) for one day a month. Fred drives to Community House and every so often buys plants for its garden. Community House pays Fred for petrol and the cost of the plants. Fred is regarded as a volunteer for the purposes of the QLD Civil Liability Act whilst performing services for Community House Inc because the only remuneration he receives is reimbursement for out-of-pocket expenses.

Question 2: Is your organisation a ‘community organisation’?

In order for the volunteer to be entitled to the protection, your organisation must meet the definition of ‘community organisation’ under the QLD Civil Liability Act.

Your organisation will meet the definition if it organises the doing of community work by volunteers (see question 3) and it fits into one of the categories listed in the checklist for Question 2 below.

Regulations to the QLD Civil Liability Act can also specify (‘prescribe’) that certain types of entities are ‘community organisations’, but there are no such regulations as at October 2018.

CAUTION

The volunteer protection provisions of the QLD Civil Liability Act do not apply to unincorporated community groups. This means volunteers who are involved in an unincorporated community group will be liable for their own actions.

RELATED RESOURCES

For more information on the difference between unincorporated and incorporated community groups see Not-for-profit Law’s factsheet ‘What is incorporation’ and does our group need to incorporate?’ available at https://www.nfplaw.org.au/incorporationdecision
Question 3: Is the work being done by the volunteer ‘community work’?

The protection under the QLD Civil Liability Act applies to a volunteer when he or she is undertaking ‘community work’. The focus is on the purpose of the activity the volunteer is performing, not the overall purpose of the organisation. Whether a volunteer is performing ‘community work’ will depend on what work the volunteer is actually doing, rather than the objects of the organisation they are doing the work for.

Community work is broadly defined as work that is done for any of the purposes in the below checklist (and includes making donations of food).

The QLD Civil Liability Act regulations can declare that certain work is not community work even if it fits in to the categories above, but no work has been declared at October 2018.

CAUTION

Some of the fields of community work set out below have a technical legal meaning (e.g. charitable purposes). You may need to seek legal advice about whether the work falls into one of these categories. For further information on what types of activities may be considered to be charitable, refer to Not-for-profit Law’s page on registering as a charity at www.nfplaw.org.au/charity.
Question 4: Is the volunteer an office holder or has the community work been ‘organised’ by a community organisation?

A volunteer is protected if he or she carries out the community work as an office holder of the organisation (for example a director or secretary), or if the community work undertaken is ‘organised’ by the community organisation.

The definition of ‘organise’ includes ‘to direct and supervise’, but this is non-exhaustive and may extend to situations where there are no specific directions or supervision given, for example, where volunteers are given general discretion to organise a fundraising event. However, the protection does not extend to spontaneous acts of volunteers or activities the organisation has not authorised.

For example, if your organisation trains a person to use a machine and directs that person to use it, he/she will be performing work organised by your organisation. A person who starts working without approval or direction from your organisation would not be performing work organised by your organisation (see also question 8 and 9 below).

QUESTION 4: CHECK LIST:

Was the community work performed by the volunteer organised, directed or supervised by the community organisation or carried out as an office holder of the organisation?

☐ Yes - go to Question 5
☐ No - go to Section E
Question 5: Was the liability incurred because of a criminal offence?

The protection is only afforded for civil liabilities. A volunteer will not be protected from liability for criminal actions (offences by a person against the state) while volunteering. These include traffic infringements as well as more serious crimes. For example, if a volunteer physically assaults someone while they are volunteering, this may result in criminal charges and possible criminal compensation. The QLD Civil Liability Act won’t protect the volunteer from criminal liability in this situation.

**QUESTION 5: CHECKLIST**

Was the liability incurred by the volunteer for an act or omission that constitutes a civil liability (for example, negligence causing physical injury) and not an act or omission that would (on the balance of probabilities) constitute a criminal offence (for example, stealing or assault)?

- ☐ Yes – go to Question 6
- ☐ No – go to Section E

Question 6: Is the civil liability included in the protection provisions?

In the QLD Civil Liability Act, certain types of civil liability are excluded from the protection provisions. A volunteer will not be protected by the QLD Civil Liability Act in certain civil proceedings:

- liability that would otherwise be covered by third-party insurance under the Motor Accidents Compensation Act 1994 (QLD), such as if the volunteer has a car accident while volunteering, or
- any other personal liability that is required to be insured against by a law of the State.

**QUESTION 6: CHECKLIST**

Was the liability incurred by the volunteer one of the following types?

- ☐ Liability that is required to be insured against by law (e.g. insurance required as part of a professional qualification and accreditation, such as doctors, accountants, nurses, or lawyers)
- ☐ Liability for personal injury due to a motor vehicle accident where that liability should have been covered by third-party insurance

If ANY apply go to Section E

If NONE apply go to Section C
Section C: When does the protection not apply to volunteers?

A volunteer is not automatically protected by meeting the threshold requirements of the legislation outlined in Section A and B. There are specific situations where the protection will not apply. These situations are listed below.

Question 7: Is the volunteer performing community work as a part of a court order or fine repayment scheme?

A person doing work under court-ordered volunteering is not considered a ‘volunteer’ under the QLD Civil Liability Act definition. Although work under a fine repayment scheme is not specifically excluded by the QLD Civil Liability Act, it is unlikely that such work would be considered ‘voluntary’ as the participant will receive a benefit in the form of their debt being cancelled or reduced.

<table>
<thead>
<tr>
<th>QUESTION 7: CHECKLIST</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is the volunteer performing the community work doing so under a court order or fine repayment scheme?</td>
</tr>
<tr>
<td>☐ Yes – go to Section E</td>
</tr>
<tr>
<td>☐ No – go to Question 8</td>
</tr>
</tbody>
</table>

**CAUTION**

Organisations working with individuals under court orders or fine repayment schemes will need to carefully manage their own risks, speak to the relevant government department and should advise the individuals to consider whether there is insurance covering their participation.


Question 8: Were the volunteer’s actions (or failure to act) done in ‘good faith’?

The volunteer’s actions (or failure to act) must have been done in ‘good faith’. Generally, to act in good faith is to act honestly and without fraud. Where a volunteer endeavours to act in the best interests of the community organisation and is not involved in any dishonest or fraudulent behaviour, it is likely the volunteer is acting in good faith.

**EXAMPLE**

‘In good faith’

A volunteer attends a community sports day to assist with minor first aid. A child falls and fractures their arm, and as a result of the volunteer’s care, their injury is worsened. The
volunteer will be acting in good faith if they were trying to help the injured person and believed that was the correct first aid action. However, they will not be acting in good faith if they gave this assistance in order to impress their friend when they knew they had no idea of what first aid action to take.

### QUESTION 8: CHECK LIST

At the time of the act or omission, was the volunteer acting in good faith?

- [ ] Yes they were acting in good faith - go to Question 9
- [ ] No they were not acting in good faith - go to Question E

### Question 9: Does an exception apply?

In general, a volunteer will **not** be protected where:

- the volunteer knew or ought to have reasonably known that he or she was acting:
  - outside the scope of the activities authorised by the community organisation concerned, or
  - contrary to instructions given by the community organisation, or
- the volunteer was intoxicated (i.e. under the influence of alcohol or drugs) and failed to exercise due care and skill when doing the work.

There are specific legal definitions and interpretations of many of the terms used in these exceptions (e.g. ‘ought reasonably to have known’, ‘drugs’ and ‘alcohol’). If potentially relevant, your organisation may need to seek legal advice about these issues.

### EXAMPLE

Scott volunteers at a community sports day and is instructed to assist with refreshments only. Scott starts to help with marshalling participants without instructions to do so. As a result of Scott’s marshalling activities, Viv, a participant in a sporting event, suffers an injury. As Scott was not acting according to instructions, it is likely that an exception under the QLD Civil Liability Act applies and that the volunteer will not be protected from liability.
If you have answered all questions in sections A, B and C, and the answer does not result in “go to section E”, the protection under the QLD Civil Liability Act is likely to apply to volunteers engaged by your organisation. If you are in doubt, seek legal advice. The volunteer will need their own, independent legal advice in the event of legal action being commenced against them.

If your volunteers are protected this means they do not incur personal civil liability as a result of performing community work organised by or as an office holder of your community organisation. This means that the volunteer will not be personally liable to pay any compensation to anyone whom they may have caused personal injury, property damage or financial loss, as a result of their own actions or failures to act.

The QLD Civil Liability Act does not state whether the organisation itself becomes liable on a volunteer’s behalf. However, under the common law, if an organisation does not fulfil its own duty of care and this leads to a volunteer causing injury or damage, it could become liable.

### Section D: Your volunteers are likely protected, what does this mean?

If your volunteers are not protected by the provisions of the QLD Civil Liability Act, your volunteers remain personally liable for their actions. They may be either sued individually or joined to an action against your community organisation, for their acts and omissions while performing community work.

### Section E: Your volunteers may not be protected, what does this mean?

If you have answered all questions in sections A, B and C, and the answer does not result in “go to section E”, the protection under the QLD Civil Liability Act is likely to apply to volunteers engaged by your organisation. If you are in doubt, seek legal advice. The volunteer will need their own, independent legal advice in the event of legal action being commenced against them.

If your volunteers are protected this means they do not incur personal civil liability as a result of performing community work organised by or as an office holder of your community organisation. This means that the volunteer will not be personally liable to pay any compensation to anyone whom they may have caused personal injury, property damage or financial loss, as a result of their own actions or failures to act.

The QLD Civil Liability Act does not state whether the organisation itself becomes liable on a volunteer’s behalf. However, under the common law, if an organisation does not fulfil its own duty of care and this leads to a volunteer causing injury or damage, it could become liable.

### Section E: Your volunteers may not be protected, what does this mean?

If your volunteers are not protected by the provisions of the QLD Civil Liability Act, your volunteers remain personally liable for their actions. They may be either sued individually or joined to an action against your community organisation, for their acts and omissions while performing community work.
NOTE – VOLUNTEERS ARE CRITICAL TO THE WORK THAT COMMUNITY ORGANISATIONS DO

Volunteers are a critical element to the work that many not-for-profit community organisations undertake. The circumstances that a volunteer is found to be personally liable are extremely rare, and in most instances, volunteers are found to be doing the right thing. The potential for liability should not be a reason in of itself not to engage volunteers, and what is most important is that organisations are aware of the risks and put in place measures to prevent incidents from occurring.
Western Australia

Checklist: Are our volunteers protected against personal liability under the Western Australian Protection Act?
Overview

This checklist is designed to provide a simple guide to assist Western Australian community organisations to determine if its volunteers are protected under the provisions of the Volunteers and Food and Other Donors (Protection from Liability) Act 2002 (WA) (the Protection Act). This checklist will also assist Western Australian community organisations to understand when they could be held liable (legally responsible) for the actions of its volunteers.

How to use this checklist

There are a number of threshold requirements to be met before a volunteer may gain the benefit of the protection set out in the Protection Act. These requirements, along with some questions to help your organisation assess whether a volunteer may be covered by the protection are set out below.

Start by answering the questions in Section A, B and C and you will either be directed to Section D ‘Your volunteers are likely protected, what does this mean’ or Section E ‘Your volunteers may not be protected, what does this mean.’ It is recommended that you seek legal advice about how the Protection Act applies to your particular organisation before acting on the content of this publication.

Section A: Do your volunteers meet the requirements for protection?

Question 1: Has the community work been undertaken by a ‘volunteer’?

A person is considered to be doing community work on a voluntary basis if they receive no remuneration for doing the work other than:

- remuneration that person would receive whether or not they did the community work
reimbursement of reasonable expenses incurred in performing the community work, or
remuneration that is not greater than the amount prescribed by the regulations (if any).

EXAMPLE
Fred is employed by B Pty Ltd as a gardener. B Pty Ltd encourages its staff to volunteer their services to Community House Inc (a Tasmanian incorporated association), which is adjacent to their business premises. B Pty Ltd allows their staff to volunteer for one day a month at Community House Inc on full pay. Fred, as part of the scheme, tends the Community House’s garden one day each month while being paid by his employer. Fred is still regarded as a volunteer for the purposes of the TAS Civil Liability Act while performing services for Community House Inc. Although he is paid as an employee, this is not linked to his volunteering at Community House Inc. He would be paid whether or not he volunteered.

QUESTION 1: CHECK LIST
To be entitled to protection the work must be performed by someone who satisfies the legal definition of ‘volunteer’. Was the community work done on a voluntary basis?
☐ Yes - go to Question 2
☐ No - go to Section E

Question 2: Is your organisation a community organisation?
In order for the volunteer to be entitled to the protection, your organisation must meet the definition of ‘community organisation’ under the Protection Act.

Your organisation will meet the definition if it organises the doing of community work by volunteers (see question 3) and it fits into one of the categories listed in the checklist for Question 2 below.

CAUTION
The volunteer protection provisions of the Protection Act do not apply to unincorporated community groups. This means volunteers who are involved in an unincorporated community group will be liable for their own actions.

RELATED RESOURCES
For more information on the difference between unincorporated and incorporated community groups see Not-for-profit Law’s factsheet ‘What is incorporation’ and does our group need to incorporate?’ available at https://www.nfplaw.org.au/incorporationdecision
Question 3: Is the work being done by the volunteer 'community work'?

The protection under the Protection Act applies to a volunteer when he or she is undertaking 'community work', i.e. the focus is on the purpose of the activity the volunteer is performing, not the overall purpose of the organisation. Whether a volunteer is performing 'community work' will depend on what work the volunteer is actually doing, rather than the objects of the organisation they are doing the work for.

Community work is broadly defined as work for any of the purposes in the below checklist.

The **Volunteers (Protection from Liability) Regulations 2005 (WA)** can declare that certain work is not community work even if it fits into the categories above, but no work has been declared at October 2018.

Some of the fields of community work set out above have a technical legal meaning (e.g. charitable purposes). You may need to seek legal advice about whether the work falls into one of these categories. For further information on what types of activities may be considered to be charitable, refer to Not-for-profit Law’s page on registering as a charity at [www.nfplaw.org.au/charity](http://www.nfplaw.org.au/charity).
Question 4: Was the volunteer carrying out community work for the community organisation?

A volunteer is protected whilst he or she is carrying out community work for the community organisation. The wording is quite broad and could, in theory, encompass tasks that the volunteer was not asked to undertake but decided to undertake of their own accord. However, the volunteer will not be protected if he or she acted without authority or contrary to instructions (see Section C below).

For example, if your organisation trains a person to use a machine and directs that person to use it, he/she will be performing work organised by your organisation. A person who starts working without approval or direction from your organisation would not be carrying out community work for the community organisation.

**QUESTION 4: CHECK LIST**

Was the work performed by the volunteer in the course of carrying out community work for the community organisation?

- [ ] Yes - go to Question 5
- [ ] No - go to Section E
Section B: Has civil liability been incurred?

Question 5: Was the liability incurred because of a criminal offence?

The protection is only afforded for civil liabilities. A volunteer will not be protected from liability for criminal actions (offences by a person against the state) while volunteering. This includes traffic infringements as well as more serious crimes. For example, if a volunteer physically assaults someone while they are volunteering, this may result in criminal charges and possible criminal compensation.

**QUESTION 5: CHECK LIST**

Was the liability incurred by the volunteer for an act or omission that constitutes a civil liability (for example, negligence causing physical injury) and not an act or omission that would (on the balance of probabilities) constitute a criminal offence (for example, stealing or assault)?

- [ ] Yes – go to Question 6
- [ ] No – go to Section E

Question 6: Is the civil liability included in the protection provisions?

Certain types of civil liability are excluded from the protection provisions. A volunteer will not be protected in certain civil proceedings:

- if the volunteer is sued for defamation, or
- if the volunteer has a car accident while volunteering. In this case, any liability for compensation for personal injury to third parties under the *Motor Vehicle (Third Party Insurance) Act 1943* is excluded (as this is covered by the compulsory third party insurance that is included in the registration costs of a vehicle).

**QUESTION 6: CHECK LIST**

Was the liability incurred by the volunteer one of the following types?

- [ ] Liability for defamation
- [ ] Liability for personal injury due to a motor vehicle accident where that liability should have been covered by third-party insurance

If ANY apply go to Section E
If NONE apply go to Question 7
Section C: When does the protection not apply to volunteers?

A volunteer is not automatically protected by meeting the threshold requirements of the legislation outlined in Section A and B. There are specific situations where the protection will not apply. These situations are listed below.

Question 7: Is the volunteer performing community work as a part of a court order or fine repayment scheme?

A person who carries out community work under the order of a court or as a condition of a bond is not regarded as working on a voluntary basis, and is therefore not considered a volunteer. Work under a fine repayment scheme is not specifically excluded by the Act, however, it is unlikely that such work would be considered ‘voluntary’ as the participant will receive a benefit in the form of their debt being cancelled or reduced.

**QUESTION 7: CHECK LIST**

Is the volunteer performing the community work doing so under a court order or fine repayment scheme?

- [ ] Yes – go to Section E
- [ ] No – go to Question 8

**CAUTION**

Organisations working with individuals under court orders or fine repayment schemes will need to carefully manage their own risks, speak to the relevant government department and should advise the individuals to consider whether there is insurance covering their participation.

For more information, view our freely available webinar ‘Volunteers versus unpaid workers’ available for download at www.nfplaw.org.au/volunteers.

Question 8: Were the volunteer's actions (or failure to act) done in 'good faith'?

The volunteer's actions (or failure to act) must have been done in 'good faith'. To act in good faith has been defined as acting honestly and without fraud. Where a volunteer endeavours to act in the best interests of the community organisation and is not involved in any dishonest or fraudulent behaviour, the volunteer is taken to be acting in good faith.
In good faith

A volunteer attends a community sports day to assist with minor first aid. A child falls and fractures their arm, and as a result of the volunteer’s care, their injury is worsened. The volunteer will be acting in good faith if they were trying to help the injured person and believed that was the correct first aid action. However, they will not be acting in good faith if they gave this assistance in order to impress their friend when they knew they had no idea of what first aid action to take.

Question 9 Does an exception apply?

Certain acts of the volunteer will exclude their ability to claim protection. Even if a person is a volunteer and they have been undertaking community work organised by a community organisation, there are exceptions set out under the Act. In general, a volunteer will not be protected where:

- the volunteer knew, or ought to have reasonably known, that at the relevant times they were acting:
  - outside the scope of the community work organised by the community organisation,
  - contrary to any instructions given by the community organisation, or
- the volunteer's ability to do the community work in a proper manner was, at the relevant times, significantly impaired by alcohol or drugs.

There are specific legal definitions and interpretations of many of the terms used in these exceptions (e.g. 'ought reasonable to have known', 'drugs', 'alcohol' and 'significantly impaired'). If potentially relevant, your organisation may need to seek legal advice about these issues.

Example

A person volunteers at a community sports day and is instructed to assist with refreshments only. The volunteer starts to help with marshalling participants without instruction to do so. An injury occurs as a result of the volunteer’s marshalling activities. As the volunteer was acting contrary to instructions, it is likely that an exception applies and that the volunteer will not be protected from liability.
QUESTION 9: CHECK LIST

Did any of the following apply to the volunteer at the time of the act or omission?

☐ volunteer’s ability to exercise reasonable care and skill was significantly impaired as a result of voluntarily consuming alcohol or a drug (whether or not consumed for medication) and they failed to exercise reasonable care and skill

☐ acting outside the scope of activities authorised by the community organisation

☐ acting contrary to instructions given by the community organisation

If ANY apply go to Section E

If NONE apply go to Section D

Section C: Your volunteers are likely protected, what does this mean?

If you have answered all questions in sections A, B and C, and the answer does not result in “go to Section E”, the protection under the Protection Act is likely to apply to volunteers engaged by your organisation. If you are in doubt, seek legal advice. The volunteer will need their own, independent legal advice in the event of legal action being commenced against them.

If your volunteers are protected this means they do not incur personal civil liability as a result of performing community work organised by or as an office holder of your community organisation.

This means that if a volunteer is protected (that is, all of the tests set out above have been met) the volunteer will not be personally liable to pay any compensation to anyone whom they may have caused personal injury, property damage or financial loss, as a result of their own actions or failures to act.

Instead, the liability of a protected volunteer will be transferred to the organisation the volunteer was performing the community work for, and the injured party would be able to sue the community organisation (rather than the volunteer) for any injury, damage or loss caused by the volunteer.

NOTE

- where there are two or more community organisations involved in organising the community work performed by the volunteer, the community organisation that principally organises the work will be liable for the actions of the volunteer, and
- an organisation will not be liable for any harm suffered from the materialisation of an obvious risk of a dangerous recreational activity, for example, a person who is injured diving into a river from a rope swing, an activity that entails an obvious risk of danger. If relevant, legal advice should be sought on the interpretation of “dangerous recreational activity”.

National Guide: Annexure to Part 3 - Checklist: Western Australian Protection Act

© 2018 Justice Connect. This information was last updated on October 2018 and does not constitute legal advice, full disclaimer and copyright notice at www.nfplaw.org.au/disclaimer.
Section D: Your volunteers may not be protected, what does this mean?

If your volunteers are not protected by the provisions of the Protection Act, your volunteers remain personally liable for their actions. They may be either sued individually or joined to an action against your community organisation, for their acts and omissions while performing community work.

**NOTE – VOLUNTEERS ARE CRITICAL TO THE WORK THAT COMMUNITY ORGANISATIONS DO**

Volunteers are a critical element to the work that many not-for-profit community organisations undertake.

The circumstances that a volunteer is found to be personally liable are extremely rare, and in most instances, volunteers are found to be doing the right thing.

The potential for liability should not be a reason in of itself not to engage volunteers, and what is most important is that organisations are aware of the risks and put in place measures to prevent incidents from occurring.
South Australia

Checklist: Are our volunteers protected against personal liability under the South Australian Volunteers Act?
Overview

This checklist is designed to provide a simple guide to assist South Australian community organisations to determine if its volunteers are protected under the provisions of the Volunteers Protection Act 2001 (SA) (the Volunteers Act). This checklist will also assist South Australian community organisations to understand when they could be held liable (legally responsible) for the actions of its volunteers.

How to use this checklist

There are a number of threshold requirements to be met before a volunteer may gain the benefit of the protection set out in the Volunteers Act. These requirements, along with some questions to help your organisation assess whether a volunteer may be covered by the protection, are set out below.

Start by answering the questions in Section A, B and C and you will either be directed to Section D ‘Your volunteers are likely protected, what does this mean’ or Section E ‘Your volunteers may not be protected, what does this mean.’ It is recommended that you seek legal advice about how the Volunteers Act applies to your particular organisation before acting on the content of this publication.

Section A: Do your volunteers meet the requirements for protection?

Question 1: Has the community work been undertaken by a ‘volunteer’?

The Volunteers Act defines a ‘volunteer’ as a person who carries our community work on a voluntary basis. A person is considered to work on a ‘voluntary basis’ if he or she receives no remuneration for the work, or is remunerated within limits fixed by regulation. The Volunteers Protection Regulations 2004 (SA) (Volunteers Regulations) set these limits as:
• reimbursement for out-of-pocket expenses, or
• a monetary gift made to the person in recognition of the person’s work as a volunteer. Such a monetary gift cannot be subject to PAYG withholding or instalment tax, paid as a consequence of the person’s employment, legally required to be paid, or an amount relied upon by the person as a source of income.

**EXAMPLE**

Fred is employed as a gardener. Fred volunteers his services to Community House Inc (a South Australian incorporated association) for one day a month. After a year of volunteering, Community House gave Fred a $100 voucher as thank you gift for his assistance. Fred is still regarded as a volunteer for the purposes of the Volunteers Act whilst performing services for Community House Inc.

**QUESTION 1: CHECK LIST**

To be entitled to protection the work must be performed by someone who satisfies the legal definition of ‘volunteer’. Was the community work done on a voluntary basis?

☐ Yes - go to Question 2

☐ No - go to Section E

**Question 2: Is your organisation a ‘community organisation’?**

In order for the volunteer to be entitled to the protection, your organisation must meet the definition of ‘community organisation’ under the Volunteers Act.

Your organisation will meet the definition if it directs or co-ordinates the carrying out of community work by volunteers (see Question 3) and it fits into one of the categories listed in the checklist for Question 2 below.

**CAUTION**

The volunteer protection provisions of the Volunteers Act do not apply to unincorporated community groups. This means volunteers who are involved in an unincorporated community group will be liable for their own actions.

**RELATED RESOURCES**

For more information on the difference between unincorporated and incorporated community groups see Not-for-profit Law’s factsheet ‘What is incorporation’ and does our group need to incorporate? available at [https://www.nfplaw.org.au/incorporationdecision](https://www.nfplaw.org.au/incorporationdecision)
QUESTION 2: CHECK LIST
Does your organisation fit into one of the following categories?

☐ a body corporate (company limited by guarantee, incorporated association etc.)
☐ the Crown (a government body)

If ANY apply go to Question 3
If NONE apply go to Section E

Question 3: Is the work being done by the volunteer ‘community work’?

The protection under the Volunteers Act applies to a volunteer when he or she is undertaking ‘community work’, i.e. the focus is on the purpose of the activity the volunteer is performing, not the overall purpose of the organisation. Whether a volunteer is performing ‘community work’ will depend on what work the volunteer is actually doing, rather than the objects of the organisation they are doing the work for.

Community work is broadly defined as work for any of the purposes listed in the below checklist.

The Volunteers Regulations can also specify that certain types of work do or do not constitute community work, but the Regulations are silent on this as at October 2018.

CAUTION

Some of the fields of community work set out above have a technical legal meaning (e.g. charitable purposes). You may need to seek legal advice about whether the work falls into one of these categories. For further information on what types of activities may be considered to be charitable, refer to Not-for-profit Law’s page on registering as a charity at www.nfplaw.org.au/charity.
QUESTION 3: CHECK LIST

Community work is not performed for private financial gain and is done for one or more of the following purposes:

☐ religious, educational, charitable or benevolent purposes
☐ promoting or encouraging literature, science or the arts
☐ looking after, or providing medical treatment or attention for, people who need care because of a physical or mental disability or condition
☐ sport, recreation, or amusement
☐ conserving resources or protecting the natural environment from harm
☐ preserving historical or cultural heritage
☐ a political purpose,
☐ protecting or promoting the common interests of the community or a section of the community.

If ANY apply go to Question 4
If NONE apply go to Section E

Question 4: Was the volunteer carrying out community work for the community organisation’?

A volunteer is protected whilst he or she is carrying out community work for the community organisation. This wording is quite broad and could, in theory, encompass tasks that the volunteer was not asked to undertake but decided to undertake of their own accord.

However, the volunteer will not be protected if he or she acted without authority or contrary to instructions (see Section C below).

For example, if your organisation trains a person to use a machine and directs that person to use it, he/she will be performing work organised by your organisation. A person who starts working without approval or direction from your organisation would not in the course of carrying out community work.

QUESTION 4: CHECK LIST

Was the work performed by the volunteer in the course of carrying out community work for the community organisation?

☐ Yes - go to Question 5
☐ No - go to Section E
Section B: Has civil liability been incurred?

Question 5: Was the liability incurred because of a criminal offence?

The protection is only afforded for civil liabilities. A volunteer will not be protected from liability for criminal actions while volunteering (which are offences by a person against the state – and include traffic infringements as well as more serious crimes). For example, if a volunteer physically assaults someone while they are volunteering, this may result in criminal charges and possible criminal compensation. The Volunteers Act won’t protect the volunteer from criminal liability in this situation.

**QUESTION 5: CHECK LIST**

Was the liability incurred by the volunteer for an act or omission that constitutes a civil liability (for example, negligence causing physical injury) and not an act or omission that would (on the balance of probabilities) constitute a criminal offence (for example, stealing or assault)?

☐ Yes - go to Question 6
☐ No – go to Section E

Question 6: Is the civil liability included in the protection provisions?

Certain types of civil liability are excluded from the protection provisions. A volunteer will not be protected by the Volunteers Act in certain civil proceedings:

- the act or omission falls within the ambit of a scheme of compulsory third-party motor vehicle insurance (i.e. where the volunteer was involved in a motor accident and the injured person follows the normal procedure for making a claim), or
- the act or omission is defamation

**QUESTION 6: CHECK LIST**

Was the liability incurred by the volunteer one of the following types?

☐ Liability for defamation
☐ Liability for personal injury due to a motor vehicle accident where that liability should have been covered by third-party insurance

If ANY apply go to Section D
If NONE apply go to Question 7
Section C: When does the protection not apply to volunteers?

A volunteer is not automatically protected by meeting the threshold requirements of the legislation outlined in Section A and B. There are specific situations where the protection will not apply. These situations are listed below.

Question 7: Is the volunteer performing community work as a part of a court order or fine repayment scheme?

A person who carries out community work under the order of a court or as a condition of a bond is not regarded as working on a voluntary basis for the purpose of the Volunteers Act and is therefore not considered a ‘volunteer’ for the purpose of the special protection. Although work under a fine repayment scheme is not specifically excluded by the Act, it is unlikely that such work would be considered ‘voluntary’ as the participant will receive a benefit in the form of their debt being cancelled or reduced.

QUESTION 7: CHECK LIST

Is the volunteer performing the community work doing so under a court order or fine repayment scheme?

☐ Yes – go to Section E
☐ No – go to Question 9

CAUTION

Organisations working with individuals under court orders or fine repayment schemes will need to carefully manage their own risks, speak to the relevant government department and should advise the individuals to consider whether there is insurance covering their participation.

For more information, view our freely available webinar ‘Volunteers versus unpaid workers’ available for download at www.nfplaw.org.au/volunteers.

Question 8: Were the volunteer’s actions (or failure to act) done in ‘good faith’ and ‘without recklessness’?

Certain acts of the volunteer will exclude their ability to claim protection. The volunteer’s actions (or failure to act) must have been done in ‘good faith’ and ‘without recklessness’. Generally, to act in good faith is to act honestly and without fraud. Where a volunteer endeavours to act in the best interests of the community organisation and is not involved in any dishonest or fraudulent behaviour, it is likely the volunteer is acting in good faith.
The term ‘recklessness’ has an imprecise definition in the law but generally means that a person knew or should have known that their action was likely to cause harm. Your organisation may need to seek legal advice about this if relevant.

**EXAMPLE**

**‘in good faith’**
A volunteer attends a community sports day to assist with minor first aid. A child falls and fractures their arm, and as a result of the volunteer’s care, their injury is worsened. The volunteer will be acting in good faith if they were trying to help the injured person and believed that was the correct first aid action. However, they will not be acting in good faith if they gave this assistance in order to impress their friend when they knew they had no idea of what first aid action to take.

**‘without recklessness’**
A person volunteers their time by running sports sessions for children. An accident occurs due to faulty sports equipment. The volunteer will have acted recklessly if they were aware that there was a problem with their equipment. The volunteer will not be reckless if their equipment had been checked recently and they had no knowledge of the problem.

**QUESTION 8: CHECK LIST**

At the time of the act or omission, was the volunteer acting in good faith and without recklessness?

- Yes they were acting in good faith and without recklessness - go to Question 9
- No they were not acting in good faith, or they were acting recklessly - go to Question E

**Question 9: Does an exception apply?**

Even if a person is a volunteer and they have been undertaking community work organised by a community organisation, done in ‘good faith’ and ‘without recklessness’ there are further exceptions set out under the Volunteers Act. In general, a volunteer will not be protected where:

- the volunteer’s ability to carry out the work properly was significantly impaired by a recreational drug
- the volunteer knew, or ought reasonably to have known, that at the relevant times they were:
  - acting outside the scope of the community work authorised by the community organisation, or
  - acting contrary to any instructions given by the community organisation.

**EXAMPLE**

A person volunteers at a community sports day and is instructed to assist with refreshments only. The volunteer starts to help with marshalling participants without instruction to do so. An injury occurs as a result of the volunteer’s marshalling activities. As the volunteer was not acting according to instructions, it is likely that an exception under the Volunteers Act applies and that the volunteer will not be protected from liability.
There are specific legal definitions and interpretations of many of the terms used in these exceptions (e.g. ‘ought reasonably to have known’, ‘drugs’, ‘alcohol’ and ‘significantly impaired’). If potentially relevant, your organisation may need to seek legal advice about these issues.

**QUESTION 9: CHECK LIST**

Did any of the following apply to the volunteer at the time of the act or omission?

- volunteer’s ability to exercise reasonable care and skill was significantly impaired as a result of voluntarily consuming alcohol or a drug (whether or not consumed for medication) and they failed to exercise reasonable care and skill
- acting outside the scope of activities authorised by the community organisation
- acting contrary to instructions given by the community organisation

If ANY apply go to Section E

If NONE apply go to Section D

Section D: Your volunteers are likely protected, what does this mean?

If you have answered all questions in sections A, B and C, and the answer does not result in “go to section E”, the protection under the Volunteer protection act is likely to apply to volunteers engaged by your organisation. If you are in doubt, seek legal advice. The volunteer will need their own, independent legal advice in the event of legal action being commenced against them.

If your volunteers are protected this means they do not incur personal civil liability as a result of performing community work organised by your community organisation.

This means that the volunteer will not be personally liable to pay any compensation to anyone whom they may have caused personal injury, property damage or financial loss, as a result of their own actions or failures to act.

Instead, the liability of a protected volunteer will be transferred to the organisation the volunteer was performing the community work for, and the injured party would be able to sue the community organisation (rather than the volunteer) for any injury, damage or loss caused by the volunteer.
Section E: Your volunteers may not be protected, what does this mean?

If your volunteers are not protected by the provisions of the Volunteer protection act, your volunteers remain personally liable for their actions. They may be either sued individually or joined to an action against your community organisation, for their acts and omissions while performing community work.

NOTE – VOLUNTEERS ARE CRITICAL TO THE WORK THAT COMMUNITY ORGANISATIONS DO

Volunteers are a critical element to the work that many not-for-profit community organisations undertake.

The circumstances that a volunteer is found to be personally liable are extremely rare, and in most instances, volunteers are found to be doing the right thing.

The potential for liability should not be a reason in of itself not to engage volunteers, and what is most important is that organisations are aware of the risks and put in place measures to prevent incidents from occurring.
Australian Capital Territory

Checklist: Are our volunteers protected against personal liability under the Australian Capital Territory Wrongs Act?
Overview

This checklist is designed to provide a simple guide to assist ACT community organisations to determine if its volunteers are protected under the provisions of the Civil Law (Wrongs) Act 2002 (ACT) (ACT Wrongs Act). This checklist will also assist ACT community organisations to understand when they could be held liable (legally responsible) for the actions of its volunteers.

How to use this checklist

There are a number of threshold requirements to be met before a volunteer may gain the benefit of the protection set out in the ACT Wrongs Act. These requirements, along with some questions to help your organisation assess whether a volunteer may be covered by the protection are set out below.

Start by answering the questions in Section A, B and C and you will either be directed to Section D ‘Your volunteers are likely protected, what does this mean’ or Section E ‘Your volunteers may not be protected, what does this mean.’ It is recommended that you seek legal advice about how the ACT Wrongs Act applies to your particular organisation before acting on the content of this publication.

Section A: Do your volunteers meet the requirements for protection?

Question 1: Has the community work been undertaken by a ‘volunteer’?

The ACT Wrongs Act defines a ‘volunteer’ as an individual who carries out community work on a voluntary basis. A person is considered to work on a ‘voluntary basis’ if he or she:

- receives no remuneration for the work, or
• is remunerated for the work but within limits prescribed by regulation. There is no amount prescribed by regulation as at July 2018.

The volunteer may receive reimbursement of their reasonable expenses and the work will still be considered as being on a voluntary basis.

Example
Fred is employed by as a gardener. Fred volunteers his services to Community House Inc (an ACT incorporated association) for one day a month as part of his employer’s volunteering scheme. Although Fred is paid by his employer, he is still regarded as a volunteer for the purposes of the ACT Wrongs Act whilst performing services for Community House Inc because he is not remunerated for his volunteer work.

Question 1: Check List
To be entitled to protection the work must be performed by someone who satisfies the legal definition of ‘volunteer’. Was the community work done on a voluntary basis?

☐ Yes - go to Question 2
☐ No - go to Section E

Question 2: Is your organisation a ‘community organisation’?

In order for the volunteer to be entitled to the protection, your organisation must meet the definition of ‘community organisation’ under the ACT Wrongs Act.

Your organisation will meet the definition if it directs or coordinates the carrying out of community work by volunteers (see question 3) and you fit into one of the categories listed in the checklist for Question 2 below.

The definition in the ACT Wrongs Act allows for-profit entities as well as not-for-profit entities to fall within the definition of ‘community organisations’. The meaning of ‘community work’ is discussed in question 3 below, but note that ‘community work’ does not have to be the organisation’s sole activity.

Caution
The volunteer protection provisions of the ACT Wrongs Act do not apply to unincorporated community groups. This means volunteers who are involved in an unincorporated community group will be liable for their own actions.

Related Resources
For more information on the difference between unincorporated and incorporated community groups see Not-for-profit Law’s factsheet ‘What is incorporation’ and does our group need to incorporate?’ available at https://www.nfplaw.org.au/incorporationdecision
Question 3: Is the work being done by the volunteer ‘community work’?

The protection under the ACT Wrongs Act applies to a volunteer when he or she is undertaking ‘community work’, i.e. the focus is on the purpose of the activity the volunteer is performing, not the overall purpose of the organisation. Whether a volunteer is performing ‘community work’ will depend on what work the volunteer is actually doing, rather than the objects of the organisation they are doing the work for.

Community work is broadly defined as work for any of the purposes listed in the below checklist.

Certain types of work may be declared by regulation to constitute, or not to constitute, ‘community work’. There is no ‘community work’ prescribed by the ACT Wrongs Act regulation as at July 2018.

The ACT Wrongs Act also specifically excludes from the definition of community work any work that involves act or threats of violence or creates a serious risk to the health or safety of the public or a section of the public.

QUESTION 3: CHECK LIST

Community work is not performed for private financial gain and is done for one or more of the following purposes:

- religious, educational, charitable or benevolent purposes
- promoting or encouraging literature, science or the arts
- looking after, or giving attention to, people who need care because of a physical or mental disability or condition
- sport, recreation or amusement
- conserving resources or protecting the natural environment from harm
- preserving historical or cultural heritage
- a political purpose, or
- protecting or promoting the common interests of the community generally or a particular section of the community.

If ANY apply go to Question 4
If NONE apply go to Section E
Question 4 - Has the community work been ‘carried out for’ a community organisation?

A volunteer is protected if their action (or failure to act) took place whilst they were carrying out community work for the community organisation. The definition of ‘community organisation’ as an organisation that directs or coordinates community work indicates a degree of direction, coordination and organisation on the part of the community organisation, but the wording ‘carried out for’ is broad and could, in theory, encompass tasks that the volunteer was not asked to undertake but decided to undertake of their own accord.

However, the volunteer will not be protected if he or she acted without authority or contrary to instructions (see Section C below).

**QUESTION 4: CHECK LIST**

Was the work performed by the volunteer carried out for the community organisation?

- □ Yes - go to Question 5
- □ No - go to Section E

Section B: Has civil liability been incurred?

Question 5: Was the liability incurred because of a criminal offence?

The protection is only afforded for civil liabilities. A volunteer will not be protected from criminal liability while volunteering (a criminal offence is an offence by a person against the state and includes traffic infringements as well as more serious offences). For example, if a volunteer physically assaults someone while they are volunteering, this may result in criminal charges and possible criminal compensation. The ACT Wrongs Act won’t protect the volunteer from criminal liability in this situation.
Question 6: Is the civil liability included in the protection provisions?

Certain types of civil liability are excluded from the protection provisions. A volunteer will not be protected under the ACT Wrongs Act in certain civil proceedings:

- if the volunteer is sued for defamation, or
- if the volunteer has a car accident while volunteering. In this case, any liability for compensation for personal injury to third parties which falls within the ambit of a compulsory third-party motor vehicle insurance scheme is excluded (as this is covered by the compulsory third party insurance that is included in the registration costs of a vehicle).

Section C: When does the protection not apply to volunteers?

A volunteer is not automatically protected by meeting the threshold requirements of the legislation outlined in Section A and B. There are specific situations where the protection will not apply. These situations are listed below.

Question 7: Is the volunteer performing community work as a part of a court order or fine repayment scheme?

Although the ACT Wrongs Act does not specifically exclude a person who carries out community work under a court order, it is unlikely that such a person would be considered to be working on a 'voluntary
basis’ as there are penalties for failure to comply with a court order. The Crimes (Sentence Administration) Act 2005 (ACT) (see sections 315 to 317) contains provisions that may protect a community organisation against civil liability for conduct engaged in by the offender in doing the community service work. Your organisation should seek further legal advice if you are in this situation. It is also unlikely work under an infringement notice work and development scheme would be considered as being undertaken ‘voluntarily’ as the participant will receive a benefit in the form of their fine debt being repaid or waived.

**QUESTION 7: CHECK LIST**

Is the volunteer performing the community work doing so under a court order or fine repayment scheme?

- □ Yes – go to Section E
- □ No – go to Question 8

**CAUTION**

Organisations working with individuals under court orders or fine repayment schemes will need to carefully manage their own risks, speak to the relevant government department and should advise the individuals to consider whether there is insurance covering their participation.

For more information, view our freely available webinar ‘Volunteers versus unpaid workers’ available for download at www.nfplaw.org.au/volunteers.

**Question 8: Were the volunteer’s actions (or failure to act) done ‘honestly and without recklessness’?**

The volunteer’s actions (or omissions) must have been done ‘honestly and without recklessness’.

A person is reckless about causing harm if there is a substantial risk that harm will occur and he or she ignores the risk. If relevant, your organisation may need to seek legal advice about these issues.

**EXAMPLE**

- **‘Honestly’**
  A volunteer attends a community sports day to assist with minor first aid. A child falls and fractures their arm, and as a result of the volunteer’s care, their injury is worsened. The volunteer will be acting honestly if they were trying to help the injured person and genuinely believed that was the correct first aid action. However, they will not be acting honestly if they gave this assistance in order to impress their friend when they knew they had no idea of what first aid action to take.

- **‘Without recklessness’**
  A person volunteers their time by running sports sessions for children. An accident occurs due to faulty sports equipment. The volunteer will have acted recklessly if they were aware that there was a problem with their equipment. The volunteer will not be reckless if their equipment had been checked recently and they had no knowledge of the problem.
QUESTION 8: CHECK LIST
At the time of the act or omission, was the volunteer acting honestly and without recklessness?

☐ Yes they were acting honestly and without recklessness - go to Question 9

☐ No they were not acting honestly, or they were acting recklessly - go to Question E

Question 9: Does an exception apply?

Even if a volunteer acted honestly and without recklessness while carrying out community work for a community organisation, he or she may not be protected under the ACT Wrongs Act if an exception applies. In general, your organisation will not be liable (and a volunteer may be personally liable) if:

- the volunteer’s capacity to carry out the work properly was, at the relevant time, significantly impaired by a recreational drug
- the volunteer knew, or ought to have known, that he or she was acting:
  - outside the scope of the activities authorised by the community organisation, or
  - contrary to instructions given by the community organisation.

There are specific legal definitions and interpretations of many of the terms used in these exceptions (e.g. ‘recreational drug’ and ‘significantly impaired’). If relevant, your organisation may need to seek legal advice about these issues.

QUESTION 9: CHECK LIST
Did any of the following apply to the volunteer at the time of the act or omission?

☐ volunteer’s ability to exercise reasonable care and skill was significantly impaired as a result of voluntarily consuming alcohol or a drug (whether or not consumed for medication) and they failed to exercise reasonable care and skill

☐ acting outside the scope of activities authorised by the community organisation

☐ acting contrary to instructions given by the community organisation

If ANY apply go to Section E
If NONE apply go to Section D
Section D: Your volunteers are likely protected, what does this mean?

If you have answered all questions in sections A, B and C and the answer does not result in “go to section E”, the protection under the ACT Wrongs Act is likely to apply to volunteers engaged by your organisation. If you are in doubt, seek legal advice. The volunteer will need their own, independent legal advice in the event of legal action being commenced against them.

If your volunteers are protected this means they do not incur personal civil liability as a result of performing community work organised by or as an office holder of your community organisation. This means that the volunteer will not incur personal civil liability as a result of their own actions or failures to act.

Instead, the liability of a protected volunteer will be transferred to the organisation the volunteer was performing the community work for, and the injured party would be able to sue the community organisation (rather than the volunteer) for any injury, damage or loss caused by the volunteer.

Section E: Your volunteers may not be protected, what does this mean?

If your volunteers are not protected by the provisions of the ACT Wrongs Act, your volunteers remain personally liable for their actions. They may be either sued individually or joined to an action against your community organisation, for their acts and omissions while performing community work.

NOTE – VOLUNTEERS ARE CRITICAL TO THE WORK THAT COMMUNITY ORGANISATIONS DO

Volunteers are a critical element to the work that many not-for-profit community organisations undertake.

The circumstances that a volunteer is found to be personally liable are extremely rare, and in most instances, volunteers are found to be doing the right thing.

The potential for liability should not be a reason in of itself not to engage volunteers, and what is most important is that organisations are aware of the risks and put in place measures to prevent incidents from occurring.
Tasmania

Checklist: Are our volunteers protected against personal liability under the Tasmanian Civil Liability Act?
Checklist: Are our volunteers protected against personal liability under the Tasmanian Civil Liability Act?

Overview

This checklist is designed to provide a simple guide to assist Tasmanian community organisations to determine if its volunteers are protected under the provisions of the Civil Liability Act 2002 (TAS Civil Liability Act). This checklist will also assist Tasmanian community organisations to understand when they could be held liable (legally responsible) for the actions of its volunteers.

How to use this checklist

There are a number of threshold requirements to be met before a volunteer may gain the benefit of the protection set out in the TAS Civil Liability Act. These requirements, along with some questions to help your organisation assess whether a volunteer may be covered by the protection are set out below.

Start by answering the questions in Section A, B and C and you will either be directed to Section D ‘Your volunteers are likely protected, what does this mean’ or Section E ‘Your volunteers may not be protected, what does this mean.’ It is recommended that you seek legal advice about how the TAS Civil Liability Act applies to your particular organisation before acting on the content of this publication.

Section A: Do your volunteers meet the requirements for protection?

Question 1: Has the community work been undertaken by a ‘volunteer’?

The TAS Civil Liability Act defines a ‘volunteer’ as a person who does community work (discussed below) on a voluntary basis. The Act says that a person is considered to work on a voluntary basis if he or she receives:
• no remuneration for the work other than:
  • remuneration that would have been received whether or not they did that work (for example, a person who is in paid employment with another organisation, but is released from that employment to undertake voluntary work) or
  • reimbursement for reasonable out-of-pocket expenses, or
  • remuneration for the work that is not greater than the amount prescribed by regulations of the TAS Civil Liability Act – there is no regulation in place as at July 2018.

**EXAMPLE**

Fred is employed by B Pty Ltd as a gardener. B Pty Ltd encourages its staff to volunteer their services to Community House Inc (a Tasmanian incorporated association), which is adjacent to their business premises. B Pty Ltd allows their staff to volunteer for one day a month at Community House Inc on full pay. Fred, as part of the scheme, tends the Community House’s garden one day each month while being paid by his employer. Fred is still regarded as a volunteer for the purposes of the TAS Civil Liability Act while performing services for Community House Inc. Although he is paid as an employee, this is not linked to his volunteering at Community House Inc. He would be paid whether or not he volunteered.

**QUESTION 1: CHECK LIST**

To be entitled to protection the work must be performed by someone who satisfies the legal definition of ‘volunteer’. Was the community work done on a voluntary basis?

☐ Yes - go to Question 2
☐ No - go to Section E

**Question 2: Is your organisation a ‘community organisation’?**

In order for the volunteer to be entitled to the protection, your organisation must meet the definition of ‘community organisation’ under the TAS Civil Liability Act.

Your organisation will meet the definition if it organises the doing of community work by volunteers (see question 3) and you fit into one of the categories listed in the checklist for Question 2 below.

**CAUTION**

The volunteer protection provisions of Tasmania’s Civil Liability Act do not apply to unincorporated community groups. This means volunteers who are involved in an unincorporated community group will be liable for their own actions.
Question 3: Is the work being done by the volunteer ‘community work’?

The protection under the TAS Civil Liability Act applies to a volunteer when he or she is undertaking ‘community work’, i.e. the focus is on the purpose of the activity the volunteer is performing, not the overall purpose of the organisation. Whether a volunteer is performing ‘community work’ will depend on what work the volunteer is actually doing, rather than the objects of the organisation they are doing the work for.

Community work is broadly defined as work organised by a community organisation for any of the purposes listed in the below checklist.

Regulations to the TAS Civil Liability Act can also specify that certain types of work do or do not constitute community work, but there are no such regulations at October 2018.

CAUTION

Some of the fields of community work set out above have a technical legal meaning (e.g. charitable purposes). You may need to seek legal advice about whether the work falls into one of these categories. For further information on what types of activities may be considered to be charitable, refer to Not-for-profit Law’s page on registering as a charity at www.nfplaw.org.au/charity.
Question 4: Has the community work been ‘organised’ by a community organisation?

A volunteer is protected if he or she carried out community work that is ‘organised’ by the community organisation. The definition of ‘organised’ in the TAS Civil Liability Act includes work that is ‘directed’ or ‘supervised’ by a community organisation, but this is non-exhaustive and may extend to situations where there are no specific directions or supervision given, for example, where volunteers are given a general discretion to organise a fundraising event.

However, the protection does not extend to spontaneous acts of volunteers or activities the organisation has not authorised (see Section C below).

For example, if your organisation trains a person to use a machine and directs that person to use it, he/she will be performing work organised by your organisation. A person who starts working without approval or direction from your organisation would not be performing work organised by your organisation.

Question 4: CHECK LIST

Was the work performed by the volunteer organised, directed or supervised by the community organisation?

☐ Yes - go to Question 5
☐ No - go to Section E
Section B: Has civil liability been incurred?

Question 5: Was the liability incurred because of a criminal offence?

The protection is only afforded for civil liabilities. A volunteer will not be protected from liability for criminal actions (offences by a person against the state) while volunteering. This includes traffic infringements as well as more serious crimes. For example, if a volunteer physically assaults someone while they are volunteering, this may result in criminal charges and possible criminal compensation. The TAS Civil Liability Act won’t protect the volunteer from criminal liability in this situation.

**QUESTION 5: CHECK LIST**

Was the liability incurred by the volunteer for an act or omission that constitutes a civil liability (for example, negligence causing physical injury) and not an act or omission that would (on the balance of probabilities) constitute a criminal offence (for example, stealing or assault)?

- [ ] Yes – go to Question 6
- [ ] No – go to Section E

Question 6: Is the civil liability included in the protection provisions?

Certain types of civil liability are excluded from the protection provisions. A volunteer will not be protected under the TAS Civil Liability Act in certain civil proceedings:

- if the volunteer is sued for defamation, or
- if the volunteer has a car accident while volunteering. In this case, any liability for compensation for personal injury to third parties under the Motor Accidents (Liabilities and Compensation) Act 1973 is excluded (as this is covered by the compulsory third party insurance that is included in the registration costs of a vehicle).

**QUESTION 6: CHECK LIST**

Was the liability incurred by the volunteer one of the following types?

- [ ] Liability for defamation
- [ ] Liability for personal injury due to a motor vehicle accident where that liability should have been covered by third-party insurance

If ANY apply go to Section E

If NONE apply go to Question 7
Section C: When does the protection not apply to volunteers?

A volunteer is not automatically protected by meeting the threshold requirements of the legislation outlined in Section A and B. There are specific situations where the protection will not apply. These situations are listed below.

Question 7: Is the volunteer performing community work as a part of a court order or fine repayment scheme?

A person doing work under court-ordered volunteering is not a volunteer under the TAS Civil Liability Act definition. Although work under a fine repayment scheme is not specifically excluded by the Act, it is unlikely that such work would be considered 'voluntary' as the participant will receive benefit in the form of their debt being cancelled or reduced.

**QUESTION 7: CHECK LIST**

Is the volunteer performing the community work doing so under a court order or fine repayment scheme?

☐ Yes – go to Section E
☐ No – go to Question 9

**CAUTION**

Organisations working with individuals under court orders or fine repayment schemes will need to carefully manage their own risks, speak to the relevant government department and should advise the individuals to consider whether there is insurance covering their participation.


Question 8: Were the volunteer’s actions (or failure to act) done in ‘good faith’?

The volunteer’s actions (or failure to act) must have been done in ‘good faith’. To act in good faith has been defined as acting honestly and without fraud. Where a volunteer endeavours to act in the best interests of the community organisation and is not involved in any dishonest or fraudulent behaviour, the volunteer is taken to be acting in good faith.
In good faith’

A volunteer attends a community sports day to assist with minor first aid. A child falls and fractures their arm, and as a result of the volunteer’s care, their injury is worsened. The volunteer will be acting in good faith if they were trying to help the injured person and believed that was the correct first aid action. However, they will not be acting in good faith if they gave this assistance in order to impress their friend when they knew they had no idea of what first aid action to take.

Question 8: Check List

At the time of the act or omission, was the volunteer acting in good faith?

☐ Yes they were acting in good faith - go to Question 9

☐ No they were not acting in good faith - go to Question E

Question 9: Does an exception apply?

Even if a person is a volunteer and they have been undertaking community work organised by a community organisation, there are exceptions set out under the TAS Civil Liability Act. In general, a volunteer will not be protected where:

- the volunteer knew, or ought reasonably to have known, that at the relevant times they were acting:
  - outside the scope of the community work organised by the community organisation, or
  - contrary to any instructions given by the community organisation, or
- the volunteer’s ability to do the community work in a proper manner was, at the relevant times, significantly impaired by alcohol or drugs.

There are specific legal definitions and interpretations of many of the terms used in these exceptions (e.g. ‘ought reasonably to have known’, ‘drugs’, ‘alcohol’ and ‘significantly impaired’). If potentially relevant, your organisation may need to seek legal advice about these issues.

A person volunteers at a community sports day and is instructed to assist with refreshments only. The volunteer starts to help with marshalling participants without instruction to do so. An injury occurs as a result of the volunteer’s marshalling activities. As the volunteer was acting contrary to instructions, it is likely that an exception under the TAS Civil Liability Act applies and that the volunteer will not be protected from liability.
QUESTION 9: CHECK LIST

Did any of the following apply to the volunteer at the time of the act or omission?

☐ volunteer’s ability to exercise reasonable care and skill was significantly impaired as a result of voluntarily consuming alcohol or a drug (whether or not consumed for medication) and they failed to exercise reasonable care and skill

☐ acting outside the scope of activities authorised by the community organisation

☐ acting contrary to instructions given by the community organisation

If ANY apply go to Section E

If NONE apply go to Section D

Section D: Your volunteers are likely protected, what does this mean?

If you have answered all questions in sections A, B and C, and the answer does not result in “go to section E”, the protection under the TAS Civil Liability Act is likely to apply to volunteers engaged by your organisation. If you are in doubt, seek legal advice. The volunteer will need their own, independent legal advice in the event of legal action being commenced against them.

If your volunteers are protected this means they do not incur personal civil liability as a result of performing community work organised by or as an office holder of your community organisation. This means that if a volunteer is protected (that is, all of the tests set out above have been met) the volunteer will not be personally liable to pay any compensation to anyone whom they may have caused personal injury, property damage or financial loss, as a result of their own actions or failures to act.

Instead, the liability of a protected volunteer will be transferred to the organisation the volunteer was performing the community work for, and the injured party would be able to sue the community organisation (rather than the volunteer) for any injury, damage or loss caused by the volunteer.

NOTE

Under the TAS Civil Liability Act:

- where there are two or more community organisations involved in organising the community work performed by the volunteer, the community organisation that principally organises the work will be liable for the actions of the volunteer, and

- an organisation will not be liable for any harm suffered from the materialisation of an obvious risk of a dangerous recreational activity, for example a person who is injured diving into a river from a rope swing, an activity that entails an obvious risk of danger. If relevant, legal advice should be sought on the interpretation of ‘dangerous recreational activity’.
Section E: Your volunteers may not be protected, what does this mean?

If your volunteers are not protected by the provisions of the TAS Civil Liability Act, your volunteers remain personally liable for their actions. They may be either sued individually, or joined to an action against your community organisation, for their acts and omissions while performing community work.

NOTE – VOLUNTEERS ARE CRITICAL TO THE WORK THAT COMMUNITY ORGANISATIONS DO

Volunteers are a critical element to the work that many not-for-profit community organisations undertake.

The circumstances that a volunteer is found to be personally liable are extremely rare, and in most instances, volunteers are found to be doing the right thing.

The potential for liability should not be a reason in of itself not to engage volunteers, and what is most important is that organisations are aware of the risks and put in place measures to prevent incidents from occurring.
Northern Territory

Checklist: Are our volunteers protected against personal liability under the Northern Territory Personal Injuries Act?
Overview

This checklist is designed to provide a simple guide to assist Northern Territory community organisations to determine if its volunteers are protected under the provisions of the Personal Injuries (Liabilities and Damages) Act 2003 (NT) (the Personal Injuries Act). This checklist will also assist Northern Territory community organisations to understand when they could be held liable (legally responsible) for the actions of its volunteers.

How to use this checklist

There are a number of threshold requirements to be met before a volunteer may gain the benefit of the protection set out in the Personal Injuries Act. These requirements, along with some questions to help your organisation assess whether a volunteer may be covered by the protection are set out below.

Start by answering the questions in Section A, B and C and you will either be directed to Section D ‘Your volunteers are likely protected, what does this mean’ or Section E ‘Your volunteers may not be protected, what does this mean.’ It is recommended that you seek legal advice about how the Personal Injuries Act applies to your particular organisation before acting on the content of this publication.

Section A: Do your volunteers meet the requirements for protection?

Question 1: Has the community work been undertaken by a ‘volunteer’?

The Personal Injuries Act defines a ‘volunteer’ as a person doing community work for a community organisation (these terms are discussed below) who receives:
no remuneration for the work other than:
- remuneration that would have been received whether or not they did that work (for example, a person who is in paid employment with another organisation, but is released from that employment to undertake voluntary work)
- reimbursement for reasonable out-of-pocket expenses, or
  - remuneration for the work not greater than the amount prescribed by the regulations of the Personal Injuries Act – there is no amount prescribed by regulation as at July 2018.

**EXAMPLE**

Fred is employed by B Pty Ltd as a gardener. B Pty Ltd encourages its staff to volunteer their services to Community House Inc (a Territory registered body corporate), which is adjacent to their business premises. B Pty Ltd allows their staff to volunteer for one day a month at Community House Inc on full pay. Fred, as part of the scheme, tends the Community House's garden one day each month while being paid by his employer. Fred is still regarded as a volunteer for the purposes of the Personal Injuries Act while performing services for Community House Inc. Although he is paid as an employee, this is not linked to his volunteering at Community House Inc. He would be paid whether or not he volunteered.

**QUESTION 1: CHECK LIST**

To be entitled to protection the work must be performed by someone who satisfies the legal definition of ‘volunteer’. Was the community work done on a voluntary basis?

- [ ] Yes - go to Question 2
- [x] No - go to Section E

**Question 2: Is your organisation a ‘community organisation’?**

In order for the volunteer to be entitled to the protection, your organisation must meet the definition of ‘community organisation’ under the Personal Injuries Act.

Your organisation will meet the definition if you organise, direct or supervise ‘community work’ (see Question 3) done by volunteers and you fit into one of the categories listed in the checklist for Question 2 below.

**CAUTION**

The volunteer protection provisions of the Personal Injuries Act do not apply to unincorporated community groups unless it is a religious body. This means volunteers who are involved in an unincorporated community group will be liable for their own actions.
Question 3: Is the work being done by the volunteer ‘community work’?

The protection under the Personal Injuries Act applies to a volunteer when he or she is undertaking ‘community work’, i.e. the focus is on the purpose of the activity the volunteer is performing, not the overall purpose of the organisation. Whether a volunteer is performing ‘community work’ will depend on what work the volunteer is actually doing, rather than the objects of the organisation they are doing the work for.

Community work is broadly defined as work that is done for any of the purposes in the below checklist.

The regulations to the Personal Injuries Act can also specify that certain types of work constitute community work, but there are no such regulations as at July 2018.

CAUTION

Some of the fields of community work set out above have a technical legal meaning (e.g. charitable purposes). You may need to seek legal advice about whether the work falls into one of these categories. For further information on what types of activities may be considered to be charitable, refer to Not-for-profit Law’s page on registering as a charity at www.nfplaw.org.au/charity.
Question 4: Was the volunteer doing community work for the community organisation?

A volunteer is protected if their action (or failure to act) took place whilst they were doing community work for the community organisation. This wording is quite broad and could, in theory, encompass tasks that the volunteer was not asked to undertake but decided to undertake of their own accord.

However, the volunteer will not be protected if he or she acted without authority or contrary to instructions (see Section C below).

For example, if your organisation trains a person to use a machine and directs that person to use it, he/she will be performing work organised by your organisation. A person who starts working without approval or direction from your organisation would not be performing work for a community organisation.

QUESTION 4: CHECK LIST

The work undertaken must have been community work for a community organisation. Was the work performed by the volunteer for the community organisation?

☐ Yes - go to Question 5
☐ No - go to Section E
Section B: Has civil liability been incurred?

Question 5: Was the liability incurred because of a criminal offence?

The protection is only afforded for civil liabilities. A volunteer will not be protected from liability for criminal actions (offences by a person against the state) while volunteering. This includes traffic infringements as well as more serious crimes. For example, if a volunteer physically assaults someone while they are volunteering, this may result in criminal charges and possible criminal compensation. The Personal Injuries Act won’t protect the volunteer from criminal liability in this situation.

**QUESTION 5: CHECK LIST**

Was the liability incurred by the volunteer for an act or omission that constitutes a civil liability (for example, negligence causing physical injury) and **not** an act or omission that would (on the balance of probabilities) constitute a criminal offence (for example, stealing or assault)?

- [ ] Yes – go to Question 6
- [ ] No – go to Section E

Question 6: Is the civil liability included in the protection provisions?

Certain types of civil liability are excluded from the protection provisions. A volunteer will not be protected under the Personal Injuries Act in certain civil proceedings for personal injury if the volunteer has a car accident while volunteering. In this case, any liability for compensation for personal injury to third parties under the Motor Accidents (Compensation) Act 1979 (NT) is excluded (as this is covered by the compulsory third party insurance that is included in the registration costs of a vehicle).

**QUESTION 6: CHECK LIST**

Was the liability incurred by the volunteer one of the following types?

- [ ] Liability for defamation
- [ ] Liability for personal injury due to a motor vehicle accident where that liability should have been covered by third-party insurance

If ANY apply go to Section E
If NONE apply go to Question 7
Section C: When does the protection not apply to volunteers?

A volunteer is not automatically protected by meeting the threshold requirements of the legislation outlined in Section A and B. There are specific situations where the protection will not apply. These situations are listed below.

Question 7: Is the volunteer performing community work as a part of a court order or fine repayment scheme?

A person doing work under court-ordered volunteering or a fine repayment scheme is not a volunteer under the Personal Injuries Act.

**QUESTION 7: CHECK LIST**

Is the volunteer performing the community work doing so under a court order or a fine repayment scheme?

☐ Yes - go to Section E
☐ No - go to Question 8

**CAUTION**

Organisations working with individuals under court orders or fine repayment schemes will need to carefully manage their own risks, speak to the relevant government department and should advise the individuals to consider whether there is insurance covering their participation.

For more information, view our freely available webinar ‘Volunteers versus unpaid workers’ available for download at www.nfplaw.org.au/volunteers.

Question 8: Were the volunteer’s actions (or failure to act) done in ‘good faith’ and ‘without recklessness’?

Certain acts of the volunteer will exclude their ability to claim protection. The volunteer’s actions (or failure to act) must have been done in ‘good faith’ and ‘without recklessness’. Generally, to act in good faith is to act honestly and without fraud. Where a volunteer endeavours to act in the best interests of the community organisation and is not involved in any dishonest or fraudulent behaviour, the volunteer is taken to be acting in good faith.

The term ‘recklessness’ has an imprecise definition in the law but generally means that a person knew or should have known that their action was likely to cause harm. Your organisation may need to seek legal advice about this if relevant.
**Question 8: Check List**

At the time of the act or omission, was the volunteer acting in good faith and without recklessness?

- [ ] Yes they were acting in good faith and without recklessness - go to Question 9
- [ ] No they were not acting in good faith, or they were acting recklessly - go to Question E

**Question 9: Does an exception apply?**

Certain acts of the volunteer will exclude their ability to claim protection. Even if a person is a volunteer and they have been undertaking community work organised, directed or supervised by a community organisation, there are exceptions set out under the Personal Injuries Act. In general, a volunteer will not be protected where:

- the volunteer knew, or ought reasonably to have known, that he or she was acting outside the scope of his or her authority, or contrary to the instructions of the community organisation, or
- the volunteer did the act (or failed to act) while intoxicated.

There are specific legal definitions and interpretations of many of the terms used in these exceptions (e.g. ‘ought reasonably to have known’ and ‘intoxicated’). If potentially relevant, your organisation may need to seek legal advice about these issues.

**Example**

‘In good faith’

A volunteer attends a community sports day to assist with minor first aid. A child falls and fractures their arm, and as a result of the volunteer’s care, their injury is worsened. The volunteer will be acting in good faith if they were trying to help the injured person and believed that was the correct first aid action. However, they will not be acting in good faith if they gave this assistance in order to impress their friend, when they knew they had no idea of what first aid action to take.

‘without recklessness’

A person volunteers their time by running sports sessions for children. An accident occurs due to faulty sports equipment. The volunteer will have acted recklessly if they were aware that there was a problem with their equipment. The volunteer will not be reckless if their equipment had been checked recently and they had no knowledge of the problem.

**A person volunteers at a community sports day and is instructed to assist with refreshments only, The volunteer starts to help with marshalling participants without instruction to do so. An injury occurs as a result of the volunteer’s marshalling activities. As the volunteer was acting contrary to instructions, it is likely that an exception under the Personal Injuries Act applies and that the volunteer will not be protected from liability.**
**QUESTION 9: CHECK LIST**

Did any of the following apply to the volunteer at the time of the act or omission?

- ☐ volunteer’s ability to exercise reasonable care and skill was significantly impaired as a result of voluntarily consuming alcohol or a drug (whether or not consumed for medication) and they failed to exercise reasonable care and skill

- ☐ acting outside the scope of activities authorised by the community organisation, or

- ☐ acting contrary to instructions given by the community organisation

If ANY apply go to Section E
If NONE apply go to Section D

---

**Section D: Your volunteers are likely protected, what does this mean?**

If you have answered all questions in sections A, B, or C and the answer does not result in “go to section E”, the protection under the Personal Injuries Act is likely to apply to volunteers engaged by your organisation. If you are in doubt, seek legal advice. The volunteer will need their own, independent legal advice in the event of legal action being commenced against them.

If your volunteers are protected this means they do not incur personal civil liability as a result of performing community work organised by your community organisation. This means that the volunteer will not be personally liable to pay any compensation to anyone whom they may have caused personal injury as a result of their own actions or failures to act.

Instead, the liability of a protected volunteer will be transferred to the organisation the volunteer was performing the community work for, and the injured party would be able to sue the community organisation (rather than the volunteer) for any injury or injuries caused by the volunteer.

---

**Section E: Your volunteers may not be protected, what does this mean?**

If your volunteers are not protected by the provisions of the Personal Injuries Act, your volunteers remain personally liable for their actions. They may be either sued individually or joined to an action against your community organisation, for their acts and omissions while performing community work.
NOTE – VOLUNTEERS ARE CRITICAL TO THE WORK THAT COMMUNITY ORGANISATIONS DO

Volunteers are a critical element to the work that many not-for-profit community organisations undertake.

The circumstances that a volunteer is found to be personally liable are extremely rare, and in most instances, volunteers are found to be doing the right thing.

The potential for liability should not be a reason in of itself not to engage volunteers, and what is most important is that organisations are aware of the risks and put in place measures to prevent incidents from occurring.
Related Not-for-profit Law Resources

Not-for-profit Law has developed a National Volunteer Guide, which sets out in detail the key legal issues affecting volunteer involving organisations. The Guide is in six Parts and includes a number of templates and sample policy documents, which should be read together. See Not-for-profit Law’s page on volunteering at www.nfplaw.org.au/volunteers

- Part 1: Key legal issues for volunteer involving organisations
- Part 2: Volunteer or employee or independent contractor
- Part 4: Volunteers and unlawful workplace behaviour
- Part 5: Recruiting, inducting and managing volunteers
- Part 6: Organisational issues and volunteers

Not-for-profit Law has also developed a number of free webinars for volunteer involving organisations, which can also be accessed the same page at www.nfplaw.org.au/volunteers

Other related Not-for-profit Law Resources

  For more information on insurance and risk management, read our Risk Management and Insurance guide.
  For an overview of the common law of negligence, see our Negligence guide.
  For a checklist covering what to do when an incident or accident occurs, go to our Checklist: Incidents and accidents.
  For more information on child safety issues, which are not covered in this resource, read our fact sheet on Engaging and working with youth volunteers.
  This page sets out the special legal obligations and rights that apply to an organisation’s relationships with employees, volunteers, funders, donors and service users.
  This page features resources on the legal duties for people who hold positions on the governing body of a not-for-profit community organisation.

Legislation

- **Civil Law (Wrongs) Act 2002 (ACT)**
- **Civil Law (Wrongs) Regulation 2003 (ACT)**
- **Work Health and Safety Act 2011 (ACT)**
- **Work Health and Safety Regulation 2011 (ACT)**
Civil Liability Act 2002 (NSW)
Civil Liability Regulation 2014 (NSW)
Motor Accidents Compensation Act 1999 (NSW)
Work Health and Safety Act 2011 (NSW)
Personal Injuries (Liabilities and Damages) Act 2003 (NT)
Personal Injuries (Liabilities and Damages) Regulations 2003 (NT)
Work Health and Safety (National Uniform Legislation) Act 2011 (NT)
Work Health and Safety (National Uniform Legislation) Regulations 2011 (NT)
Civil Liability Act 2003 (QLD)
Work Health and Safety Act 2011 (QLD)
Work Health and Safety Regulation 2011 (QLD)
Civil Liability Act 1936 (SA)
Volunteers Protection Act 2001 (SA)
Volunteers Protection Regulations 2004 (SA)
Work Health and Safety Act 2012 (SA)
Work Health and Safety Regulations 2012 (SA)
Civil Liability Act 2002 (TAS)
Work Health and Safety Act 2012 (TAS)
Work Health and Safety Regulations 2012 (TAS)
Child Wellbeing and Safety Act 2005 (Vic)
Children, Youth and Families Act 2005 (Vic)
Crimes Act 1958 (Vic)
Occupational Health and Safety Act 2004 (Vic)
Occupational Health and Safety Regulations 2007 (Vic)
Working with Children Act 2005 (Vic)
Wrongs Act 1958 (Vic)
Occupational Safety and Health Act 1984 (WA)
Occupational Safety and Health Regulations 1996 (WA)

Workplace regulators


ACT WorkSafe has also published numerous resources relating to workplace safety and minimising risk. These can be located at  www.worksafe.act.gov.au/publication.

SafeWork NSW  www.safework.nsw.gov.au

SafeWork NSW has published numerous resources relating to workplace safety and minimising risk. These can be located at  www.safework.nsw.gov.au.

NT WorkSafe  www.worksafe.nt.gov.au
NT WorkSafe has also published numerous resources relating to workplace safety and minimising risk available at [www.worksafe.nt.gov.au/SafetyAndPreventions/Pages/default.aspx](http://www.worksafe.nt.gov.au/SafetyAndPreventions/Pages/default.aspx).


  SafeWork SA has also published numerous resources relating to workplace safety and minimising risk at [www.safework.sa.gov.au](http://www.safework.sa.gov.au).


  WorkSafe Tasmania has also published numerous resources relating to workplace safety and minimising risk. These can be located at [www.worksafe.tas.gov.au/resources](http://www.worksafe.tas.gov.au/resources).


  WorkSafe Victoria has specific resources relating to the health and safety of volunteers.

  WorkSafe Victoria has also published numerous resources relating to workplace safety and minimising risk. For example, a Job Safety Analysis Worksheet, will help you to assess your volunteer roles and activities for possible risks and to actions to eliminate these risks.


  WorkSafe WA has also published resources relating to workplace safety and minimising risk.


  Safe Work Australia has published information for volunteer organisations on workplace safety including [The Essential Guide to Work Health and Safety for Volunteers](http://www.safeworkaustralia.gov.au/).  

**Other resources on working with children**


  The Commission has published resources for organisations in relation to creating safe environments for children, including complying with the Child Safe Standards


  The Fair Work Ombudsman has published a Best Practice Guide for employing young workers. This has useful information that could also be applied to youth volunteers.


  For more information about child protection and mandatory reporting obligations

- Victoria Department of Justice and Regulation, Working with Children Check Division [www.workingwithchildren.vic.gov.au](http://www.workingwithchildren.vic.gov.au)

  For more information about Working with Children Check requirements in Victoria


  The peak body and leading policy advocate on young people’s issues in Victoria.


Volunteering Australia resources

- Volunteering Australia [www.volunteeringaustralia.org](http://www.volunteeringaustralia.org)
Volunteering Australia has published a suite of resources for volunteer managers including information on insurance and complaint handling.

- **National Standards for Volunteer Involvement**

Volunteering Australia’s National Standards for Volunteer Involvement reflect best practice in volunteer management in Australia’s current work environment.

- **Definition of volunteering**

Volunteering Australia’s definition of volunteering has a set of explanatory notes, a detailed Issues Paper that provides background and context, and a set of FAQs around it.

**State and territory peak bodies for volunteering**

State and Territory peak bodies facilitate opportunities for people seeking to volunteer, and support volunteer involving organisations. These bodies are:


*We thank the Australian Government, Department of Social Services, for their financial contribution towards the development of this National Volunteer Guide.*


© 2018 Justice Connect. You may download, display, print and reproduce this material for your personal use, or non-commercial use within your NFP organisation, so long as you attribute Justice Connect as author and retain this and other copyright notices. You may not modify this resource. Apart from any use permitted under the Copyright Act 1968 (Cth), all other rights are reserved.

To request permission from Justice Connect to use this material, contact Justice Connect at PO Box 436 Darlinghurst NSW 1300, or email [nfplaw@justiceconnect.org.au](mailto:nfplaw@justiceconnect.org.au).