



Australia
Not-for-profit Law

National Volunteer Guide

Covering key legal obligations
organisations owe its volunteers

October 2018



Australia
Not-for-profit Law

National Volunteer Guide (Part 1)

This part provides an overview
of the key legal issues affecting
volunteer involving organisations

October 2018

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Glossary



Glossary

Some of the common terms used in this Guide include:

ACNC refers to the Australian Charities and Not-for-profit Commission

CLG refers to a company limited by guarantee

Common law refers to the law developed by the courts, or judge-made law (as opposed to legislation or statute, which is law made by Parliament)

Constitution (or Rules) refers to the governing document of a company. The Constitution sets out the company's purposes and the procedures for running the company.

Committee refers to the organisation's governing body, sometimes referred to as a **Board**, or similar

Committee or Board meeting refers to a meeting of the organisation's governing body, also referred to as a directors' meeting

Committee member or Director refers to a person specifically appointed to a position of management of the affairs of the company

Formal volunteering means time willingly given for the common good and without financial gain, taking place within organisations (including institutions and agencies) in a structured way

Incorporated association refers to an organisation incorporated under state or territory based incorporated associations laws

Informal volunteering means time willingly given for the common good and without financial gain, taking place outside the context of a formal organisation. This includes assisting people in the community, excluding one's own family members. For example, looking after children, property or pets; providing home or personal assistance; or giving someone professional advice

Member refers to the persons or entities that hold an interest in the not-for-profit organisation, as an example in the context of a CLG, these are the persons or entities who gave a guarantee to be liable for a defined amount when they became a member, to cover the company's debts and liabilities if the CLG is wound up and unable to meet them

Policy refers to a particular way of dealing with an issue or area of activity which the company has agreed on. Policies are usually (but not always) written down. A company may have policies about, for example, recruitment of new committee members, procedures for meetings or dispute resolution. Policies cannot override legal obligations or the company's Constitution (or Rules), but they can supplement them

Spontaneous volunteers means people who seek or are invited to contribute their assistance before, during and/or after an emergency, and who are not affiliated with recognised volunteer agencies, and may or may not have relevant training, skills or experience

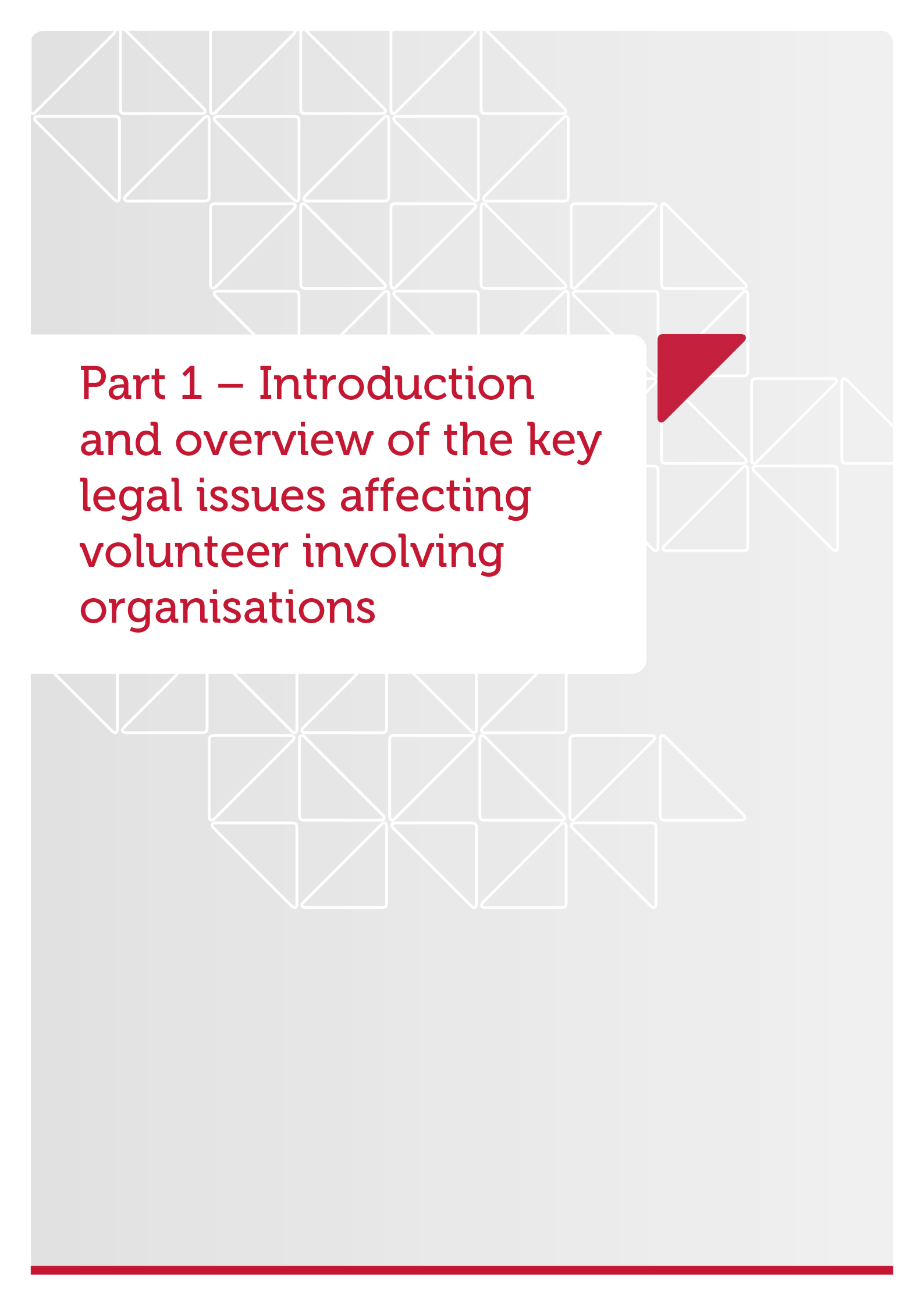
Not-for-profit Law refers to the specialist legal service for not-for-profit organisations and a program of Justice Connect, a registered charity with the ACNC and an accredited legal centre

Rules is another word for the Constitution of a not-for-profit organisation

Volunteer refers to those who give their time willingly for the common good and without financial gain

Volunteer involving organisation means any organisation, corporation or group that engages volunteers

Worker refers to a person who has performed work for another. A worker could be paid, for example, an employee of an organisation or unpaid, for example, a person undertaking an unpaid student placement or another form of volunteering. Please note that 'worker' has a distinct legal meaning in the context of work health and safety law, discussed in detail in Part 3 of this Guide



**Part 1 – Introduction
and overview of the key
legal issues affecting
volunteer involving
organisations**

Introduction and overview of the key legal issues affecting volunteer involving organisations

This part covers:

- ▣ background information on this Guide
 - ▣ how to use this Guide, and
 - ▣ the key legal issues covered in the Guide.
-

Volunteers are an important resource to many, if not most, community organisations. It is estimated that almost 44% of adult Australian's volunteer more than 932 million hours on an annual basis. This amounts to an average of 55 hours per week. ¹

Most volunteers provide their services because they want to contribute to their community in a useful and meaningful way.

The relationship between the community organisation and the volunteer should be managed in a way that is mutually respectful, safe and healthy.

One way your organisation can ensure that this relationship is meaningful, and managed in a respectful, safe and healthy way is by building an understanding of the legal issues surrounding the engagement and management of volunteers. This Guide aims to strengthen this understanding.

In addition to the legal issues that surround the engagement and management of volunteers, there are “best practice” principles that volunteer involving organisations should consider in order to attract, manage, retain and recognise volunteers, and help improve the volunteer experience.

Volunteering Australia has developed the National Standards for Volunteer Involvement (the **Standards**) and these are referred to throughout. These Standards allow organisations to make use of simple, practical criteria across a broad range of volunteering situations and can be used as a general guide to best practice, as a checklist or as a reference to planning a new volunteer program or reviewing an existing program.

The Standards cover the follow areas of volunteer involvement:

- Leadership and management
- Commitment to volunteer involvement
- Volunteer roles
- Recruitment and selection
- Support and development
- Workplace safety and wellbeing
- Volunteer recognition, and

¹ Department of Social Services, *Giving Australia 2016 – Individuals: Volunteering Overview* (2016) Commonwealth of Australia <https://www.communitybusinesspartnership.gov.au/wp-content/uploads/2017/04/giving_australia_2016_fact_sheet_-_individual_volunteering_accessible.pdf>

- Quality management and continuous improvement

Where appropriate, throughout this Guide we have referred to the Standards, in recognition that “best practice” sits alongside and in addition to the legal issues that volunteer involving organisations need to consider.

The Standards can be accessed from Volunteering Australia at www.volunteeringaustralia.org.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

Volunteering Australia’s National Standards for Volunteer Involvement, contain two Standards particularly relevant to the overall management of a volunteer program.

Standard 1: Leadership and Management states that *governing body and senior employees lead and promote a positive culture towards volunteering and implement effective management systems to support volunteer involvement*

Standard 2: Commitment to volunteer involvement states that *commitment to volunteer involvement is set out through vision, planning and resourcing and supports the organisations strategic direction.*

TIP

In addition to Volunteering Australia, each state and territory has peak bodies which facilitate opportunities for people seeking to volunteer, and support organisations who are seeking to implement the Standards. These organisations are:

Volunteering and Contact ACT | www.vc-act.org.au

The Centre for Volunteering (NSW) | www.volunteering.com.au

Volunteering Queensland | www.volunteeringqld.org.au

Volunteering SA & NT | www.volunteering-sa-nt.org.au

Volunteering Tasmania | www.volunteeringtas.org.au

Volunteering Victoria | www.volunteeringvictoria.org.au

Volunteering WA | www.volunteeringwa.org.au

1. About the Guide

Who is this guide for?

This Guide is designed for use by volunteer involving organisations. It provides an overview of the key legal obligations organisations owe volunteers and provides practical examples and tips to assist in their understanding. The Guide will be useful for committee members (or directors) of an organisation along with other members of the organisation, such as the volunteer manager as well as those who work with volunteer involving organisations (such as peak bodies). It will also be useful for volunteers.

This Guide primarily focuses on providing an overview of the key legal issues involved in engaging and managing volunteers – for example, laws dealing with workplace health and safety and workplace behaviours. The Not-for-profit Law website at www.nfplaw.org.au contains numerous resources on a broader range of topics to help your not-for-profit organisation understand its legal obligations in running the organisation.

NOTE – THIS GUIDE PRINCIPALLY DEALS WITH FORMAL VOLUNTEERING



This Guide is intended for volunteering involving organisations engaging what is referred to as ‘formal volunteers’. By this we mean people who give their time willingly for the common good and without financial gain, within an organisation (including institutions and agencies) in a *structured way*. Sometimes community organisations attract ‘spontaneous volunteers.’ Spontaneous volunteers differ from ‘formal volunteers’ and may create certain challenges for organisations. For more information see Part 3 ‘Volunteer Safety’ of this Guide.

How can your organisation use this Guide?

This Guide is designed for use by volunteer involving organisations across Australia. It provides an overview of the key legal obligations of volunteer involving organisations, and where applicable differentiates between national, state and territory laws.

The Guide is divided into six parts. After this introductory part, the topics covered are:

Part 2: Volunteer, employee or independent contractor: the legal differences between types of workers and the main legal obligations an organisation owes to employees, independent contractors and volunteers

Part 3: Volunteer Safety: responsibility in regard to negligence, work health and safety, managing risk, insurance and child safe standards

Part 4: Volunteers and unlawful workplace behaviours: laws such as discrimination and sexual harassment, work health and safety and workers’ compensation

Part 5: Recruiting, inducting, managing performance and ending the volunteer relationship: recruiting, inducting, managing performance, managing grievances and ending the volunteer relationship

Part 6: Organisational issues applicable to volunteers: intellectual property, privacy and record-keeping

There are practical tools (like template documents) and tips throughout this Guide, and links to other reliable sources of information which you may find helpful.

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2. Key legal issues covered in this Guide

2.1 Part 1: Introduction and overview of the key legal issues affecting volunteer involving organisations

As outlined above, this Guide provides an overview of the key legal obligations of volunteer involving organisations and aims to assist your organisation to understand and manage risks.

Parts 2 – 6 are explained further below.

2.2 Part 2: Volunteer, employee or independent contractor?

Part 2 of this Guide is called: Volunteer, employee or independent contractor?

It is important that your community organisation understands the legal differences between employees, independent contractors and volunteers.

2.2.1 The key legal issues

- 1. The law recognises many different categories of relationships where one party (a worker) performs work for another party in exchange for payment or reward.** These include, among others, the relationships of 'employer and employee' and 'principal and independent contractor'.
- 2. The law also recognises a separate category of worker known as a 'volunteer'.** This category of 'worker' performs work for another (such as your not-for-profit organisation) without an expectation of, or legal requirement of, payment or reward.
- 3. Your volunteer involving organisations needs to understand the legal distinction between volunteers, employees and independent contractors.** The distinction is often made based upon the key 'attributes' of each category of worker.
- 4. Generally speaking the 'attributes' of each category of worker are:**

Volunteers are not paid for the work that they perform, they do so without a legally enforceable obligation to do so and the volunteer relationship can end at any time.

Employees are paid for time worked, must perform the duties of their position, perform ongoing work under the supervision and control of an employer and are entitled to paid and unpaid leave.

Independent contractors have control over how they carry out their work, are paid for results that they achieve, are contracted for a set period of time or a set task and are free to accept work from the general public and other businesses.
- 5. Merely labelling a worker a 'volunteer', 'employee' or 'independent contractor' does not mean they are in fact a 'volunteer', 'employee' or 'independent contractor'.** If the matter went to court, the court would look beyond the label to the substance of the work relationship as a whole.
- 6. Sometimes the distinction between workers can become blurred over time.** For example, where a worker starts out as a volunteer but later becomes an employee or independent contractor (or vice

versa). This may even happen without a conscious decision being made by the volunteer involving organisation, especially where some sort of payment is made to the worker.

- 7. Some laws apply differently to volunteers and there are some laws that do not apply at all to volunteers.** For example, employees can enjoy a high level of protection and be entitled to benefits under the *Fair Work Act 2009*, industrial instruments, superannuation and taxation legislation and workers' compensation laws. Whilst work health and safety laws generally apply equally to employees, independent contractors and volunteers overall, independent contractors and volunteers do not generally enjoy the full range of legal protections and benefits provided to employees.
- 8. Understanding the legal differences between volunteers, employees or independent contractors is crucial for determining the obligations that are owed and protections afforded to the volunteer.** This will put your organisation in a position to assist your volunteers to understand the basis on which your organisation is engaging them, and the legal entitlements owed to them.
- 9. Other organisational matters could be different as well.** For example, whether someone is covered by your organisation's insurance may depend on their worker status (i.e. a volunteer or employee)
- 10. In some circumstances, members may also be considered 'volunteers'.** This has certain legal implications for your organisation because certain laws apply to volunteers that may not apply to members, and insurance may apply to volunteers and members in a different way.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

Volunteering Australia's National Standards for Volunteer Involvement contain a number of standards relevant to the matters discussed in this Part. If your organisation incorporates these Standards into its day-to-day practice, it will help your organisation comply with the legal obligations.

According to the Standards, volunteer roles are designed to contribute to the organisation's purpose, goals and objectives. These roles are appropriate for the community, service user or stakeholder groups with which the organisation works. Furthermore, volunteer roles should be defined, documented and communicated and reviewed, with input from volunteers and employees.



2.3 Part 3: Volunteer Safety

Part 3 of this Guide is called: *Volunteer Safety*.

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.

2.3.1 The key legal issues

- 1. Volunteer safety is a critical issue for your organisation.** It is relevant to the risk of legal liability (legal responsibility) of community organisations, but it also impacts the ability to attract and retain the volunteers upon which community organisations rely.
- 2. There are various aspects to volunteer safety, each of which come with obligations and potential liabilities.** The two primary sources of “safety” law that organisations need to be aware of are negligence law and work health and safety (or occupational health and safety) law.
- 3. When considering safety, your organisation must also be aware of the two sides to safety.** 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.
- 4. Generally speaking, your volunteer involving organisation will have a duty of care to its volunteers.** This is called the law of negligence. This law involves both the common law (judge made law) and legislation in each state and territory in Australia.
- 5. Your organisation may also be vicariously liable for the acts or omissions of their volunteers.** If your organisation is found (by a court) to be vicariously liable for the actions of volunteer, it will most likely be ordered by the court to pay compensation (in the form of money). Other consequences for the organisation of such an outcome could include operational and reputational damage.
- 6. There is legislation which seeks to limit or eliminate civil liability of volunteers in most states and territories.** All of the states and territories have different laws concerning this situation, but generally, if a volunteer is protected (that is, they satisfy all of the tests in the relevant legislation) 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, if harm is caused by a volunteer, the community organisation may be liable rather than the volunteer individually.
- 7. Work health and safety laws also impose obligations to ensure, so far as reasonably practicable, the safety of volunteers in the workplace.** Although work health and safety legislation is largely uniform between the states and territories, there are some nuances between them. Your organisation should be aware of its organisation’s work health and safety obligations to volunteers and have policies and procedures in place to meet these obligations.
- 8. Work health and safety laws also generally impose obligations on volunteers.** Your organisation should ensure that volunteers are aware of the organisation’s work health and safety policies and procedures as well as training volunteers as to the obligations they owe as ‘workers’ in the workplace. As mentioned above, there are some nuances between the states and territories and your organisation should make sure it is aware of these differences.
- 9. It is important that your organisation adopts a risk management strategy aimed at eliminating, managing or mitigating the effects of those risks associated with the safety of its volunteers.** Ensuring your organisation is adequately covered by insurance is another way that your organisation can manage this risk.

NOTE

Part 3 of this Guide provides **you with a step by step checklist** to help you work out if your organisation could be legally responsible for the actions of its volunteers.

NOTE

Part 3 of the Guide **helps you work** out if state based work health and safety laws apply to your organisation.

10. It is important that your organisation complies with the relevant obligations under state and territory laws (and the common law) relating to the safety of children. Organisations will need to consider the safety of children who are volunteers, and the safety of children that your volunteers may be interacting with through your organisation.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

Volunteering Australia's National Standards for Volunteer Involvement contain a number of standards relevant to the matters discussed in this Part. If your organisation incorporates these standards into its day-to-day practice, it will help your organisation comply with the legal obligations. There are Standards relevant to the safety of volunteers including workplace behaviours.

Standard 5: Support and Development states that volunteers should be provided with the opportunity to *understand their roles and gain knowledge, skills and feedback needed to safely and effectively carry out their duties.*

Standard 6: Workplace Safety and Wellbeing states that *the health and safety of volunteers is protected in the workplace.*



2.4 Part 4: Volunteers and unlawful workplace behaviour

Part 4 of this Guide is called: Volunteers and unlawful workplace behaviour.

Your volunteer involving organisation has an obligation to protect volunteers from unlawful workplace behaviour and protect other people your volunteers are interacting with – to make sure they are not subject to unlawful workplace behaviour by the volunteer.

2.4.1 The key legal issues

1. **Your volunteer involving organisation should take steps to protect volunteers from unlawful workplace behaviours.** Some of these behaviours include discrimination, sexual harassment, bullying and victimisation.
2. **Laws prohibit sexual harassment.** The laws exist at both a state and federal level. Generally, sexual harassment laws apply to volunteers (whilst carrying out volunteer work) in all states except Western Australia and the Northern Territory.
3. **Laws prohibit discrimination.** Discrimination can be direct or indirect and, in the case of indirect discrimination, can often be subtle. Generally, the state-based discrimination laws will apply in the Australian Capital Territory, Queensland, South Australia and Tasmania. They may apply in Victoria and New South Wales where volunteering falls within another area covered by the discrimination legislation, but the laws are unlikely to apply to volunteers in Western Australia and the Northern Territory.
4. **Laws prevent bullying.** Bullying behaviour is prohibited under federal law (e.g. volunteers are protected in the same way as employees under the *Fair Work Act 2009*) and prohibited by state and territory work, health and safety laws.
5. **Laws prohibit victimisation.** These laws are the same laws that prohibit discrimination so your organisation will need to carefully consider whether victimisation laws apply to volunteers in the relevant state or territory.

6. Sexual harassment, discrimination, victimisation and bullying may also be a **work health and safety issue** in which case the relevant federal, state or territory work health and safety legislation may apply to your organisation.
7. **Where legislation does not protect a volunteer at work, a common law (negligence) duty of care may still be owed to your volunteer** to ensure that they do not suffer harm resulting from inappropriate workplace behaviour.
8. Aside from legal obligations to protect your volunteers from unlawful workplace behaviour, your organisation has legal **obligations to protect the people your volunteers are interacting with, and to ensure that they are not subject to unlawful workplace behaviour by the volunteer**. Your organisation could be legally responsible (under discrimination laws, work, health and safety legislation and negligence law) for the actions of volunteers.
9. We **recommend you comply with these laws** (as much as reasonably practicable) even if they do not apply. It is a matter of best practice.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

Volunteering Australia's National Standards for Volunteer Involvement contain a number of standards relevant to the matters discussed in this Part. If your organisation incorporates these standards into its day-to-day practice, it will help your organisation comply with the legal obligations. There is a specific standard in relation to safety of volunteers.

Standard 6: Workplace Safety and Wellbeing states that *the health and safety of volunteers is protected in the workplace*.



2.5 Part 5: Recruiting, inducting, managing performance, and ending the volunteer relationship

Part 5 of this Guide is called: *Recruiting, inducting, managing performance and ending the volunteer relationship*.

Your organisation should carefully consider the legal issues associated with recruiting and inducting volunteers, managing their performance, dealing with their grievances and ending the relationship.

2.5.1 The key legal issues

1. **Your organisation should recruit volunteers in a fair and non-discriminatory way, including via screening.** Organisations should undertake some level of screening for volunteers, even if certain checks are not required by law (under legislation or contract).
2. **A Position Description should be used for all volunteer positions in your organisation. It should focus on the specific skills or qualifications needed for the role.** It should be used when advertising for volunteers and in making decisions about prospective volunteers.
3. **Volunteers should be inducted before commencing their role.**

NOTE

Part 5 of the Guide provides an **induction checklist** for your organisation to use.

It also provides a **sample volunteer position description** and a **sample volunteer agreement**.

4. **A Volunteer Agreement is an important part of engaging volunteers, helping to make sure the volunteer understands their rights, role and responsibilities along with those of the organisation.** A volunteer agreement will also assist with situations where a volunteer involving organisation wants to create legally binding obligations on the volunteer, for example, to protect the organisation's confidential information or intellectual property. Provided such legally binding obligations go no further than this, having a legally binding agreement in relation to such matters will not affect a genuine volunteer relationship (i.e. inadvertently turning the relationship into another category of working relationship such as employment or independent contractor).
5. **Volunteers should be told about your organisation's procedure for handling grievances.** This will assist in preventing issues becoming more problematic. Your organisation should ensure volunteer's grievances are heard and dealt with in an appropriate manner.
6. **Managing the performance and grievances of volunteers can be problematic if not done correctly.**
7. **Volunteers can be 'dismissed' without fear of an unfair dismissal claim (under employment laws).** However, good practice dictates that the process in managing volunteers is handled well and with the same respect afforded to employees.
8. **Following a fair process in the recruiting, inducting, and managing volunteer performance will increase a volunteer's confidence and commitment to the organisation.**

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

Volunteering Australia's National Standards for Volunteer Involvement contain a number of standards relevant to the matters discussed in this Part. If your organisation incorporates these standards into its day-to-day practice, it will help your organisation comply with the legal obligations. There are a number of specific standards in relation to volunteer roles, recruitment, and support in managing volunteers.

Standard 3: Volunteer roles states that *volunteers are engaged in meaningful roles which contribute to the organisations, purpose, goals and objectives*

Standard 4: Recruitment and selection states that *Volunteer recruitment and selection strategies are planned, consistent and meet the needs of the organisation and volunteers*

Standard 5: Support and development states that *volunteers understand their roles and gain the knowledge, skills and feedback needed to safely and effectively carry out their roles*

Standard 7: Volunteer recognition states that *volunteer contribution, value and impact is understood, appreciated and acknowledged*



2.6 Part 6: Organisational issues applicable to volunteers

Part 6 of this Guide is called: *Organisational issues applicable to volunteers*.

There are other laws that can affect volunteers and have an impact upon your organisation.

2.6.1 The key legal issues

1. Your organisation needs to understand the difference between the different forms of intellectual property, because in some circumstances these laws treat volunteers differently. For example, your organisation does not automatically own any copyright created by a volunteer. This means that it is crucial that your organisation enters into written agreements with volunteers for the transfer of ownership of intellectual property to your organisation upon creation. Agreements with volunteers should also cover any Moral Rights the volunteer may have in respect of any literary, dramatic, musical or artistic work which they produce for your organisation. Your organisation should protect any trademarks, designs and patents by registering them with IP Australia.

NOTE

Part 6 of this Guide provides a table setting out the different forms of IP and how ownership arises (for example, on creation or through registration with IP Australia) and how this differs for other workers (i.e. student work experience or an employee).

2. Confidential information creates an obligation in law to maintain the confidentiality of information when it is disclosed to someone on a condition of confidentiality. The obligation to treat information in confidence does not necessarily extend to volunteers unless the confidentiality of the information is made very clear. A confidentiality agreement provides a direct and immediate way for your organisation to protect your rights in respect of confidential information.

NOTE

Part 6 of this Guide sets out what to do if your organisation is accused of infringing another person's or organisation's intellectual property rights.

- 3. Privacy laws may apply to your organisation.** Your organisation may need to implement practices and procedures which reflect privacy law obligations, including appropriately training volunteers to ensure your organisation's ongoing compliance under privacy law. If the privacy laws do not apply to your organisation, we would recommend that you follow them as a matter of best practice.
- 4. Your organisation must be aware of your obligations in relation to the personal information of its volunteers.** Only collect and store the volunteer's personal information with their consent, only use it for the purpose it was collected, treat it as confidential information, store it securely and be extra careful with 'sensitive' and 'health' information of your volunteers.
- 5. The law may require your organisation to hold records in relation to your volunteers.** For example, the ACNC requires registered charities to provide annual reports, which includes details about the number of volunteers the organisation has engaged. If your charity does not provide this information, this can lead to revocation of charity status.
- 6. Regardless of any legal obligation to keep records on volunteers it is a good idea to keep records for a number of reasons.** These reasons include internal organisational reporting, current or anticipated disputes or legal action, or for the purposes of insurance. We recommend you keep them for 7 years and that they be kept and maintained alongside the organisation's other records.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

Volunteering Australia's National Standards for Volunteer Involvement contain a number of standards relevant to the matters discussed in this Part. If your organisation incorporates these standards into its day-to-day practice, it will help your organisation comply with the legal obligations. **Standard 8: Quality Management and Continuous Improvement** states that *effective volunteer involvement results from a system of good practice, review and continuous improvement*.



Resources

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 2: Volunteer, employee or independent contractor
- ✔ Part 3: Volunteer safety
- ✔ Part 4: Volunteers and unlawful workplace behaviour
- ✔ Part 5: Recruiting, inducting, managing performance and ending the volunteer relationship
- ✔ Part 6: Organisational issues applicable to volunteers

Not-for-profit Law has also developed a number of free webinars for volunteer involving organisations, which can also be accessed from Not-for-profit Law's page on volunteering at www.nfplaw.org.au/volunteers

Volunteering Australia resources

- ✔ Volunteering Australia 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:

- ✔ Volunteering and Contact ACT – www.vc-act.org.au
- ✔ The Centre for Volunteering (NSW) – www.volunteering.com.au
- ✔ Volunteering Queensland – www.volunteeringqld.org.au
- ✔ Volunteering SA&NT – www.volunteeringsa-nt.org.au
- ✔ Volunteering Tasmania – www.volunteeringtas.org.au
- ✔ Volunteering Victoria – www.volunteeringvictoria.org.au
- ✔ Volunteering WA – www.volunteeringwa.org.au

We thank the Australian Government, Department of Social Services, for their financial contribution towards the development of this National Volunteer Guide.

A NFP Law Information Hub resource. Access more resources at www.nfplaw.org.au.

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National Volunteer Guide

(Part 2)

This part provides an overview of the volunteer, employee and independent contractor relationships and why this distinction is important for volunteer involving organisations

October 2018

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Part 2: Volunteer, employee or independent contractor?

Introduction to the differences between volunteers, employees and independent contractors

This part covers

- the importance of correctly classifying different working relationships
 - the basic legal differences between volunteers, employees and independent contractors, and
 - an overview of some of the main legal obligations an organisation owes to its volunteers, employees and independent contractors
-

1. Introduction

This Part of the Guide helps not-for-profit community organisations understand how the law treats different kinds of working relationships that exist in your organisation – volunteers, employees and independent contractors.

This Part begins by providing an overview of the key reasons it is important to distinguish between different kinds of working relationships, including a summary of how the law attaches different legal entitlements and obligations, depending on whether the worker is a volunteer, employee or an independent contractor.

This Part explains that if your organisation incorrectly classifies a worker, you may fail to provide them with their legal entitlements or to meet your obligations under law. This could result in legal claims being made against your organisation, and your organisation may be found liable to pay penalties. Conversely, if a worker is unclear on what ‘true’ category of worker they are, it can cause confusion about their own obligations and legal entitlements.

Determining the nature of the worker relationship - that is, whether a person is a volunteer, employee or independent contractor requires consideration of a number of different elements because each category of worker has different attributes. This Part provides an overview of these attributes to assist community organisations to determine whether a worker is an ‘employee’, an ‘independent contractor’ or a ‘volunteer.’ This Part also includes a checklist to help organisations analyse existing volunteer relationships to ensure that they are being appropriately categorised.

This Part concludes by providing an overview of the different legal obligations that your organisation may owe each category of worker, for example payment, safety obligations, entitlements under industrial instruments such as awards, insurance, superannuation, taxation obligations and termination rights.

2. The importance of distinguishing between different kinds of workers

The law recognises many different categories of relationships where one party (a worker) performs work for another party in exchange for payment or reward. These include, among others, the relationships of 'employer and employee' and 'principal and independent contractor'.

The law also recognises a separate category of worker known as a 'volunteer'. This type of worker performs work for another without an expectation of, or legal requirement of, payment or reward.

It is important for your community organisation to know which category of 'worker' is undertaking work in your organisation. This is because different legal entitlements and obligations apply, depending on whether the worker is a volunteer, employee or an independent contractor.

In particular, it is important that your organisation is aware:

- that your organisation can be legally responsible for both the safety of its volunteers and the consequences of their actions, so you need to know who they are and what they are doing
- that the volunteer should understand the basis on which they are engaged (e.g. so they are aware of their legal entitlements and insurance and safety risks)
- that whether or not someone is covered by your organisation's insurance may depend on their status (category of worker), and
- that there are laws that apply differently to volunteers, or some laws that do not apply at all. As a result, different legal entitlements apply to different categories of workers in your organisation, as illustrated by the following table:

Indicators	Volunteer	Employee	Independent contractor
Is the worker paid?	✗ (note: honorarium discussed further below)	✓	✓
National Employment Standards apply?	✗	✓	✗
Superannuation accrues?	✗	✓	✗ (some exceptions)
Workers' Compensation applies?	✗	✓	✗ (some exceptions)
Occupational/Workplace Health and Safety laws applies?	✓	✓	✓
Paid sick and annual leave accrues?	✗	✓	✗

Paid long service leave?	✘	✓	✘
Unfair dismissal laws apply?	✘	✓	✘ (but some contractual termination rights may apply)
Redundancy rights apply?	✘	✓	✘ (but some contractual termination rights involving payment may apply)

EXAMPLES

In the case of *Mr and Mrs Morris* (see summary in Section 2 below), the court found that Mr and Mrs Morris were employees as caretakers of a property. The organisation alleged they were volunteers. The Court found that based on the care-taker award rate the couple had been underpaid, and were awarded superannuation and annual leave to the value of approximately \$80,000.

In the case of *Dickinson* (see summary in Section 2 below), the court found Ms Dickinson was a volunteer rather than an employee when she was injured by a car. This means that she was unable to make a claim for workers compensation, which is only available to employees.

RELATED RESOURCES

For more information on the importance of your community organisation knowing which category of 'worker' is undertaking work in your organisation, see Not-for-profit Law's freely available webinar 'The volunteering relationship - *Distinguishing between volunteers and other workers in community organisations*' available at <https://www.nfplaw.org.au/volunteers>

2.1 The difference between members of a community organisation and volunteers

It is important that organisations are aware that its members may also be considered 'volunteers' in particular circumstances. A 'member' of a not-for-profit organisation has certain rights and obligations outlined under the organisation's rules or constitution (for example, the right to vote at an AGM, attend meetings and access information), as well as those set out under legislation. As soon as an organisation asks a member to do something outside of his or her role as a member, the person may be considered a volunteer (as well as a member), which has certain legal implications:

- firstly, certain laws apply to volunteers (that may not apply to members), and

- insurance may apply to volunteers and members in a different way.

If your organisation is an unincorporated association, you should consider your negligence liability, which can result in volunteer board members being personally liable. No specific duty of care arises merely because people share common membership of an unincorporated association. However, committee members may be personally liable for injuries to a member or a volunteer.

TIP

Check your insurance policies to see whether they cover injuries to volunteers as well as members, and that they also cover injuries or harm that volunteers might cause to others. If your policy does not explicitly cover volunteers and members, ask for this to be included in your policy (in writing).



SCENARIO

Mr Ball is a member of his local cricket club. He regularly exercises his right to vote and attend meetings and enjoys the club's facilities on a weekly basis. The cricket club also engages a number of staff to assist with the upkeep of the grounds. The club has insurance covering employees, and people playing sport at the club. A call goes out to members to assist in a working bee on the weekend and Mr Ball is eager to assist. He is asked to clean out the gutters. Unfortunately, he slips while climbing up the ladder and injures his back. The cricket club's public liability insurance policy does not cover injuries to volunteers. As he is not an employee, Mr Ball does not have access to workers compensation insurance. The cricket club does not have insurance that covers volunteers, and therefore Mr Ball has no access to insurance to cover the costs associated with his injuries sustained while volunteering.



3. Volunteers

Overview

In Australia, there is no accepted legal definition of a volunteer, however Volunteering Australia and the Fair Work Ombudsman provide useful definitions, and case law (that is judge-made law) provides useful guidance on the ‘attributes’ of a volunteer.

It is important to understand the ‘attributes’ of a volunteer, to consider these attributes in light of your existing or potential future volunteer relationships and to be clear on how the volunteer relationship is distinguished from the employment or independent contractor relationship.


3.1 Who is a ‘volunteer’?

The Fair Work Ombudsman (FWO) has identified the following characteristics of a genuine volunteering arrangement, based on its own review of limited case law (judge-made law) in this area:

- a volunteer is someone who does work for the main purpose of benefiting someone else
- the organisation and individual did not intend to create a legally binding employment relationship
- a volunteer is under no obligation to attend the workplace or perform work, and
- a volunteer does not expect to be paid for their work.

VOLUNTEERING AUSTRALIA – DEFINITION OF VOLUNTEERING

Volunteering Australia, and state and territory volunteering peak bodies, use the non-legal definition of volunteering, which is “*Time willingly given for the common good and without financial gain.*” Volunteering Australia advises that this definition is the most widely used in the volunteering sector, and has released guidelines around this definition that can be found on its website. For more information go to <https://www.volunteeringaustralia.org/definition-of-volunteering/>



Generally, a worker will be found to be a volunteer when the following below attributes exist (other factors may also be relevant in particular cases).

3.1.1 Volunteer attributes

Type of work	Payments and Benefits
<ul style="list-style-type: none"> • works or provides services on an ‘ex-gratia’ basis, which means that they do so voluntarily, without a legally enforceable obligation to do so and with no expectation of payment for work performed 	<ul style="list-style-type: none"> • generally, has no legally enforceable right to receive payments such as honoraria, allowances or expenses
<ul style="list-style-type: none"> • any agreement between the volunteer and the organisation (whether verbal or written) does not contain any evidence that the 	<ul style="list-style-type: none"> • may be reimbursed for out-of-pocket expenses

<p>parties intended to enter into a legally binding contract in relation to the work being carried out. Refer to Part 5 of this Guide for more information about what should and shouldn't be included in a volunteer agreement.</p>	
<ul style="list-style-type: none"> the volunteer arrangement can end at any time, either by the volunteer or the organisation 	<ul style="list-style-type: none"> may receive payments like an 'honoraria', or allowances, or non-cash benefits such as free use of facilities or free or reduced-price entry into an event

CAUTION

Where a volunteer is in receipt of some benefit for the services they provide, be careful that you are clear and careful in how you distinguish between volunteers and employees.

Payments or benefits to volunteers may attract taxation obligations, and if regularly received and/or of considerable value, may add weight to an argument that the 'volunteer' is an employee or contractor.

This may also pose problems in determining an organisation's tax liabilities (for example, for fringe benefits tax or the obligation to remit PAYG tax payments to the Australian Tax Office).



TIP

The best way to be clear about the relationship between your community organisation and a volunteer is to write it down. As a general rule, if a person is described as a volunteer in a document governing the arrangement, then it would usually be considered that there is no intention to create a contractual or legal relationship (as long as, in reality, the relationship is truly a voluntary one).

Refer to Part 5 of this Guide for more information about what should and shouldn't be included in a volunteer agreement, along with some suggested wording.



NOTE – SPONTANEOUS VOLUNTEERS

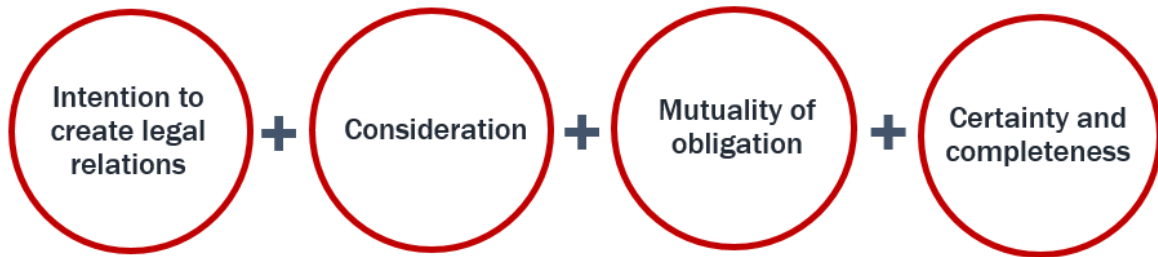
Sometimes community organisations attract 'spontaneous volunteers'- for example, spontaneous offers of assistance and volunteering following an emergency, crisis or issue resulting in significant media coverage. Spontaneous volunteers differ from 'formal volunteers' and may create certain challenges for organisations. For more information see Part 3 'Volunteer Safety' of this Guide.



3.2 Assessing whether a worker is a 'volunteer'

Generally, when a worker's relationship with an organisation is being assessed, the Fair Work Ombudsman will look at the four key factors (discussed above) to establish whether a worker is a volunteer. If these factors are in place, the relationship is unlikely to be considered a volunteering relationship.

Generally, there are four key requirements that evidence a legally binding relationship:



1. Is there an intention to create legal relations regarding the obligation to carry out the work?

Do the facts and circumstances point to an intention of both parties to have a legal relationship and that the arrangement could be enforced?

Under the arrangement, can the organisation and individual be compelled to do something (as opposed to where either party can walk away at any time without challenge)?

If the parties intend to create legal relations regarding the obligation to carry out the work, the relationship is not likely to be a volunteer relationship.

NOTE – WHAT IS A LEGALLY BINDING RELATIONSHIP?

Legal relations exist when the parties have a legally binding agreement between them. Generally, this means that they intend that the promises made by each party will be binding, and if one party breaches the terms of the agreement, the other one has a right to seek damages against the breaching party or, in some circumstances, force the other party to perform certain obligations under the agreement.

In a volunteer relationship, there must be no intention to create a legally binding agreement regarding the work to be carried out. This means that, for example, if the organisation does not provide the volunteer with work, the volunteer has no recourse against the organisation. Similarly, if the volunteer fails to report for duty as agreed, the organisation has no recourse against the volunteer.

NOTE – PROTECTING INTELLECTUAL PROPERTY AND CONFIDENTIAL INFORMATION

There may be situations where a volunteer involving organisation wants to create legally binding obligations on the volunteer. Common situations when this is done is to protect the organisation's confidential information or intellectual property (as explained in Part 6 of this Guide). Provided such legally binding obligations go no further than this (i.e. create obligations around other tasks or the work), having a legally binding agreement in relation to such matters will not affect the nature of the volunteer relationship.

The sample Volunteer Agreement in Part 5 of this Guide makes it clear that there is no legally binding relationship between the parties regarding the work to be carried out, but also includes a paragraph which deals with intellectual property and confidential information and asks the volunteer to agree that a section of the agreement is binding.

2. Is there consideration?

Does each party agree to provide a benefit or reward to the other party? For the worker, this will usually be their labour and for the employer/principal, this will usually be monetary but may also be a commitment to offer training, experience or other non-monetary benefits.

Although the payment of consideration is generally an indicator of an employment or independent contracting relationship, this is not always the case, particularly where there is no correlation between the payment and the hours worked or completion of a specific task or job. For more information, see Section 2.3 below.

3. Is there mutuality of obligation?

Is the commitment by the individual to perform work provided in exchange for whatever benefits or experience the employer/principal is offering?

Mutuality of obligation is more likely to indicate an employment or independent contracting relationship where the benefit (usually payment) is linked or correlates to hours worked or completion of a set task or tasks.

4. Is there certainty and completeness?

Is there an agreement on all the essential terms to make the contract workable and are those terms certain and clear in meaning?

Whether certainty and completeness of terms is indicative of an employment or contracting relationship, or that of a volunteer, depends on the actual terms. Where the terms are clearly stated, for example, it is clearly stated that:

- the relationship is a volunteer one
- that there is no intention to create legal relations between the parties in relation to the volunteering role, and
- that any payments are not linked to the hours of work or completion of set tasks,

the arrangement is more likely to be a volunteer relationship. Of course, the agreement should not include any terms which indicate an employment relationship.

NOTE

Be careful when entering into negotiations with a worker. A legally binding agreement does not have to be in writing. It can be formed verbally through conversations, through communication such as a string of email correspondence or even inferred from the conduct of the people involved.



CASE EXAMPLE: MR AND MRS MORRIS

Anglican Community Services (ACS) owned a property in South Australia that they hired out to various groups for camps and retreats. Mr and Mrs Morris (husband and wife) were asked by ACS's camp manager Mr Brandenburg (who they knew because Mr Brandenburg was Mrs Morris' uncle) to act as caretakers of the property. They did so for a period of three years, at the end of which they made a claim for unpaid wages. ACS argued that Mr and Mrs Morris were volunteers and therefore not entitled to wages.



Mr Brandenburg had passed away before Court proceedings were commenced, however, he had sent Mr and Mrs Morris a letter outlining the nature of their role. This letter described Mr and Mrs Morris as being 'appointed' to the position of caretakers of the property. The initial appointment was for six months, which would then be reviewed and could be extended. Their duties were clearly set out and relatively onerous. They included cleaning, light maintenance work, inspecting the condition of the building and facilitating building inspections for prospective groups. The onerous nature of these tasks required them to be present at the property seven days a week. In return, they were to receive free rent, power, water, a telephone and have all council rates paid for them. During the course of their duties Mr and Mrs Morris were reimbursed for various expenses incurred.

The judge found that Mr and Mrs Morris were employees and not volunteers, as the parties intended to create legal relations. This was demonstrated by several factors. Firstly, they were under the instruction of Mr Brandenburg who would inform them when groups were coming to stay and when the premises would need to be cleaned and inspected. Secondly, the nature of the agreement created mutual expectations between the parties (ie. free rent and amenities in exchange for labour), which could be legally enforced. Thirdly, the regularity of their appointment was indicative of employment, as was the inclusion of the initial provisional period which the trial judge said would be unusual in a volunteering context, because a true volunteer (or the organisation) is able to end the arrangement at any time with no repercussions. As a result, Mr and Mrs Morris were awarded compensation for unpaid wages.

You can read the detailed decision here: [Morris and Morris v Anglican Community Services \[2000\] SAIRC 6](#).

CASE EXAMPLE: MS DICKINSON



Tropical Fruits was a not-for-profit (incorporated) gay and lesbian social club which held dance parties for members in NSW. On 31 December 2003, it held an event at which Ms Dickinson was engaged as a car park attendant. Tropical Fruits' engagement process involved their work crew coordinator (Ms Benham) contacting members, or people who had expressed interest, and asking if they would like to provide assistance. Their shifts were then determined and their duties explained. On the date of the event, helpers checked in with Ms Benham, were given an ID arm band and instructed as to their duties and shift times. They were not remunerated, but were always allowed to attend the party free of charge at the end of their shifts.

During the course of her duties, Ms Dickinson was struck by a car. She made a claim for workers compensation asserting that she was an employee at the time of the injury. The Workers Compensation Commission of NSW found that Ms Dickinson was in fact a volunteer. This conclusion was reached due to the lack of evidence supporting any intention to establish legal relations, the absence of a contractually binding promise, and nothing to suggest that admission to the party was given in return for the duties performed.

The Commission stated that in the absence of an intention to create legal relations, allowing entry to the party was merely a reward or gift in return for volunteering to help out. There was also no correlation between the cost of the ticket and the hours worked by Ms Dickinson.

You can read the detailed decision here: [Dickinson v The Tropical Fruits Incorporated \[2006\] NSWCCPD 331](#).

NOTE

The decision in *Dickinson* does not mean that volunteers are always excluded from coverage under workers' compensation schemes or that organisations utilising volunteer services are not liable for costs associated with injuries to volunteers. For more information, see Part 3 of this Guide - Volunteer Safety.



CASE EXAMPLE: MR GRINHOLZ

Mr Grinholz was a coach for an under 13s soccer team for Football Federation Victoria (FFV). Mr Grinholz was engaged under a 'voluntary services agreement' which stated he would receive an honorarium of \$6,000 to be paid in 2 equal instalments – one at the beginning of the season and the other at the end. In exchange, Mr Grinholz was required to attend training sessions each week, attend matches throughout the season and attend the youth championships. He was also required to liaise with full time coaches and administrators of FFV.

Mr Grinholz's engagement was terminated by FFV halfway through the 2016 season. He then made an unfair dismissal application to the Fair Work Commission. FFV brought a jurisdictional objection on the basis that Mr Grinholz was a volunteer and not an employee (and therefore not entitled to bring a claim for unfair dismissal).

In deciding the case, the Commission looked at the various indicators of a volunteer and employment relationship. On the one hand, there were various indicators of an employment relationship - FFV was able to exercise a substantial degree of control over Mr Grinholz's work, he was required to wear a uniform, was required to act consistently with FFV's policies and to promote the FFV in his coaching activities. On the other hand, there were various indicators of a volunteer relationship – the payment of the honorarium was not paid on the basis of hours worked, but closely correlated with the expenses Mr Grinholz would likely incur in carrying out his role. There were also various provisions of the volunteer services agreement which expressly stated that Mr Grinholz was a volunteer and not an employee or independent contractor, and that he was not entitled to any fees for services.

The Commission determined that Mr Grinholz was a volunteer and so not entitled to make an unfair dismissal claim against FFV. In making its decision, the Commission stated that although certain terms of the agreement indicated the existence of an employment relationship, those terms were not inconsistent with requirements that would normally be expected to be placed on volunteers, particularly in the not-for profit sector. In other words, the factors that would normally suggest an employment relationship could be attributed to other legitimate purposes, such as the need to uphold standards and protect the interests of the organisation and, in this case, young people. The Commission also emphasised the fact that the honorarium was reflective of the expenses Mr Grinholz could be expected to incur in carrying out his role and were not linked to the hours of work he carried out.

You can read the detailed decision here: [Grinholz v Football Federation Victoria Inc \[2016\] FWC 7976](#).



3.3 Can volunteers be paid for their work?

Some payments to volunteers are acceptable. It is common, and appropriate, for volunteers to be reimbursed for authorised expenses they incur while performing their role and sometimes organisations provide some kind of monetary reward or other recognition to show gratitude for a volunteer's contribution.

Some organisations provide benefits to volunteers that they may call an honorarium, allowance or one-off payment. However, if these payments are comparable to wages or a salary in disguise, then this may point to an employment relationship, and such payments should not be made to volunteers. The following are examples where a payment or pattern of payments may be deemed to be a wage or payment for services:

- if a payment is calculated with reference to time with the organisation or hours worked
- if an allowance far exceeds the expenses actually incurred or is paid on a regular basis, or
- a lump sum payment is in exchange for services provided.

EXAMPLES: PAYMENT TO A VOLUNTEER

In the case of *Dickinson* (above), the Commission found that allowing entry to the event was merely a reward or gift in return for volunteering to help out. There was also no correlation between the cost of the ticket and the hours worked by Ms Dickinson.

In the case of *Grinholz* (above), the Commission found that the payment of a \$6,000 honorarium to a volunteer did not change the nature of Mr Grinholz's engagement as a volunteer. This is because the payment was not linked to the hours worked, but was more closely related to the expenses he could be expected to incur in carrying out his role.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

[Volunteering Australia's National Standards for Volunteer Involvement](#) contains a number of standards relevant to the matters discussed in this Part. If your organisation incorporates these standards into its day-to-day practice, it will help your organisation comply with the legal obligations as set out in this Part.

Standard 7: Volunteer Recognition "*Volunteer contribution, value and impact is understood, appreciated and acknowledged*" outlines a number of non-monetary ways that your organisation can recognise the valuable contribution of volunteers. This could help ensure that you are not inadvertently providing a benefit that is comparable to wages.

For example:

- The organisation plans and schedules activities to acknowledge the contribution, value and impact of volunteers at individual and group level.
- References and statements of service are provided to volunteers as appropriate.
- The governing body and management take an active role in volunteer acknowledgement

Standard 2: Commitment to volunteer involvement "*Commitment to volunteer involvement is set out through vision, planning and resourcing, and supports the organisation's strategic direction*" recommends that organisations have a policy and procedure for reimbursement for volunteer out of pocket expenses. Implementing this policy will help ensure that you are appropriately reimbursing volunteers.

3.4 What does it mean for our organisation if a person is a 'volunteer'?

Many laws which protect employees' rights and entitlements apply differently to volunteers or not at all. A summary of the basic legal entitlements and obligations that apply to volunteers is set out in Section 6 of this Part 2 of the Guide below.

4. Employees

Overview

The legal distinction between a worker who is an 'employee' and a worker who is an 'independent contractor' or 'volunteer' is not always easy to make.

Although a great deal of employment law is now prescribed by legislation, the issue of whether a worker is an employee, independent contractor or volunteer is based on principles that have been established through case law over time (ie. judge-made law).

In such cases, the courts and other relevant tribunals have considered whether a 'worker' is an 'employee' by assessing the entire relationship between the worker and the organisation. These attributes are outlined below.

It is important to understand the 'attributes' of an employee, to consider these in light of your existing or potential future employment relationships and to be clear on how the employment relationship is distinguished from the volunteer relationship.

4.1 When is a worker an 'employee'?

Determining whether a worker is an 'employee', an 'independent contractor' or a 'volunteer' requires consideration of a number of different elements of the working relationship.

Generally, a worker will be found to be an employee when the following below attributes exist (other factors may also be relevant in particular cases).

4.1.1 Employee attributes

Type of work	Payments and Benefits
<ul style="list-style-type: none">performs ongoing work under the control, direction and supervision of the employer	<ul style="list-style-type: none">is paid for time worked
<ul style="list-style-type: none">must perform the duties of their position	<ul style="list-style-type: none">is paid regularly (ie. weekly, fortnightly or monthly) and has income tax withheld from their salary by their employer
<ul style="list-style-type: none">provides their personal services and cannot delegate their work to 'outsiders' (ie. arrange for their work to be done by someone else who is not another employee)	<ul style="list-style-type: none">is entitled to have superannuation contributions paid into a nominated superannuation fund by their employer
<ul style="list-style-type: none">work hours set by the employer, an enterprise agreement or modern award	<ul style="list-style-type: none">is entitled to paid and unpaid leave (eg. sick leave, personal/carers' leave, annual or recreation leave, or long service leave)
<ul style="list-style-type: none">is recognised as a part of the employer's business and/or holds themselves out to the public as being part of that business (eg. wearing a uniform, using a business card)	<ul style="list-style-type: none">is covered by professional indemnity, public liability and workers compensation insurance premiums paid by the employer

- does not take commercial risks and cannot make a 'profit' or 'loss' from the work performed

- generally has all 'tools of the trade' provided by the employer to carry out the work (eg. desk, computer, stationary) unless otherwise agreed

NOTE

Other factors may also be relevant and of importance in particular cases. While it is often straight-forward to determine whether or not a worker is an employee, where there is doubt, the organisation should seek legal advice.



EXAMPLE: EMPLOYEE

Barry is a retired clerk and is often called upon by, Jo, the Office Manager at a local charity to undertake administrative duties, including project work. Jo provides Barry with details of the work to be done and negotiates with Barry as to the days and times he works. The charity provides Barry with the equipment he needs to get the work done and pays him by the hour. When working, Barry is required to wear a uniform displaying the charity's logo and must report to Jo regularly about the status of the work. The charity deducts tax from Barry's wages and remits it to the ATO.

Even though Barry works irregular hours for the charity, Barry is employed by the charity, most likely on a casual basis.



4.2 What does it mean for our organisation if a worker is an 'employee'?

The law requires that employers provide their employees with certain benefits. Examples of these benefits include paid leave and superannuation, but there are many others. The law also requires that employers treat their employees in a certain way. For example, an employer must provide an employee with a notice period (or payment instead of notice) before terminating their contract of employment. Independent contractors and volunteers are not owed all of the same entitlements as employees. This is why it is important for your community organisation to be clear about the terms on which a person becomes 'involved' in your community organisation.

A summary of the basic legal entitlements that employers owe to their employees is set out under Section 7 below.

TIP

It is a good idea to have a written agreement documenting the nature of the relationship between your community organisation and any person doing work for it. This way both parties will be clear about the nature of the relationship. However, merely labelling a worker an employee, independent contractor or volunteer does not mean they are in fact an employee, independent contractor or volunteer. If the matter went to court, the court would look beyond the label to the substance of the work relationship as a whole. To understand more about the risks of inaccurately describing a worker's status, see the Section 8 below.



4.3 Can legislation make someone (including a volunteer) an 'employee' for particular purposes?

Yes. Some legislation may provide that a worker that is not an 'employee' at law may still be entitled to particular protections as if they were an employee. For example, the laws governing workplace health and safety, workers' compensation and superannuation contain 'deeming' provisions which group employees, independent contractors and volunteers together as 'workers' in certain circumstances, or provide a definition of an employee that is broader than the standard legal tests established by the courts. In such instances, 'employee' has a broader meaning than the tests in the 'employee attributes' table above. The effect of this is that an organisation may owe duties to certain independent contractors and/or volunteers and be liable to provide them with certain entitlements, as if the independent contractor or volunteer was actually an employee.

5. Independent contractors

Overview

The legal test to determine whether a worker is an employee or an independent contractor requires consideration of a number of different elements of the working relationship.

There are many circumstances where a community organisation may wish to engage an independent contractor or consultant to provide services to the organisation. For example, when the organisation has a short term project which it requires someone with specialist skills to complete, such as an independent evaluation of the organisation's services or programs.

It is important to understand the 'attributes' of an independent contractor relationship, to consider these attributes in light of your existing or potential future independent contractor relationships and to be clear on how this relationship is distinguished from the volunteer relationship.

5.1 When is a worker an 'independent contractor'?

Unlike employees who are seen to be subject to the control and direction of their employer, independent contractors are often recognised as running their own business and provide services under commercial, rather than employment, contracts.

Generally, a worker will be found to be an 'independent contractor' when the below attributes exist (other factors may also be relevant in particular cases).

5.1.1 Independent contractor attributes

Type of work	Payments and Benefits
<ul style="list-style-type: none">has control over how to carry out their work and has the expertise to do so	<ul style="list-style-type: none">is paid for results achieved (for example, submits an invoice for work completed or is paid at the end of, or at stages of, a project)
<ul style="list-style-type: none">also provides services to the general public and other businesses	<ul style="list-style-type: none">pays their own superannuation, income tax and GST and holds own insurance policies
<ul style="list-style-type: none">is contracted to work for a set period of time or do a set task and can decide what hours of work are required to complete that work	<ul style="list-style-type: none">may have their own registered business and Australian Business Number (ABN)
<ul style="list-style-type: none">is free to accept or refuse work beyond the requirements of any current contract with the organisation	<ul style="list-style-type: none">provides all or most of the necessary materials and equipment to complete the work (for example, uses their own tools)
<ul style="list-style-type: none">is usually free to delegate work to others (eg. engage a subcontractor)	<ul style="list-style-type: none">is in a position to make a profit or loss from work

FURTHER READING

The Australian Tax Office (ATO) has developed an employee/contractor decision tool which you can use to help you understand whether individual workers in your organisation are employees or contractors in order to comply with your tax and superannuation obligations. For details, see the ATO tools in Resources at the end of this document.



EXAMPLE: INDEPENDENT CONTRACTOR

Steve is a handyman and is often called upon by Abdul, the Operations Manager at a local charity, to undertake minor repairs. Abdul provides Steve with details of the work to be done and the time by which he needs it done. Abdul is not concerned about how Steve does the work only that it is done on time and on budget. Steve considers the request for the work to be done and decides that although he personally does not have time to do it, his colleague Geoff does. Steve agrees with Abdul as to the work to be done, the timeframe in which it is to be done in and the cost of the work to be carried out.

Steve arranges for Geoff to attend at the charity's offices with his tools and equipment and complete the work. Steve invoices the charity for the work carried out by Abdul and is responsible for payment to Abdul and remitting tax on the invoiced amount.

Steve is an independent contractor.



5.2 What does it mean for our organisation if a worker is an 'independent contractor'?

Many of the laws which protect employees' rights and provide for their entitlements do not apply to independent contractors, or will apply differently. A summary of the basic legal entitlements and obligations that apply to independent contractors is set out in Section 7 below.

6. Checklist: Analysing your existing volunteer relationships

In analysing your existing volunteer relationships, it may be useful to complete the following check list.

We note this is not an exhaustive checklist and there may be other relevant factors to consider in particular circumstances.

	Factors indicating a volunteer relationship	Factors indicating an employee/employer relationship	Factors indicating an independent contractor relationship
Was there an intention to create a legally binding agreement?	<input type="checkbox"/> No	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes
Is the individual motivated by selfless reasons consistent with a volunteering role?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> No
Is there an expectation or provision of remuneration or benefit in relation to the work performed?	<input type="checkbox"/> No	<input type="checkbox"/> Yes	<input type="checkbox"/> Yes
Is the type of remuneration based on hourly rates or wages (and are overtime and penalties paid)?	<input type="checkbox"/> No	<input type="checkbox"/> Yes	<input type="checkbox"/> No
Does the person have absolute discretion and autonomy about how they perform their tasks or work (can they determine their start and finish times)?	<input type="checkbox"/> No	<input type="checkbox"/> No	<input type="checkbox"/> Yes
Is the person free to provide similar services to others within the same industry?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Yes
Can the arrangement end at any time?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> No

7. Legal obligations owed by community organisations

Overview

It is important for your community organisation to know which category of 'worker' is undertaking work in your organisation. This is because different legal entitlements and obligations apply, depending on whether the worker is a volunteer, employee or an independent contractor.

We have included a brief overview of some of the different legal obligations that a community organisation owes to its volunteers, employees, and independent contractors.

The main obligations owed by an organisation to its volunteers, employees and independent contractors are quite detailed and are only summarised very briefly below. For more information on the different types of workers and their entitlements, see the Resources Section at the end of this document.

7.1 Minimum legal protections

7.1.1 Volunteers

The *Fair Work Act 2009* (Cth) and the *Independent Contractors Act 2006* (Cth) do not apply to volunteers. A volunteer does not have any legally enforceable right to hours of work or payment. Some organisations may have policies about paying out-of-pocket expenses and other payments for volunteers, but generally there is no legally enforceable obligation for the organisation to do so.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

As mentioned above, [Volunteering Australia's National Standards for Volunteer Involvement](#) contain a number of Standards relevant to the matters discussed in this Part. Your organisation is encouraged to use the Standards as a best practice guide for volunteer involvement. The Standards have been designed to ensure that you are engaging volunteers safely and in a fair, transparent and respectful manner.



7.1.2 Employees

All employees are entitled to 10 minimum standards of employment which are set out in the *Fair Work Act 2009* (Cth). These minimum standards are known as the National Employment Standards (NES) and relate to the following basic entitlements:

- maximum weekly hours
- requests for flexible working arrangements
- parental leave and related entitlements
- annual leave
- personal/carer's leave and compassionate leave

- community service leave
- long service leave
- public holidays
- notice of termination, and
- redundancy pay.

7.1.3 Independent contractors

Independent contractors have no statutory entitlement to minimum wages or other benefits such as paid leave. They are free to negotiate the terms of their contracts with the organisations that hire them. However, independent contractors are entitled to some ‘general protections’ set out in the *Fair Work Act 2009* (Cth), including protection from unlawful discrimination.

Independent contractors and organisations may also have rights under the *Independent Contractors Act 2006* (Cth). Under that Act, if the provisions apply either party can apply to a court for an order to have the contract (or a part of it) revoked or varied on the grounds that it is ‘harsh’ or ‘unfair’. This could happen if the independent contractor believes that they are being paid at a rate that is, or is likely to be, less than an employee would get for performing similar work.

If your organisation is concerned about whether a contract is unfair, you may need to seek legal advice.

7.2 Application of industrial instruments (awards, enterprise agreements and determinations)

7.2.1 Volunteers

Volunteers are not covered by the terms of industrial instruments.

7.2.2 Employees

Employees and employers in certain industries and occupations may be bound by an industrial instrument such as a modern award, enterprise agreement or determination of Fair Work Australia. These instruments contain additional minimum entitlements that supplement the NES (for example, penalty and overtime rates, loadings and allowances).

7.2.3 Independent contractors

Independent contractors are not covered by the terms of modern awards, enterprise agreements or determinations of Fair Work Australia. An independent contractor’s entitlements are set out in the contract between the contractor and the organisation (although those rights may be impacted by the *Independent Contractors Act 2006* (Cth), certain provisions of the *Fair Work Act 2009* (Cth) and various other deeming legislation. See Section 7.4, 7.5 and 7.7 below for further information in relation to superannuation, taxation and workplace health and safety.

7.3 Long service leave

7.3.1 Volunteers

Volunteers have no legal entitlement to long service leave.

7.3.2 Employees

Employees are generally entitled to long service leave after a long period of working for an employer. For most employees, their long service leave entitlements come from the laws in the state or territory where they are working. These laws set out how long an employee has to work to get long service leave and details of how long service leave is calculated.

7.3.3 Independent contractors

Independent contractors have no legal entitlement to long service leave.

FURTHER READING

Long service leave entitlements generally vary from state to state/territory. To find out more about long service leave entitlements, contact the long service leave agency in your state or territory. For a list of these agencies, see the FWO website at www.fairwork.gov.au/leave/long-service-leave.



7.4 Superannuation

7.4.1 Volunteers

Volunteers have no legal entitlement to superannuation.

7.4.2 Employees

Your organisation is required to make superannuation contributions for all employees (whether full time, part time or casual) who are aged 18 years and over and paid \$450 or more (before tax) in a calendar month. Your organisation may also be required to make superannuation contributions for employees under the age of 18 who work more than 30 hours per week. This is required by the *Superannuation Guarantee (Administration) Act 1992* (Cth).

7.4.3 Independent contractors

Under superannuation law, the definition of an employee is expanded to include a person who is engaged wholly or principally for their labour, who is paid under a contract for the hours they work (rather than to achieve a result) and who is not permitted to delegate their work. The effect of this is that in certain circumstances your organisation may be required to make superannuation payments on behalf of workers you consider to be independent contractors.

FURTHER READING

The ATO has developed a Superannuation Guarantee eligibility decision tool to help you understand whether you need to make superannuation contributions for individual workers (including any contractors who are treated as employees). For details see the ATO tools in Resources at the end of this document. However, these situations can be difficult and you should seek legal advice in case of doubt.



7.5 Safety

7.5.1 Volunteers, employees and independent contractors

Not-for-profit community organisations are required by law to ensure they provide a safe working environment for their volunteers, employees and independent contractors.

This legal obligation stems from two primary sources of law:

- the common law (judge made law) of negligence and the negligence provisions in state and territory legislation, and
- work health and safety (or occupational health and safety) laws in each state and territory.

Generally speaking, under both sets of laws, if your organisation fails to take steps to protect the safety of volunteers, employees or independent contractors there may be legal repercussions.

RELATED RESOURCES

More information about your organisation's obligations to volunteers under negligence law and work health and safety laws can be found in Part 3 of this Guide. For more information about the work health and occupational health and safety laws in Australia generally see, Not-for-profit Law's OHS webpage at www.nfplaw.org.au/OHS. For more information about negligence laws in Australia generally see, Not-for-profit Law's negligence webpage at www.nfplaw.org.au/negligence.



7.6 Insurance

7.6.1 Volunteers

Generally, volunteers are not covered by workers' compensation insurance. Therefore, it is a good idea for your organisation to take out personal accident insurance to cover your volunteers for out of pocket medical expenses if they are injured whilst performing work on behalf of your organisation. You should ensure that any existing public liability, product liability and professional indemnity insurances are sufficient to cover the activities (acts or omissions) of your volunteers. If they do not, it may also be necessary for your organisation to take out product liability and professional indemnity insurance in respect of its volunteers.

7.6.2 Employees

Employers are generally required by state and territory health and safety laws to take out workers' compensation insurance to cover the employees and the organisation.

Depending on its activities and functions, your organisation may also need to take out product liability, public liability and professional indemnity insurance to cover its own liability and that of its employees to other people.

7.6.3 Independent contractors

Unlike employees, independent contractors are typically required to organise their own insurance cover, such as accident compensation, public liability and professional indemnity. However, in some cases, an organisation engaging a contractor may have an obligation to effect workers' compensation insurance in respect of the contractor. The contractor itself may also have insurance and compensation obligations in respect of its workers.

When you engage a contractor, you should determine if your organisation is required to effect workers' compensation in respect of that contractor and, if so, ensure that your policy is adequate to cover them. If your organisation is not required to cover the contractor, you should check whether they have the necessary insurance because your organisation's policies may not cover them (you should understand what your policies do and do not cover). These situations can be difficult and you should seek legal advice in case of doubt.

RELATED RESOURCES

For more information about insurance for your community organisation, see Part 3 of this Guide – Volunteer Safety and Not-for-profit Law's Risk and Insurance guide on the Not-for-profit Law website at www.nfplaw.org.au/insurance. For more information about the workers' compensation scheme in your state or territory, contact the relevant regulator. For a list of the different regulators, see the Resources Section at the end of this Guide



7.7 Taxation

7.7.1 Volunteers

In certain circumstances, volunteers may be provided with payments or other benefits in the course of undertaking work for an organisation. This may include cash payments, non-cash benefits, or both. These payments are given various descriptions, including honoraria, reimbursements and allowances. Honorary or ex-gratia payments by the organisation to a volunteer are generally not legally enforceable.

How an amount is described does not determine its treatment for tax purposes. Whether a payment is assessable income in the hands of a volunteer depends on the nature of the payment and the recipient's circumstances.

As a general rule, volunteers do not have to pay tax on payments or benefits they may receive in their capacity as a volunteer for a not-for-profit organisation. Community organisations are similarly not liable to withhold income tax or fringe benefits tax for payments or benefits they provide to volunteers. There are, however, exceptions to these general rules and the ATO has further information on this issue.

For more information about the tax obligations of community organisations, see the Resources Section below.

7.7.2 Employees

If your community organisation is an employer, it is required to withhold income tax from wage payments to employees (**PAYG withholding**) each pay period. The organisation must then provide this tax to the ATO. The ATO website contains a tax withheld calculator that you can use to work out how much tax you need to withhold from payments you make to your employees and other workers each pay period (week, fortnight or month). See the ATO tools in Resources at the end of this document.

Other taxes, such as fringe benefits tax, may also apply to employees. In addition, depending on the size of your organisation and the total remuneration paid by its payroll, it may also be liable to pay payroll tax to the State Revenue Office.

CAUTION

Some not-for-profit community organisations are eligible for an exemption from paying income tax. This means the organisation does not have to pay tax on any income that comes into the community organisation (for example, on money received as part of a grant).

However, this exemption only applies to the community organisation income tax liability. It does not mean that employees of the community organisation are exempt from paying income tax. All employers are required to comply with the ATO's income tax withholding obligations in relation to payments of income to employees.

7.7.3 Independent contractors

Typically, independent contractors are paid after they provide a tax invoice to your organisation. The independent contractor is responsible for any income tax liability that may flow from that payment. As a general rule, the community organisation usually does not have to withhold income tax in respect of payments made to independent contractors. However, if a contractor fails to provide you with an ABN, you may have an obligation to withhold PAYG tax.

There is also scope under taxation laws for independent contractors to enter into voluntary agreements authorising their hirers to withhold taxation from payments. Before entering into such a voluntary agreement with an independent contractor, your organisation should contact the ATO or seek legal advice to ensure that the necessary requirements for an arrangement of this type are met.

If your organisation is registered or required to be registered for GST purposes, your organisation may have GST obligations in relation to services provided by an independent contractor.

It is important to note that certain tax laws (such as payroll tax laws) apply an expanded definition of employee or deem an independent contractor to be an employee in some cases. The effect of this is that in certain circumstances your organisation may be liable to pay tax in relation to workers that would otherwise be considered independent contractors.

7.8 Termination

7.8.1 Volunteers

There is no notice period or other requirements to terminate a volunteer relationship – the voluntary nature of the relationship means that it can be ended by either party at any time.

Volunteers cannot make unfair or unlawful dismissal claims. However, it is worth noting that if a person who your organisation said was a 'volunteer' is able to establish in court that they had the attributes of an employee (see the table in Section 4 above for the attributes of an employee), and the court accepts that they were an employee, then they may be entitled to lodge an action for unfair dismissal.

RELATED RESOURCES

For more information about termination of the volunteer relationship, see Part 5 of this Guide– Recruiting, Inducting and Managing Performance

7.8.2 Employees

In relation to the termination of their employment, most full-time and part-time employees are entitled to a notice period (or pay in lieu of such a notice period) in accordance with the NES. If the employee is covered by a modern award or enterprise agreement or has a written contract of employment, that award, agreement or contract may specify a greater period of notice. Casual employees are not entitled to notice of termination.

If your organisation dismisses an employee for a reason that contravenes the provisions of the *Fair Work Act 2009* or for a reason that is discriminatory, or the termination is 'harsh, unjust or unreasonable', the employee may be able to make a claim against your organisation.

Legal advice should always be sought before proceeding with the termination of any employee's employment.

RELATED RESOURCES

For more information about termination of employment, see Not-for-profit law's fact sheet 'What are our legal obligations if we want to terminate our employee's employment?' on the Not-for-profit Law website at www.nfplaw.org.au/terminationandresignation.



7.8.3 Independent contractors

If your organisation has a contract with an independent contractor, that contract will ordinarily end when the independent contractor has completed the work and received payment from your organisation. However, if your organisation wants to terminate the agreement before the completion of the work, it can only do so in accordance with the terms of the contract or if otherwise allowed by the law (for example, it may be possible to terminate the contract if it cannot be completed for reasons outside the control of either party). You need to check the terms of your contract to see whether

- your organisation can terminate by giving notice, and
- whether you are required to pay the contractor for costs they incurred up to the date of termination.

These situations can be difficult and you should seek legal advice, particularly if the contract does not have any express provision dealing with termination.

Depending on its terms, your organisation may also be able to terminate a contract if the contractor is in serious breach of the contract. Again, it is important to look carefully at the terms of the contract

because sometimes they require you to give the independent contractor a 'notice to remedy a breach' and an opportunity to fix it before terminating the agreement.

Unlike employees, independent contractors cannot make unfair or unlawful dismissal claims. However, if your organisation attempts to terminate its contract with an independent contractor, other than in accordance with the terms of that contract, the independent contractor may take legal action against your organisation for breach of contract or breach of applicable general protections provisions of the *Fair Work Act 2009*.

It is also worth noting that if a person whom your organisation regards as an 'independent contractor' can establish in court that they are properly classified as an employee (see the table in Section 4 above for attributes of an employee), then they will be able to make any claims available to an employee, including an unfair dismissal application.

8. Calling an employee, a 'volunteer' or a 'contractor'

Often the parties to a contract for the performance of work will try to describe the legal nature of the relationship between them. For example, a contract may state 'this agreement does not create a relationship of employment' or that 'the parties agree that their relationship is one of principal and independent contractor'. While it is a good idea to write down the terms of the relationship in a contract so both parties are clear about the arrangement, the label you give your worker does not alone determine the true nature of the relationship.

The question of whether a person is an 'employee', an 'independent contractor', or 'volunteer' is decided by looking at the entire relationship between the worker and the other party. The way a contract classifies or labels a worker is just one factor that will be considered. If the matter went to court, the court would look behind the description of a situation in documents to what is actually occurring in practice.

So, if a person who is called an 'independent contractor' or a 'volunteer' actually has all or many of the attributes of an employee (see the table in Section 4 above for employee attributes), then that person could try to argue in a court, and the court could accept, that they are in fact an 'employee' and are various legal entitlements.

CAUTION

Remember, even if it is made clear in writing that the person is a 'volunteer', if the true nature of the relationship is that of an employer and employee, your organisation cannot rely on the label of 'volunteer' or the existence of a volunteer agreement as proof of this arrangement.



If your organisation is unsure about how to correctly classify the worker, or uncertain that you have correctly labelled the worker seek legal advice.

Summary: The differences between a volunteer, employee and independent contractor

The importance of distinguishing between different kinds of workers: Your organisation needs to be aware that the law recognises many different categories of 'workers' such as volunteers, employees and independent contractors, that the law treats each category of worker differently, and that it is very important for you to do so as well.

The consequences of failing to do so, or allowing the 'blurring of lines' between the different types of 'worker' relationships, can have harsh consequences for your organisation. The consequences for failing to understand these differences include exposing your organisation to claims for employee entitlements, unfair dismissal claims and penalties for failing to remit taxes or pay superannuation.

There are different legal obligations owed to volunteers, employees and independent contractors: Your organisation needs to be across the different legal entitlements and obligations surrounding payment, safety, industrial instruments (such as awards), insurance, superannuation, taxation and termination.

Each category of worker has unique attributes: Your organisation should ensure that it understands the 'attributes' of each category of worker that it considers these attributes in light of your existing or potential future relationships with 'workers' and is clear on how the attributes are distinguished or in line with the attributes of the volunteer relationship. Generally speaking:

Volunteers are not paid for the work that they perform, they do so without a legally enforceable obligation to do so and the volunteer relationship can end at any time.

Employees are paid for time worked, must perform the duties of their position, perform ongoing work under the supervision and control of an employer and are entitled to paid and unpaid leave.

Independent contractors have control over how they carry out their work, are paid for results that they achieve, are contracted for a set period of time or a set task and are free to accept work from the general public and other businesses.

Volunteer agreement: Your organisation should consider using a Volunteer Agreement. This is the best way to be clear about the relationship between your organisation and the volunteer. For a sample Volunteer Agreement, go to Part 5 of this Guide.

Whenever your organisation engages a worker, it should clarify from the outset the nature of the relationship and the expectations and obligations of the parties.

The difference between members and volunteers: It is important that your organisation is aware that its members may also be considered 'volunteers' in particular circumstances. This has certain

Resources

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 3: Volunteer safety
- ✔ Part 4: Volunteers and unlawful workplace behaviour
- ✔ Part 5: Recruiting, inducting and managing volunteers
- ✔ Part 6: Organisational issues applicable to 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

The Not-for-profit Law website at www.nfplaw.org.au has resources on the following related topics:

- ✔ **Employees** – www.nfplaw.org.au/employees

This page provides resources on the recruitment and engagement of employees, employee entitlements, the Fair Work System, termination and resignation and disputes with employees.

- ✔ **Insurance and risk** – www.nfplaw.org.au/riskinsurance

This section covers insurance, negligence, work health and safety, Personal Property Securities Register and criminal conduct.

- ✔ **National WHS Guide** – www.nfplaw.org.au/ohs

Not-for-profit Law's National WHS Guide can help your organisation understand its obligations under the occupational health and safety laws, whether it is bound by these laws and how it can ensure it complies. A separate Guide also exists for Victorian organisations as their laws differs slightly.

- ✔ **Tax** – www.nfplaw.org.au/tax

The section explains Deductible Gift Recipient Endorsement, Fringe Benefits Concessions, Goods and Services Tax, income tax exemptions and state tax laws.

Other Related Resources

- ✔ [Australian Tax Office \(ATO\)](#)

The ATO has designed the following tools which may help you work out your obligations:

- ✔ [Employee/contractor decision tool](#)
- ✔ [Superannuation Guarantee eligibility decision tool](#)
- ✔ [Tax withheld calculator](#)

✔ [Fair Work Ombudsman \(FWO\)](#)

The FWO provides information and advice for both workers and organisations about workplace rights and obligations.

Workplace Health and Safety Regulators

To find out more about workplace health and safety and the workers' compensation scheme that applies to your organisation, contact the regulator in your state or territory:

✔ Australian Capital Territory (ACT): [Worksafe ACT](#)

✔ New South Wales (NSW): [SafeWork NSW](#)

✔ Northern Territory (NT): [NT WorkSafe](#)

✔ Queensland (QLD): [WorkSafe Queensland](#)

✔ South Australia (SA): [SafeWork SA](#)

✔ Tasmania (Tas): [WorkSafe Tasmania](#)

✔ Victoria (Vic): [WorkSafe Victoria](#)

✔ Western Australia (WA): [WorkSafe WA](#)

Legislation

✔ [Fair Work Act 2009 \(Cth\)](#)

✔ [Independent Contractors Act 2006 \(Cth\)](#)

✔ [Superannuation Guarantee \(Administration\) Act 1992 \(Cth\)](#)

Volunteering Australia resources

✔ Volunteering Australia 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:

✔ Volunteering and Contact ACT – www.vc-act.org.au

✔ The Centre for Volunteering (NSW) – www.volunteering.com.au

✔ Volunteering Queensland – www.volunteeringqld.org.au

✔ Volunteering SA&NT – www.volunteeringsa-nt.org.au

✔ Volunteering Tasmania – www.volunteeringtas.org.au

▀ Volunteering Victoria – www.volunteeringvictoria.org.au

▀ Volunteering WA – www.volunteeringwa.org.au

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A NFP Law Information Hub resource. Access more resources at www.nfplaw.org.au.

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National Volunteer Guide (Part 3)

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

October 2018

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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

Your 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).

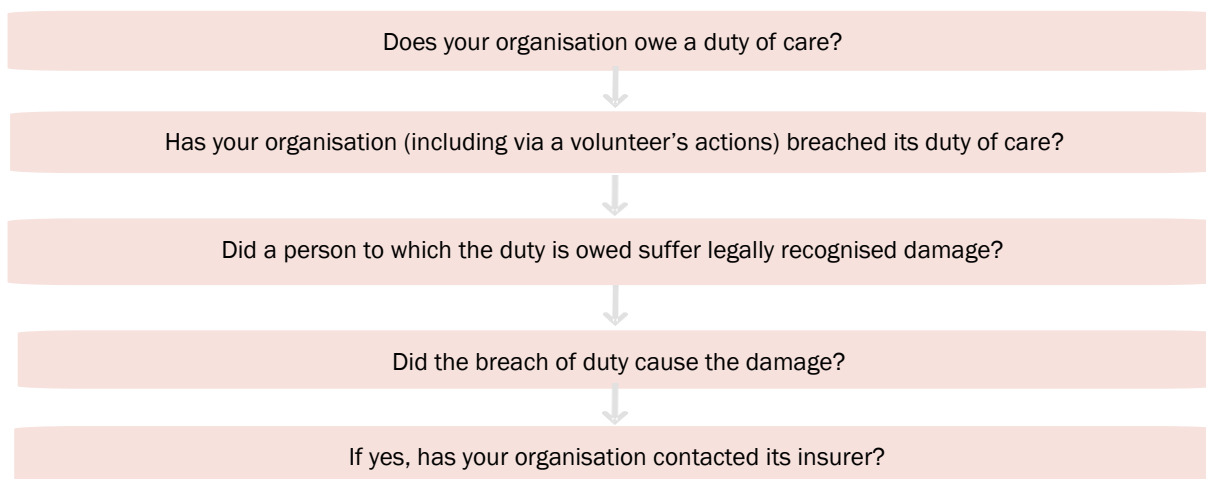
2.2 Negligence laws

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 vicariously 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

The *Civil Law (Wrongs) Act 2002* (ACT) (**the ACT 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) 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?’

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 or as an office holder of 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

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 acknowledgment 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.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT



[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>

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.

Jurisdiction	Legislation	Regulations	Regulator
Commonwealth	<i>Work Health and Safety Act 2011</i> (Cth)	<i>Work Health and Safety Regulations 2011</i> (Cth)	Comcare

Tasmania	<i>Work Health and Safety Act 2012 (Tas)</i>	<i>Work Health and Safety Regulations 2012 (Tas)</i>	WorkSafe Tasmania
Northern Territory	<i>Work Health and Safety (National Uniform Legislation) Act 2012 (NT)</i>	<i>Work Health and Safety (National Uniform Legislation) Regulations 2012 (NT)</i>	NT WorkSafe
South Australia	<i>Work Health and Safety Act 2012 (SA)</i>	<i>Work Health and Safety Regulations 2012 (SA)</i>	SafeWork SA
Australian Capital Territory	<i>Work Health and Safety Act 2011 (ACT)</i>	<i>Work Health and Safety Regulation 2011 (ACT)</i>	WorkSafe ACT
Queensland	<i>Work Health and Safety Act 2011 (QLD)</i>	<i>Work Health and Safety Regulation 2011 (QLD)</i>	WorkSafe Qld
New South Wales	<i>Work Health and Safety Act 2011 (NSW)</i>	<i>Work Health and Safety Regulation 2017 (NSW)</i>	SafeWork NSW

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 PCBU's. 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>



3.1.1.2 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.



RELATED RESOURCES

For more information about reimbursing volunteers, see Part 2 of the National Volunteer Guide.



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.

Duty holder	Duty
PCBU	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.
Officer	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.
Workers (volunteers)	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.
Other persons	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

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.

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).

TIP

To help volunteers comply with their obligation to take reasonable care 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.

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.



TIP

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.

RELATED RESOURCES

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.



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 '[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.



TIP

A director or officer will still be classed as a volunteer where they receive repayment from the organisation for out-of-pocket expenses incurred as a result of their position.

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.

EXAMPLE

A community centre or community hub may have a range of organisations that operate within the same building. Some of the community organisations operating out of the centre may be entirely volunteer-based, whereas others have employees. If this is the case, a volunteer-based organisation with management and control of the centre will still be required to comply with the 'workplace' duties in the OHS Law.



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.

EXAMPLE

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



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.

Duty holder	Duty
Employer	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.
Persons who manage or control workplaces	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.
Any person at a workplace	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. .

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.

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.

TIP

To help volunteers comply with their obligation to take reasonable care 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.

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 “Volunteers are provided with orientation relevant to their role and responsibility” and “Volunteers’ knowledge and skill needs relevant to their roles are identified, and training and development opportunities are provided to meet these needs” and “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 law.

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

Organisations should read Part 5 of Not-for-profit Law's Guide 'Occupational health and safety laws' available at <https://www.nfplaw.org.au/OHS> and familiarise themselves with:

- 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,



TIP

An officer will still be classed as a volunteer, even where they receive repayment from the organisation for out-of-pocket expenses incurred as a result of their position.

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>



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.

EXAMPLE

An entirely volunteer-run group meets in each other's homes regularly to discuss their organisation's progress and plan for the future. Because there are no employees in the organisation and no employees are present in the various homes, Western Australian OSH Laws will not 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.

Duty holder	Duty
Employer	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.
Persons who manage or control a workplace	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.

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 barbeque. They recklessly cause a gas leak which results in a minor explosion. The employee, volunteer and a passer-by are injured. As the charity is an employer, it will owe a duty to all three injured parties



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

Source: Australia. Royal Commission into Institutional Responses to Child Sexual Abuse. 2017, *Final report. Volume 6, Making institutions child safe / Royal Commission into Institutional Responses to Child Sexual Abuse*, Royal Commission into Institutional Responses into Child Sexual Abuse [Sydney], page 13.

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**

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.

NOTE

An individual is 'akin to an employee' of an organisation if the individual carries out activities as an integral part of the activities carried on by the organisation and does so for the benefit of the organisation. This is potentially wide enough to include volunteers and independent contractors.

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

RELATED RESOURCES

For more information about your organisation's obligations under negligence law and work health and safety law, refer to Section 3.1 and 3.2 of this Part 3 of the Guide.

For more information about legal issues relating to youth volunteers, see our freely available webinar 'Youth Volunteers' available at <https://www.nfplaw.org.au/volunteers>



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?

RELATED RESOURCES

For more information about risk and insurance see Section 3.6 of this Part 3 of the Guide and our guide on this topic on the [Not-for-profit Law website](#).

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 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:

Protects:	Type of insurance:
Volunteers	Volunteer personal accident insurance
Volunteer committee members or directors	Directors' and officers' liability insurance
Members of the public	Public liability insurance
Experts or advisors	Professional indemnity insurance
Property and assets	Building and contents/occupiers/fraud insurance
Vehicles	Motor vehicle insurance

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

For more information on insurance and risk management, including volunteer personal accident insurance, read Not-for-profit Law's Risk Management and Insurance guide on the Not-for-profit Law website at www.nfplaw.org.au/riskinsurance.



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

Workers compensation in NSW is covered under the *Workplace Injury Management and Workers Compensation Act 1998*, the *Workers Compensation Act 1987* and the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987*.

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.

Summary: Volunteer safety

- ✓ **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



Annexure to Part 3

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?

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.

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 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.

QUESTION 4: CHECK LIST

The community work performed must be 'organised' by the community organisation. 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 Wrongs 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?

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).

QUESTION 6: CHECK LIST

Certain types of civil liability are excluded from the protection provisions. 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
- A claim under the Transport Accident Act 1986, Accident Compensation Act 1985 or Workers' Compensation Act 1958

If ANY apply go to Section E

If NONE apply go 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 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?

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.

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 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

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 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 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?

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.

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

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.

EXAMPLE

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 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 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 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 trustee acting the capacity of trustee
- a registered political party
- a public or other authority under section 34 of the *QLD Civil Liability Act* (including a local government)
- a parents and citizens association
- a church or other religious organisation

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 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 3: CHECK LIST:

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

- charitable
- benevolent
- philanthropic
- recreational
- political
- sporting
- educational
- cultural
- Work to be declared by the *Civil Liability Regulations 2014* (QLD)

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 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**

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. 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.

QUESTION 7: CHECKLIST

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'. 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.



QUESTION 9: CHECK LIST

Certain acts of the volunteer will exclude their ability to claim protection. 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 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?

Checklist: Are our volunteers protected against personal liability under the Western Australia 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.

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 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 2: CHECK LIST

Does your organisation fit into one of the following categories?

- a state agency
- a department of the public service
- an incorporated association (under the *Associations Incorporation Act 2015 (WA)*)
- a local government
- another body corporate (such as a company limited by guarantee)

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 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.

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

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:

- religious, educational, charitable or benevolent purpose
- promoting or encouraging literature, science or the arts
- sport, recreation or amusement
- disability and mental health care
- conserving or protecting the environment
- promoting or preserving historical or cultural heritage
- establishing, carrying on or improving a community, social or cultural centre
- promoting the interests of a local community
- political purposes
- promoting the interests of an ethnic community
- promoting the interests of a religious 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. 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.

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?

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’.



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?



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.

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 *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 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 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>

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 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

Territory

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

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.

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 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 2: CHECK LIST

Does your organisation fit into the following category?

- a corporation that directs or coordinates the carrying out of community work by volunteers

If YES 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 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

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 '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 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 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).

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 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?

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.

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 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



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?

- a State Service Agency or statutory authority
- an incorporated association under the *Associations Incorporation Act 1964* (Tas)
- a council
- a body corporate (such as a company limited by guarantee)

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 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 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:

- religious, educational, charitable or benevolent purposes
- promoting or encouraging literature, science or the arts
- sport, recreation or amusement
- caring for, treating or otherwise assisting people who need assistance because of a physical or mental disability or condition
- conserving or protecting the environment
- promoting or preserving historical or cultural heritage
- establishing, carrying on or improving a community, social or cultural centre
- promoting the interests of a local community
- a political purpose.

If ANY apply go to Question 4

If NONE apply go to Section E

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.

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.

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?

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.

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 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?

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.

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 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
- 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.



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?

- a religious body
- a body corporate (for example, a company limited by guarantee or an incorporated association)
- an Agency or department of the Territory

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 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 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 or amusement
- conserving or protecting the environment
- establishing, carrying on or improving a community, social or cultural centre
- promoting the interests of a local community
- a political purpose.

If ANY apply go to Question 4

If NONE apply go to Section E

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.

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?

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



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.

Resources

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

- ✔ **Insurance and Risk** – www.nfplaw.org.au/riskinsurance

For more information on insurance and risk management, read our Risk Management and Insurance guide.

- ✔ **Negligence** – www.nfplaw.org.au/negligence

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.

- ✔ **Volunteers** – www.nfplaw.org.au/volunteers

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.

- ✔ **The people involved** – <https://www.nfplaw.org.au/people>

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.

- ✔ **Governance** – <https://www.nfplaw.org.au/governance>

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

- WorkSafe ACT www.worksafe.act.gov.au/health_safety

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.

✔ Workplace Health and Safety Queensland, Office of Industrial Relations www.worksafe.qld.gov.au

Workplace Health and Safety Queensland has also published numerous resources relating to workplace safety and minimising risk available at www.worksafe.qld.gov.au/forms-and-resources.

✔ SafeWork SA www.safework.sa.gov.au

SafeWork SA has also published numerous resources relating to workplace safety and minimising risk at www.safework.sa.gov.au.

✔ WorkSafe Tasmania www.worksafe.tas.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.

✔ WorkSafe Victoria www.worksafe.vic.gov.au

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 Western Australia <https://www.commerce.wa.gov.au/worksafe>

WorkSafe WA has also published resources relating to workplace safety and minimising risk.

✔ Safe Work Australia www.safeworkaustralia.gov.au

Safe Work Australia has published information for volunteer organisations on workplace safety including [The Essential Guide to Work Health and Safety for Volunteers](#).

Other resources on working with children

✔ Commission for Children and Young People www.ccyp.vic.gov.au

The Commission has published [resources](#) for organisations in relation to creating safe environments for children, including complying with the Child Safe Standards

✔ Fair Work Ombudsman www.fairwork.gov.au

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.

✔ Victorian Department of Human Services (DHS) www.dhhs.vic.gov.au

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

For more information about Working with Children Check requirements in Victoria

✔ Youth Affairs Council of Victoria www.yacvic.org.au

The peak body and leading policy advocate on young people's issues in Victoria.

Child Protection Toolkit www.communitydirectors.com.au

Volunteering Australia resources

✔ Volunteering Australia 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:

- ✔ Volunteering and Contact ACT – www.vc-act.org.au
- ✔ The Centre for Volunteering (NSW) – www.volunteering.com.au
- ✔ Volunteering Queensland – www.volunteeringqld.org.au
- ✔ Volunteering SA&NT – www.volunteeringsa-nt.org.au
- ✔ Volunteering Tasmania – www.volunteeringtas.org.au
- ✔ Volunteering Victoria – www.volunteeringvictoria.org.au
- ✔ Volunteering WA – www.volunteeringwa.org.au

We thank the Australian Government, Department of Social Services, for their financial contribution towards the development of this National Volunteer Guide.

A NFP Law Information Hub resource. Access more resources at www.nfplaw.org.au.

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National Volunteer Guide (Part 4)

This part provides guidance on
volunteers and unlawful workplace
behaviour

October 2018

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Part 4: Volunteers and unlawful workplace behaviour

Introduction to volunteers and unlawful workplace behaviour

This part covers:

- ✔ protections for volunteers from unlawful workplace behaviour
- ✔ protections for volunteers under work health and safety laws
- ✔ volunteers' entitlements to workers compensation
- ✔ an organisation's responsibility for the actions of its volunteers, and
- ✔ the potential exposure of volunteers to civil liability claims

1. Introduction

This Part of the Guide covers unlawful workplace behaviours.

This Part covers the following types of unlawful workplace behaviour:

- Sexual Harassment
- Discrimination
- Bullying
- Victimisation

This Part starts with a summary of the laws that cover unlawful workplace behaviour, and provides an indication of whether they are applicable to volunteers in the workplace. The obligations your organisation may owe its volunteers under these laws are explained throughout this Part.

This Part provides guidance on how to comply with these laws. We recommend your volunteer involving organisation comply with these laws (as much as reasonably practicable), even if you are not strictly legally obliged to comply with the laws, or if they apply in limited circumstances – it is a matter of best practice.

This Part also provides an overview of the duties your organisation may owe under work health and safety laws (which may offer some protections to your volunteers if they are harmed by workplace behaviours) and if workers compensation is a consideration for your volunteers.

In addition, this Part explains the common law duty your organisation has to take reasonable care to avoid exposing workers, including volunteers, to reasonably foreseeable risks of injury. This could include harm caused by sexual harassment, discrimination and victimisation or bullying.

This Part also briefly discusses your organisation's responsibility for the actions of its volunteers, and how a volunteer's actions may expose the volunteer to civil liability.

1.1 Do sexual harassment, discrimination, bullying and victimisation laws apply to volunteers in the workplace?

Jurisdiction	Sexual Harassment	Discrimination	Bullying	Victimisation
Section of the Guide	2	3	4	5
Commonwealth	<p><i>Sex Discrimination Act 1984</i></p> <p>This may apply to volunteers in certain circumstances - see Section 2 of this Part</p>	<p><i>Racial Discrimination Act 1975</i> <i>Disability Discrimination Act 1992</i> <i>Age Discrimination Act 2004</i> <i>Sex Discrimination Act 1984</i></p> <p>These may apply to volunteers in certain circumstances – see Section 3 of this Part.</p>	<p><i>Fair Work Act 2009</i> (Cth)</p> <p>This applies to volunteers unless the organisation has no employees or is not a constitutionally covered organisation – see Section 4 and 9 of this Part and Part 3 of this Guide</p>	<p><i>Racial Discrimination Act 1975</i> <i>Disability Discrimination Act 1992</i> <i>Age Discrimination Act 2004</i> <i>Sex Discrimination Act 1984</i></p> <p>These may apply to volunteers in certain circumstances – see Section 5 of this Part</p>
Australian Capital Territory	<p><i>Discrimination Act 1991</i></p> <p>This applies to volunteers</p>	<p><i>Discrimination Act 1991</i></p> <p>This applies to volunteers</p>	<p><i>Work Health and Safety Act 2011</i> (ACT)</p> <p>This applies to volunteers if the organisation meets the definition of a 'Person conducting a business or undertaking' and if the organisation does not meet the definition of a 'volunteer association'. See Section 4 and 9 of this Part and Part 3 of this Guide</p>	<p><i>Discrimination Act 1991</i></p> <p>This applies to volunteers</p>
New South Wales	<p><i>Anti-Discrimination Act 1977</i></p> <p>This applies to volunteers</p>	<p><i>Anti-Discrimination Act 1977</i></p> <p>This may apply to volunteers in certain circumstances – see Section 3 of this Part</p>	<p><i>Work Health and Safety Act 2011</i> (NSW)</p> <p>This applies to volunteers if the organisation meets the definition of a 'Person conducting a business or undertaking' and if the organisation does not meet the definition of a 'volunteer association'. See Section 4 and 9 of this Part and Part 3 of this Guide</p>	<p><i>Anti-Discrimination Act 1977</i></p> <p>This may apply to volunteers in certain circumstances – see Section 5 of this Part</p>

Jurisdiction	Sexual Harassment	Discrimination	Bullying	Victimisation
Section of the Guide	2	3	4	5
Northern Territory	<p><i>Anti-Discrimination Act</i></p> <p>This is unlikely to apply to volunteers- see Section 2 of this Part</p>	<p><i>Anti-Discrimination Act</i></p> <p>This is unlikely to apply to volunteers- see Section 3 of this Part</p>	<p><i>Work Health and Safety (National Uniform Legislation) Act (NT)</i></p> <p>This applies to volunteers if the organisation meets the definition of a 'Person conducting a business or undertaking' and if the organisation does not meet the definition of a 'volunteer association'. See Section 4 and 9 of this Part and Part 3 of this Guide</p>	<p><i>Anti-Discrimination Act</i></p> <p>This may apply to volunteers in certain circumstances - see Section 5 of this Part</p>
Queensland	<p><i>Anti-Discrimination Act 1991</i></p> <p>This applies to volunteers</p>	<p><i>Anti-Discrimination Act 1991</i></p> <p>This applies to volunteers</p>	<p><i>Work Health and Safety Act 2011 (QLD)</i></p> <p>This applies to volunteers if the organisation meets the definition of a 'Person conducting a business or undertaking' and if the organisation does not meet the definition of a 'volunteer association'. See Section 4 and 9 of this Part and Part 3 of this Guide</p>	<p><i>Anti-Discrimination Act 1991</i></p> <p>This applies to volunteers</p>
South Australia	<p><i>Equal Opportunity Act 1984</i></p> <p>This applies to volunteers</p>	<p><i>Equal Opportunity Act 1984</i></p> <p>This applies to volunteers</p>	<p><i>Work Health and Safety Act 2012 (SA)</i></p> <p>This applies to volunteers if the organisation meets the definition of a 'Person conducting a business or undertaking' and if the organisation does not meet the definition of a 'volunteer association'. See Section 4 and 9 of this Part and Part 3 of this Guide</p>	<p><i>Equal Opportunity Act 1984</i></p> <p>This applies to volunteers</p>
Tasmania	<p><i>Anti-Discrimination Act 1998</i></p> <p>This applies to volunteers</p>	<p><i>Anti-Discrimination Act 1998</i></p> <p>This applies to volunteers</p>	<p><i>Work Health and Safety Act 2012 (Tas)</i></p> <p>This applies to volunteers if the organisation meets the definition of a 'Person conducting a business or undertaking' and if the organisation does not meet the definition of a 'volunteer association'. See Section 4 and 9 of this Part and Part 3 of this Guide</p>	<p><i>Anti-Discrimination Act 1998</i></p> <p>This applies to volunteers</p>
Victoria	<p><i>Equal Opportunity Act 2010</i></p> <p>This applies to volunteers</p>	<p><i>Equal Opportunity Act 2010</i></p> <p>This may apply to volunteers in certain circumstances - see Section 3 of this Part</p>	<p><i>Occupational Health and Safety Act 2004 (Vic)</i></p> <p>This applies to volunteers if the organisation is an 'employer' (that is, they have employees) or if the organisation manages or controls a 'workplace.' See Section 4 and 9 of this Part and Part 3 of this Guide</p>	<p><i>Equal Opportunity Act 2010</i></p> <p>This may apply to volunteers in certain circumstances - see Section 5 of this Part</p>

Jurisdiction	Sexual Harassment	Discrimination	Bullying	Victimisation
Section of the Guide	2	3	4	5
Western Australia	<p><i>Equal Opportunity Act 1984</i></p> <p>This does not apply to volunteers</p>	<p><i>Equal Opportunity Act 1984</i></p> <p>This does not apply to volunteers</p>	<p><i>Occupational Safety and Health Act 1984 (WA)</i></p> <p>This applies to volunteers if the organisation is an 'employer' (that is, they have employees) or if the organisation manages or controls a 'workplace.' See Section 4 and 9 of this Part and Part 3 of this Guide</p>	<p><i>Equal Opportunity Act 1984</i></p> <p>This <i>may</i> apply to volunteers in certain circumstances - see Section 5 of this Part</p>

NOTE – 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. Failing to meet your 'duty of care' and the 'standard of care' expected of your community organisation in relation to unlawful workplace behaviours may mean that your organisation is found negligent. See Section 10 of this Part and Part 3 of this Guide for more information.

2. Sexual harassment

Sexual harassment laws exist at both the state and federal level. Where the federal and a state or territory law relating to sexual harassment overlap both must be complied with. At a federal level the law is the *Sex Discrimination Act 1984* (Cth). In certain circumstances these laws may apply to protect volunteers. Sexual harassment at the state and territory level is covered by the same laws that cover discrimination (set out in the Table in Section 1.1 above and explained in Section 3 below). The state and territory laws apply explicitly to volunteers in most states (but not in Western Australia or the Northern Territory).

Alongside duties that your organisation may owe under sexual harassment laws, your organisation may have duties under work health and safety laws (explained in Section 9 of this Part) and under the law of negligence, which contains a duty to take reasonable care to avoid exposing your workers, including volunteers, to reasonably foreseeable risks of injury which could include harm caused by sexual harassment (explained in Section 10 of this Part).

2.1 What is sexual harassment?

The definition of sexual harassment differs slightly between the federal laws and the laws in each state and territory. Generally, sexual harassment occurs when the following two factors are met:

- a person makes unwelcome sexual advances, requests sexual favours, makes unsolicited acts of physical intimacy, or physical contact of a sexual nature or remarks with sexual connotations about another person, and
- the behaviour is intended, or could reasonably be expected, to offend, humiliate or intimidate the other person.

EXAMPLES OF CONDUCT – SEXUAL HARASSMENT

Examples of conduct which is likely to constitute sexual harassment include:

- unwelcome physical touching
- staring or leering in a sexual manner
- suggestive comments or jokes
- unwanted requests to go out on dates
- requests for sex
- emailing pornography or rude jokes
- sending sexually explicit emails, texts or posts on social networking sites
- intrusive questions about a person's private life or body, and
- displaying posters, magazines or screen savers of a sexual nature



EXAMPLE – SEXUAL HARASSMENT



Peter volunteers with an environmental organisation. He leads a team of up to 10 other volunteers and they do door knocking, phone call campaigns and street petitions. Peter is very friendly with his team and tries to create a very close team atmosphere. He uses words like “babe” and “doll” when talking to female members of the team. He also often winks and makes other sexually suggestive facial expressions at a few members of the team, male and female. Some team members are very uncomfortable with Peter’s behaviour. One female team member has even said to Peter that she really doesn’t like the pet names he uses and his other behaviour isn’t appropriate. Peter laughed this off. Peter’s behaviour is likely to constitute sexual harassment. Peter’s behaviour has sexual connotations and, particularly for the team member who expressed her discomfort, is unwelcome and could reasonably be expected to offend, humiliate or intimidate others.

NOTE: RECENT MEDIA - SEXUAL HARASSMENT - #ME TOO



Sexual harassment in the workplace has been at the forefront of public discussion over the past year, thanks to the worldwide #metoo and #TimesUp movements. Along with media reports of high profile people being alleged to have assaulted their colleagues in for-profit workplaces (and subsequent criminal charges and findings of guilt) there have also been allegations in not-for-profit workplaces. For example, it was [reported](#) in national [media](#) in February 2018 the not-for-profit organisation that operates the Sovereign Hill tourist facility in Victoria had failed to act on allegations of sexual assaults over a two year period. The matter continues to be reported in the media with the person allegedly responsible facing court in [October 2018](#).

It is also worth being aware that recent of decisions in state and federal courts have awarded damages in excess of \$100 000 (earlier decisions awards for generally damages were in the range of \$12 000 to \$20 000). These decisions have followed the case of *Richardson v Oracle Pty Ltd [2014] FCAFC 82*, in which the Full Federal Court awarded \$130,000 (which included \$30 000 as general damages) from an earlier decision of \$18,000 and recognised that “*community attitudes regarding the impact of sexual harassment [have] changed, in particular that the adverse consequences ... can extend to loss of employment and career; severe psychological illness; and relationship breakdown*”. See [here](#) for more detail.

2.2 Sexual harassment law and your organisation’s obligations

Under these laws (where they apply):

- Sexual harassment of volunteers, while they are doing their volunteer work, is unlawful
- Volunteers must not sexually harass others in the workplace (including staff, volunteers, clients, and members of the public)
- Volunteers in your volunteer involving organisation have the same legal rights and protections against sexual harassment as employees
- Your organisation could be liable (legally responsible) for any harm, injury or loss as a result of the actions of your volunteers (this ‘vicarious liability’ can generally be avoided if your organisation takes all reasonable steps to prevent sexual harassment), and

- Your organisation has a positive duty to take reasonable and proportionate measures to eliminate sexual harassment from the workplace. This includes taking steps to prevent this behaviour and not waiting for a complaint before addressing inappropriate workplace behaviour.

Regardless of whether the sexual harassment laws apply to your organisation and its volunteers (or only in limited circumstances, or only to your employees) it is best practice to comply with the laws (as much as reasonably practicable). Not only is it favourable to your volunteers (and workers, clients and members of the public in contact with your organisation), it will help prevent any reputational or other damage to your organisation that may arise from a complaint of sexual harassment.

TIPS ON MINIMISING SEXUAL HARASSMENT IN THE WORKPLACE

- Have, and implement, a policy on appropriate workplace behaviour, which makes clear sexual harassment is unacceptable and will not be tolerated. This policy should cover how the organisation will comply with laws about sexual harassment (where they apply).
- Have a nominated person to whom complaints on inappropriate behaviour can be made.
- Make sure you have a fair and transparent process for resolving complaints.
- Make all volunteers (and all workers) aware of the kind of behaviour that is unacceptable, the policy, and what to do if the process for making a complaint does not resolve the complaint.
- Conduct ongoing training in relation to appropriate workplace behaviour.
- Have an appropriate screening process for volunteers to make sure you are not engaging a volunteer with a history of repeated sexual harassment (Part 5 of this Guide).

2.3 Federal sexual harassment law

The *Sex Discrimination Act 1984* (Cth) (**SDA**) primarily concerns sexual harassment by employers against employees and contractors. It does not apply to volunteers and the organisations they volunteer with in the same way. This is because volunteering is not an area of ‘public life’ covered by the SDA. However, in particular circumstances, the SDA may apply to volunteers where volunteering falls within a specified area of public life covered by the SDA. These areas of public life include: providing goods, services and facilities (see example, below), carrying out a function under a federal law or for the purposes of a federal government program (see example, below) or by a member of a management committee of a club (in this context ‘club’ means an association of at least 30 people that funds the provision of facilities for the club and sells or supplies alcohol).

NOTE

The Australian Human Rights Commission’s [submission](#) to the Sex Discrimination Act Review (2008) recommended coverage of voluntary work. In its [submission](#) of 2011 to the Federal Attorney-General on the consolidation of Commonwealth discrimination laws, the Commission also provided in principal support for need for coverage of voluntary workers by Commonwealth discrimination laws. It noted that “volunteering provides important opportunities for social participation ... measures to advance equality in this area are thus an important component of advancing equality more generally”.

However, even if the SDA does not apply, or only in specified areas of public life, your organisation may still owe duties under other laws to protect your volunteers from sexual harassment (e.g. state and territory discrimination laws, work health and safety laws or negligence law).

GOVERNMENT PROGRAMS – SEXUAL HARASSMENT



Greg and Ananya volunteer with an organisation that receives funding from the federal government as part of a federal program to support elderly people and assist them to stay living in their homes. Greg and Ananya go to clients' homes and assist with everyday tasks, and sometimes provide respite care for clients' carers. Greg is often flirtatious with female clients, frequently making comments about their physical appearance. He says he is paying them compliments and making them feel good about themselves. However, Ananya has observed that many clients feel uncomfortable when Greg behaves this way. Greg's behaviour is prohibited under the SDA because even though he is a volunteer, his role is for the purpose of delivering a federal government program. His behaviour constitutes an unwelcome sexual advance.

GOODS, SERVICES OR FACILITIES – SEXUAL HARASSMENT



Sexual Health Awareness (SHA) is a charity that works to promote and increase sexual health knowledge and education for young people. SHA volunteers to go out to sexual health clinics and provide information pamphlets and free condoms to any patients who want them. Nathan is a regular volunteer for SHA. He tries to make jokes to patients who pick up pamphlets or condoms, but his jokes are generally of a sexual nature. Patients frequently feel very uncomfortable by Nathan's jokes, which they feel are in bad taste given the circumstances. Nathan's behaviour while providing these goods and services is very likely prohibited under sexual harassment laws. Nathan's jokes are remarks with sexual connotations and could be reasonably expected to offend, humiliate or intimidate others.

NOTE – CURRENT INQUIRY INTO SEXUAL HARASSMENT



The Australian Human Rights Commission is undertaking a National Inquiry into sexual harassment in Australian workplaces. The focus of the Inquiry is on:

- the nature and prevalence of sexual harassment in Australian workplaces
- the drivers of this harassment, and
- measures to address sexual harassment in Australian workplaces.

Submissions close on 31 January 2019. Not-for-profit Law will be submitting to the Inquiry that volunteers should be protected from sexual harassment in the same way as employees in every state and territory and under federal law.

2.4 State and territory sexual harassment law

Sexual harassment at the state and territory level is covered by the same laws that cover discrimination (see the Table in Section 1.1 above and Section 3 below). They apply explicitly to volunteers in the **Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania and Victoria**. While the sexual harassment provisions in these laws are all slightly different, they generally provide (as outlined above) that sexual harassment is likely to occur in situations where a person engages in unwelcome conduct of a sexual nature and where a reasonable person would

have anticipated the possibility the other person would be offended, humiliated or intimidated by the behaviour. These laws are explained further below.

In the **Northern Territory** and **Western Australia**, it is unlikely the sexual harassment law applies to volunteers. However, your organisation may still owe duties under other laws to protect your volunteers from sexual harassment (e.g. work health and safety laws (see Section 9 below) or the common law (see Section 10 below)).

2.4.1 Australian Capital Territory

Volunteers are covered by the *Discrimination Act 1991* (ACT) (the '**ACT Discrimination Act**') under the definition of employment, which includes an unpaid worker being a person who performs work for an employer for no remuneration (s 4 and Schedule 1). Under the ACT Discrimination Act it is unlawful for:

- an employer to subject an employee (or volunteer), or a person seeking employment, to sexual harassment, or
- an employee (or volunteer) to subject a fellow employee (or volunteer), or a person seeking employment with the same employer, to sexual harassment.

A person subjects someone else to sexual harassment if the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person or engages in other unwelcome conduct of a sexual nature in circumstances in which the other person reasonably feels offended, humiliated or intimidated (ACT Discrimination Act, s 58(1)). The term "conduct of a sexual nature" includes the making of a statement of a sexual nature to, or in the presence of, a person, whether the statement is made orally or in writing (ACT Discrimination Act, s 58(2)).

2.4.2 New South Wales

In relation to sexual harassment, s 22B(9)(e) of the *Anti-Discrimination Act 1977* (NSW) (the '**NSW Anti-Discrimination Act**') provides that the term "workplace participant" includes a volunteer or unpaid trainee. It is unlawful under the NSW Discrimination Act for a volunteer to be sexually harassed by another person at the place that is a workplace of both those persons (NSW Anti-Discrimination Act, s 22B(6)).

A person sexually harasses another person if:

- the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the other person, or
- the person engages in other unwelcome conduct of a sexual nature in relation to the other person,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

2.4.3 Northern Territory

Under the *Anti-Discrimination Act* (NT) (the '**NT Anti-Discrimination Act**') the term "work" (s 4) does not include work undertaken by volunteers. Work includes work in a relationship of employment, under a contract of services, remunerated in full or part, under a statutory appointment, by a person with an impairment in a sheltered workshop and under a guidance program, vocational training program or other occupational training or retraining program. This means that volunteers are unlikely to be covered by most

provisions of the NT Anti-Discrimination Act, including the sexual harassment provisions. However, the law is unclear. In a recent Northern Territory Government [Discussion Paper](#), it was stated that:

“It is unclear whether the current definition of “work” includes volunteers: it is not exhaustive and may include volunteer work”.

The Discussion Paper, published by the Northern Territory Department of the Attorney-General and Justice concerns a current review of the NT Anti-Discrimination Act (see the Note Box below page 25).

2.4.4 Queensland

Volunteers are protected under the *Anti-Discrimination Act 1991 (Qld)* (the '**Qld Anti-Discrimination Act**') from discrimination pursuant to the meaning of the term “work” (Schedule 1 Dictionary). “Work” includes work under a work experience arrangement, vocational placement, on a voluntary or unpaid basis, by a person with an impairment in a sheltered workshop and under a guidance program, vocational training program or other occupational training or retraining program. Sexual harassment is prohibited under the Qld Anti-Discrimination Act (s 118-119) and occurs where a person:

- subjects another person to an unsolicited act of physical intimacy,
- makes an unsolicited demand or request (whether directly or by implication) for sexual favours from the other person,
- makes a remark with sexual connotations relating to the other person, or
- engages in any other unwelcome conduct of a sexual nature in relation to the other person,

with the intention of offending, humiliating or intimidating the other person or in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

2.4.5 South Australia

Volunteers are protected by the *Equal Opportunity Act 1984 (SA)* (the '**SA Equal Opportunity Act**') pursuant to the definitions of employee and employment, which include unpaid worker and unpaid work (s 5). The SA Equal Opportunity Act makes it unlawful for a person to subject a volunteer with whom they work to sexual harassment while in attendance at a place that is a workplace of both the persons or in circumstances where the person was, or ought reasonably to have been, aware that the other person was a fellow worker or seeking to become a fellow worker (SA Equal Opportunity Act, s 87(1)). A person sexually harasses another if:

- the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed, or
- engages in other unwelcome conduct of a sexual nature in relation to the person harassed,

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated (s 87(9)).

2.4.6 Tasmania

Volunteers are protected by the *Anti-Discrimination Act (TAS)* (the '**Tas Anti-Discrimination Act**') pursuant to the definition of the term "employment", which includes employment or occupation in any capacity, with or without remuneration. The Tas Anti-Discrimination Act provides that a person must not sexually harass another person. Sexual harassment will take place if a person, in circumstances where a reasonable person having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed (Tas Anti-Discrimination Act, s 17):

- subjects another person to an unsolicited act of physical contact of a sexual nature
- makes an unwelcome sexual advance or an unwelcome request for sexual favours to another person
- makes an unwelcome remark or statement with sexual connotations to another person or about another person in that person's presence
- makes any unwelcome gesture, action or comment of a sexual nature, or
- engages in conduct of a sexual nature in relation to another person that is offensive to that person.

2.4.7 Victoria

The definition of "employee" under the *Equal Opportunity Act 2010 (VIC)* (the '**Vic Equal Opportunity Act**') includes, in relation to the prohibition of sexual harassment, unpaid workers and volunteers (Vic Equal Opportunity Act, s 4).

The Vic Equal Opportunity Act makes it unlawful for either an employer to sexually harass an employee (or a volunteer), or for an employee (or volunteer) to sexually harass a fellow employee (or volunteer).

The term "sexual harassment" means:

- making an unwelcome sexual advance, or an unwelcome request for sexual favours, to another person, or
- engaging in any other unwelcome conduct of a sexual nature in relation to another person,

in circumstances where a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated.

The term "conduct of a sexual nature" can include:

- subjecting a person to any act of physical intimacy
- making, orally or in writing, any remark or statement with sexual connotations to a person or about a person in his or her presence, or
- making any gesture, action or comment of a sexual nature in a person's presence.

2.4.8 Western Australia

The definition of “employment” in the *Equal Opportunity Act 1984* (WA) (the ‘WA Equal Opportunity Act’) includes part time and temporary employment, work under a contract of service and work as a State employee (WA Equal Opportunity Act, s 4). Provisions relating to sexual harassment (s 24) rely upon ‘employment’ (and only apply in relation to specified areas of public life being education, employment and accommodation). Accordingly, volunteers are unlikely to be covered by most provisions of the WA Equal Opportunity Act, including the sexual harassment provisions.

FURTHER READING

There are a number of resources published by the different bodies in each state and at the federal level which administer the sexual harassment laws. These resources include:

- Victorian Equal Opportunity and Human Rights Commission, [Volunteers and Act – Sexual Harassment Fact Sheet](#)
- Australian Human Rights Commission, [Effectively preventing and responding to sexual harassment – a code of practice](#)
- Anti-Discrimination Commission Queensland, [Sample Policy](#)- discrimination and sexual harassment, [Checklist](#) for developing a policy on discrimination and sexual harassment and a [DOs and DONTs](#) for managers responsible for dealing with complaints.



3. Discrimination

Anti-discrimination laws exist at both the state and federal level. They may apply to your organisation's volunteers. At the federal level, anti-discrimination laws are found in a number of pieces of legislation that set out protected attributes such as age, race, disability and sex and protected areas of public life. All of the states and territories have their own legislation (usually called anti-discrimination or equal opportunity legislation).

We refer to all of these laws collectively as **anti-discrimination laws**. They are explained further below.

Alongside duties that your organisation may owe under anti-discrimination laws, your organisation may have duties under work health and safety laws (explained in Section 9 of this Part) and under the law of negligence, which contains a duty to take reasonable care to avoid exposing your workers, including volunteers, to reasonably foreseeable risks of injury which could include harm caused by discrimination (explained in Section 10 of this Part).

3.1 What is discrimination?

Under anti-discrimination laws, discrimination occurs when:

- a person is treated unfavourably because of a 'personal attribute' protected by law
- the treatment happens in an 'area of public life' protected by the law
- the treatment causes the person to be disadvantaged, and
- an exception does not apply.

Discrimination can be:

- direct - when someone directly treats, or proposes to treat, another person less favourably than others because the person has one or more protected attributes.
- indirect - when a person or business imposes, or proposes to impose, a condition or requirement that has, or is likely to have, the effect of disadvantaging another person because they have one or more protected attributes. The condition or requirement must not be reasonable in the circumstances.

3.1.1 Examples of discrimination

Discrimination of volunteers could occur in the recruitment process (see Part 5 of this Guide), or in other situations including not being given opportunities that other volunteers are given. Some further examples are below.

NOTE

While it is not clear in the law whether volunteers are protected from discrimination in the recruitment process, as a matter of best practice (and to protect your organisation from other risks such as reputational harm), your organisation should ensure that it does not have discriminatory practices in the volunteer recruitment process.



EXAMPLE – DIRECT DISCRIMINATION



Michael wishes to volunteer at his local Op Shop and goes into the shop to see the manager to apply for a role. Mary, the manager, tells Michael that although he's clearly qualified to carry out the role, because the rest of the volunteers and staff at the shop are women, she doesn't think he will fit in and so will not be offered a volunteer position. Mary has discriminated against Michael on the basis of his gender.

EXAMPLE – INDIRECT DISCRIMINATION



Sarah is a hairdresser and is transgender. She only recently started publicly identifying as female. Sarah has volunteered for many years with an organisation called Trims for Change, which gives haircuts for free to the homeless. Trims for Change has a policy that requires its volunteers to wear a uniform. The policy also provides that only one uniform per year will be provided to volunteers. The uniforms are gender specific: male volunteers wear a shirt and pants and female volunteers wear a dress. Sarah asked to be provided with the female uniform when she decided to publicly identify as female. Trims for Change refused, telling Sarah the policy only allowed one uniform per year for each volunteer.

The policy is likely to indirectly discriminate against Sarah and other transgender persons on the basis of gender identity.

EXAMPLE – REASONABLE INDIRECT DISCRIMINATION



Mandeep is Sikh and an avid cyclist. He wants to volunteer with an organisation that runs cycling programs for children to promote health and exercise.

The organisation Mandeep applies to volunteer with has a policy that all volunteers must wear a helmet when cycling. Mandeep wears a turban as part of his religion.

The policy likely indirectly discriminates against persons who wear religious headdresses on the basis of religion, but the policy may also be reasonable because it is a reasonable safety requirement to require volunteers to wear helmets while cycling.

3.1.2 Protected personal attributes

The particular personal attributes across the various anti-discrimination laws differ. They may include all or some of the following: age, sex, race, skin colour, descent, national or ethnic origin, religious belief or activity (or lack of), disability, physical features, sexual orientation, sexual or gender identity, intersex status, marital or relationship status, carer and parental status, pregnancy or potential pregnancy, breastfeeding, family responsibilities, employment and industrial activity, political belief or activity, association with someone who has (or is assumed to have) one of these attributes, and irrelevant criminal record.

3.1.3 Protected areas of public life

The 'areas of public life' protected under the anti-discrimination laws all differ. Many of the laws include as areas of public life employment, education, accommodation, some clubs, goods and services and facilities. Some also include sport, local government, administration of government laws and programs and/or land.

As discussed below (in relation to the specific laws) these areas of public life may mean the federal laws might apply to your organisation in certain circumstances (when they might otherwise might not have done so (similarly, the New South Wales and Victorian laws)).

3.1.4 Exceptions: when it is lawful to discriminate

Generally, discrimination will be lawful when it does not contravene any relevant anti-discrimination legislation. Not all discrimination is against the law, either because the discrimination is not on the basis of a protected attribute or because it is excused or exempted by law. Discriminatory conduct that is excused or exempted differs between the states and territories, as set out in Part 5 of this Guide.

3.2 Discrimination law and your organisation's obligations

Under these laws (where they apply):

- Discrimination of volunteers, while doing volunteer work, is unlawful
- Volunteers must not discriminate against others in the workplace (including staff, volunteers, clients, and members of the public)
- Volunteers in your volunteer involving organisation have the same legal rights and protections against discrimination as employees
- Your organisation could be liable (legally responsible) for any harm, injury or loss as a result of the actions of your volunteers (this 'vicarious liability' can generally be avoided if your organisation takes all reasonable steps to prevent sexual harassment), and
- Your organisation has a positive duty to take reasonable and proportionate measures to eliminate discrimination from the workplace. This includes taking steps to prevent this behaviour and not waiting for a complaint before addressing inappropriate workplace behaviour.

As we have stated for sexual harassment, regardless of whether or the not anti-discrimination laws apply to your organisation and its volunteers (or only in limited circumstances, or only to your employees) it is best practice to comply with the laws (as much as reasonably practicable). Not only is it favourable to your volunteers (and workers, clients and members of the public in contact with your organisation) it will help prevent any reputational or other damage to your organisation that may arise from a complaint of discrimination.

TIPS ON MINIMISING DISCRIMINATION IN THE WORKPLACE

- Have, and implement, an anti-discrimination policy with a section on discrimination in recruitment that covers your volunteers (in addition to other workers). For further information on what should be contained in a policy, see Part 5 of the Guide.
- When recruiting volunteers, prepare a Position Description that focuses on the skills required for the volunteer role rather than the personal attributes that may be desirable. Use the same language in the Position Description across advertisements and in the interview process (for further information, see Part 5 of this Guide).
- Have a nominated person to whom complaints on discriminatory behaviour can be made and a fair and transparent process for resolving complaints.
- Make all volunteers (and all workers) aware of relevant policies, and what to do if the process for making a complaint does not resolve the complaint.

- Conduct regular training for all volunteers and workers in relation to the policy so they recognise discriminatory practices and the processes for addressing them.

As a matter of best practice, if not otherwise required by law, organisations should consider having an anti-discrimination policy and procedure in place. Not only will this help an organisation to meet its legal obligations, but it will also protect its workers from discriminatory behaviour and protect the reputation of the organisation in the event that a complaint of discrimination is made.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

[Volunteering Australia's National Standards for Volunteer Involvement](#) have a number of standards relevant to the matters discussed in this Part, including **Standard 4: Recruitment of volunteers**, which states that *recruitment and selection strategies are planned, consistent and meet the needs of the organisation*. A criterion for meeting this standard is that volunteers are recruited based on interest, knowledge, skills or attributes relevant to their role. Evidence of meeting this standard is that volunteer recruitment and selection complies with anti-discrimination legislation.



3.3 Federal anti-discrimination laws

At the federal level, discrimination laws are set out in the following pieces of legislation:

- *Racial Discrimination Act 1975* (Cth). This Act makes discrimination on the basis of a person's race, colour, descent, or national or ethnic origin unlawful where it occurs in specified areas of public life.
- *Disability Discrimination Act 1992* (Cth). This Act prohibits discrimination against people with disabilities in specified areas of public life.
- *Age Discrimination Act 2004* (Cth). This Act ensures people are not treated less favourably on the ground of age in specified areas of public life.
- *Sex Discrimination Act 1984* (Cth). This Act prohibits discrimination on the basis of sex, gender identity, sexual orientation, intersex status, marital or relationship status, and pregnancy and family responsibilities in specified areas of public life.

Together these **Federal Discrimination Laws** apply to all Australian employers and workers. These laws mainly cover discrimination by employers against employees and contractors. They do not apply to volunteers and the organisations they volunteer with in the same way. However, in specified areas of public life the Federal Discrimination Laws may apply to volunteers. All of the Federal Discrimination Laws specify that they apply in the context of the provision of facilities, goods or services. Some of them also cover clubs (in this context means an association of at least 30 people that funds the provision of facilities for the club and sells or supplies alcohol) or sporting activities. Discrimination in these contexts prohibits organisations from discriminating against anyone, including volunteers.

There may also be some protections afforded to volunteers by the *Australian Human Rights Commission Act 1986* (Cth), which incorporates a number of international conventions and prohibits certain discriminatory behaviour including irrelevant criminal records.

However, even if these federal discrimination laws do not apply or apply only in limited circumstances (such as specified areas of public life) your organisation may still owe duties under other laws to protect your volunteers from discrimination (e.g. state and territory discrimination laws).

DISCRIMINATION – GOODS AND SERVICES

Hai Van has multiple sclerosis and is in a wheelchair. She is a client of an organisation that provides crisis accommodation

The organisation runs a kitchen that provides meals to which all clients are entitled. The kitchen is on the second floor of the building that the organisation occupies, and there is no way for Hai Van to get to the second floor in her wheelchair.

Under Federal Discrimination Laws, the organisation may be exposing itself to a complaint.



DISCRIMINATION – ACCESS TO PREMISES

Consider the above example if Hai Van was a volunteer of the organisation rather than a client.

Under Federal Discrimination Laws, Hai Van is not protected from unlawful discrimination in the area of her work because Federal Discrimination Laws do not apply to discrimination against volunteers working in the workplace. However, Federal Discrimination Laws do prohibit discrimination against a person on the basis of a disability in relation to their access to premises, or parts of premises, unless providing that access would cause the organisation an unjustifiable hardship (for example, it may be too costly or impractical for the organisation to install an elevator or stair lift).

In this case, under Federal Discrimination Laws, the organisation may be exposing itself to a complaint.



3.4 State anti-discrimination laws

Whether volunteers are covered by state and territory anti-discrimination laws, and what protected attributes are covered, differs. Volunteers are generally protected by these laws in the **Australian Capital Territory, Queensland, South Australia and Tasmania**.

In specified areas of public life, the laws may also apply to volunteers in **New South Wales and Victoria**.

It is unlikely the law applies to volunteers in the **Northern Territory or Western Australia**. However, even if these laws do not apply or apply only in limited circumstances (such as specified areas of public life) your organisation may still owe duties under other laws to protect your volunteers from discrimination.

NOTE: OTHER LAWS TO PROTECT HUMAN RIGHTS AND VOLUNTEERS



In each state and territory, volunteers may be able to rely on other laws that protect them from discrimination. For example:

- In Victoria: *Racial and Religious Tolerance Act 2001* (Vic) which prohibits vilification on the basis of race or religion (and has a broad application so is likely to apply to volunteers) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (volunteers for government local authorities and other public authorities may be able to rely on this law).
- In Western Australia, the *Spent Convictions Act 1988* (WA), prohibits discrimination on the basis of having a spent conviction (this may be applicable to recruitment of volunteers, see Part 5 of this Guide).
- The Australian Capital Territory's *Human Rights Act 2004* (ACT) sets out the every person has the right to equal and effective protection against discrimination on any ground (volunteers for public authorities may be able to rely on this law).

3.4.1 Table: Protected personal attributes in state and territory discrimination law

Each state and territory's legislation varies. The following is an overview.

A more detailed outline of the law in each jurisdiction is set out on the following pages.

Protected Attribute	NSW	Vic	Qld	WA	SA	Tas	ACT	NT
Accommodation status							✓	
Age	✓	✓	✓	✓	✓	✓	✓	✓
Breastfeeding	✓	✓	✓	✓	✓	✓	✓	✓
Disability	✓	✓	✓	✓	✓	✓	✓	✓
Employment status		✓					✓	
Gender identity	✓	✓	✓		✓	✓	✓	
Gender history				✓			✓	
Genetic information							✓	
Immigration status							✓	
Industrial (trade union) activity		✓	✓			✓	✓	✓
Intersex status						✓	✓	
Irrelevant criminal record						✓	✓	✓
Irrelevant medical record						✓		✓
Occupation							✓	
Nationality	✓	✓			✓			
Lawful sexual activity		✓	✓			✓		
Parental, family or carer responsibilities	✓	✓	✓	✓	✓	✓	✓	✓
Physical features		✓					✓	
Political views		✓	✓	✓		✓	✓	✓
Pregnancy	✓	✓	✓	✓	✓	✓	✓	✓
Race	✓	✓	✓	✓	✓	✓	✓	✓
Relationship status	✓	✓	✓	✓	✓	✓	✓	✓
Religion		✓	✓	✓		✓	✓	✓
Religious dress or appearance					✓			
Sex	✓	✓	✓	✓	✓	✓	✓	✓
Sexuality	✓	✓	✓	✓	✓	✓	✓	✓
Spent conviction	✓			✓	✓		✓	✓
Association with a person who has, or is believed to have, any listed attribute	✓	✓	✓		✓	✓	✓	✓
Association with a person who has, or is believed to have, protected attributes of sexual orientation, age or impairment (disability)				✓				

3.4.2 Australian Capital Territory

Pursuant to the *Discrimination Act 1991* (ACT) (the '**ACT Discrimination Act**'), the term:

- “employment” includes work as an unpaid worker
- “unpaid worker” means a person who performs work for an employer for no remuneration
- “employer” in relation to an unpaid worker, means the person for whom the unpaid worker performs work.

Accordingly, volunteer workers are covered by the provisions of the ACT Discrimination Act. The ACT Discrimination Act prohibits discrimination on the grounds listed in the table above.

3.4.3 New South Wales

The definition of “employment” under the *Anti-Discrimination Act 1977* (NSW) (the '**NSW Anti-Discrimination Act**') does not include volunteers, and volunteers are unlikely to be covered by most provisions of the NSW Anti-Discrimination Act. However, in particular circumstances, the NSW Anti-Discrimination Act may apply to volunteers where volunteering falls within another area covered by the NSW Discrimination Act (e.g. the provision of goods and services). In the event that it applies, the NSW Discrimination Act prohibits discrimination on the grounds listed in the table above.

The New South Wales authority responsible for administering the NSW Anti-Discrimination Act (the Anti-Discrimination Board) has published [helpful information](#) on volunteers and discrimination (which also explains the areas of ‘public life’ which may apply to volunteers).

3.4.4 Northern Territory

Under the *Anti-Discrimination Act* (NT) (the '**NT Anti-Discrimination Act**') the term “work” (s 4) does not include work undertaken by volunteers. “Work” includes work in a relationship of employment, under a contract of services, remunerated in full or part, under a statutory appointment, by a person with an impairment in a sheltered workshop and under a guidance program, vocational training program or other occupational training or retraining program. Accordingly, volunteers are unlikely to be covered by most provisions of the NT Anti-Discrimination Act. However, as mentioned above in relation to sexual harassment, the Northern Territory Government has recently [stated](#) it is unclear whether the current definition of “work” includes volunteers. The law is also unclear if the NT Anti-Discrimination Act may apply to volunteers where volunteering falls within an area of public life covered by the NT Anti-Discrimination Act. The same Discussion Paper stated that in relation to the public life area of “goods, services and facilities”, only customers are protected, not the service providers themselves. In the event that it were to apply, the NT Anti-Discrimination Act prohibits discrimination on the grounds listed in the table at above.

NOTE: CURRENT REVIEW OF NT DISCRIMINATION ACT



The Northern Territory Department of the Attorney-General and Justice has commenced a review of the NT Anti-Discrimination Act to ensure it continues to meet the needs of the community. It released a discussion paper which you can access [here](#). Consultation is now closed, but some of the matters it sought comment on included:

- introducing new protections under the Act such as domestic violence, homelessness, lawful sexual activity and socioeconomic status;
- introducing specific anti-vilification laws prohibiting offensive conduct on the basis of race, religious belief, disability, sexual orientation, gender identity and intersex status;
- extending the sexual harassment provisions to include all areas of public life

You should check the Department's [website](#) for further updates

3.4.5 Queensland

Pursuant to the *Anti-Discrimination Act 1991* (Qld) (the '**Qld Anti-Discrimination Act**'), volunteers are protected from discrimination as the meaning of the term "work" includes:

- work under a work experience arrangement within the meaning of the *Education (Work Experience) Act 1996* (Qld)
- work under a vocational placement
- work on a voluntary or unpaid basis
- work by a person with an impairment in a sheltered workshop, whether on a paid basis (including a token remuneration or allowance) or an unpaid basis
- work under a guidance program, an apprenticeship training program or other occupational training or retraining program.

The Qld Anti-Discrimination Act prohibits discrimination on the grounds listed in the table above.

3.4.6 South Australia

Volunteers are covered by the *Equal Opportunity Act 1984* (SA) (the '**SA Equal Opportunity Act**') as, under s 5:

- "employee" includes an unpaid worker
- "employer" means an organisation for which the unpaid worker performs services
- "employment" includes unpaid work
- "unpaid worker" means a person who performs work for an employer for no remuneration.

The SA Equal Opportunity Act prohibits discrimination on the grounds listed in the table above.

3.4.7 Tasmania

Under the *Anti-Discrimination Act 1998* (Tas) (the '**Tas Anti-Discrimination Act**'), volunteers are covered as the definition of "employment" in s 3 includes employment or occupation in any capacity, with or without remuneration. The Tas Anti-Discrimination Act prohibits discrimination on the grounds listed in the table above.

3.4.8 Victoria

Under the *Equal Opportunity Act 2010* (Vic), (the '**Vic Equal Opportunity Act**'), the definition of "employee" only includes unpaid workers and volunteers in relation to the prohibition of sexual harassment.

Accordingly, volunteers are unlikely to be covered by most provisions of the Vic Equal Opportunity Act. However, in particular circumstances, the Vic Equal Opportunity Act may apply to volunteers where volunteering falls within another area covered by the Vic Discrimination Act (e.g. the provision of goods and services). In the event where it applies, the Vic Discrimination Act prohibits discrimination on the grounds in the table above.

The Victorian authority responsible for administering the Vic Equal Opportunity Act (the Victorian Equal Opportunity and Human Rights Commission) has published [helpful information](#) on volunteers and discrimination (which also explains the areas of 'public life' which may apply to volunteers).

3.4.9 Western Australia

Unlike in other jurisdictions, the definition of "employment" in the *Equal Opportunity Act 1984* (WA) (the '**WA Equal Opportunity Act**') does not include volunteers, unpaid workers or vocational placement by an educational or training authority. Accordingly, volunteers are unlikely to be covered by most provisions of the WA Discrimination Act. If in the event it were to apply, the WA Equal Opportunity Act prohibits discrimination on the grounds listed in the table above.

FURTHER READING

There are a number of resources published by the different bodies in each state and at the federal level which administer the discrimination laws. These resources include:

- Victorian Equal Opportunity and Human Rights Commission, [Discrimination Fact Sheet](#) and [Discrimination FAQs](#)
- Australian Human Rights Commission, [Willing to Work: Good Practice Examples for Employers](#) (covering age and disability),
- Anti-Discrimination Commission Queensland, [Sample Policy](#)- discrimination, [Checklist](#) for developing a policy on discrimination and a [DOs and DONTs](#) for managers responsible for dealing with complaints.



4. Bullying

Bullying laws exist at a federal level. The *Fair Work Act 2009* (Cth) (Fair Work Act) has provisions that relate to bullying behaviour, which can apply to volunteers.

Separately to these provisions, workplace bullying of volunteers can also breach state and territory work health and safety (**WHS Laws**). Organisations covered by these laws owe various duties to their volunteers including providing and maintaining a working environment that is safe and without risks to health. Bullying in the workplace is a risk to 'psychological health.' The obligation to provide and maintain a working environment that is safe and without risks to health is explained briefly at Section 9 below and in more detail in Part 3 of this Guide.

There is also a duty under negligence law to take reasonable care to avoid exposing your workers, including volunteers who might be exposed to reasonably foreseeable risks of injury, which could include harm caused by bullying. This is explained in greater detail in Section 10 of this Guide.

4.1 What is bullying?

Under the Fair Work Act, workplace bullying occurs when:

- an individual, or group of individuals, repeatedly behaves unreasonably towards a worker or a group of workers at work, and
- the behaviour creates a risk to health and safety.

A 'worker' is defined broadly and extends to volunteers, except those that volunteer in a completely volunteer-based organisation with no employees ('volunteer association'). Being at 'work' is not limited to the confines of a physical workplace. It can occur offsite, at work related functions and through social media channels.

However, this law only applies to behaviour in a 'constitutionally-covered business.' Working out whether your community organisation fits this definition is not straightforward. If your organisation 'conducts a business or undertaking' (the business or undertaking does not need to be for profit) within the meaning of work health and safety legislation (see the Table at 1.1 and Part 3 of this Guide) and is either a 'constitutional corporation' (see the Note above) or is incorporated in the Australian Capital Territory or the Northern Territory it will be 'constitutionally-covered business' (unincorporated associations are not covered). Many incorporated not-for-profit volunteer involving organisations will qualify as a 'constitutionally covered business', unless they do not have any paid staff. If you are unsure you may need to seek legal advice to help your organisation determine if it meets this definition.

NOTE

The Fair Work Act applies to an organisation that is a '**constitutional corporation**'. A 'constitutional corporation' is a body which is incorporated under a federal or state Act (for example, a company limited by guarantee or incorporated association), and which conducts trading or financial activities. The key question for most not-for-profits will usually be whether they are 'trading'. 'Trading' in this context means the provision of good or services for payment as well as the provision of services carried on for the purpose of earning revenue. This may only be a small part of the organisation's activities and it doesn't matter that the income from trading activities is used for charitable purposes. Activities classified by the courts as "trading" activities include: providing services in return for a fee or charge, selling goods from a shop or stall, international student fees, patient charges, fundraising activities, charging car parking fees, ticket sales and sales of publications, advertising and broadcasting, and charging for admission. The receipt of government grants and subsidies to not for profit organisations are generally not regarded by the courts as trading.

4.1.1 Unreasonable behaviour that creates a risk to health and safety

Unreasonable behaviour includes, but is not limited to, behaviour that is humiliating, victimising, intimidating or threatening. The question is whether an objective, reasonable person in the circumstances would think that the behaviour is reasonable or not.

Bullying behaviour must also create a risk to health and safety. Often, bullying behaviour will create a risk of *mental or psychological harm*, for both the person being bullied and other workers who may witness the bullying behaviour. Bullying can make a person feel sad, isolated, and can lead to a mental health condition such as anxiety and depression.

The bullying behaviour may also create a risk of *physical harm*, such as where the bully behaves in physically intimidating or violent ways, where workers are pressured not to conduct their work in a safe way, or where workers engage in activities like ‘hazing’ or initiation ceremonies.

EXAMPLE – BULLYING

Background

Hiruni has, for a number of years, been a volunteer board member of a charity that works with culturally and linguistically diverse youth to help them succeed academically. Recently, the board has elected a new Chair, Megan.

Since Megan was elected Chair, the ‘culture’ of the board has changed. Hiruni has witnessed Megan talking down to particular board members, particularly Matthew, who is also a volunteer. Whenever Matthew speaks in board meetings Megan rolls her eyes and sometimes very abrasively interrupts him. Hiruni checks in with Matthew about Megan’s behaviour. He says that it upsets him and he is intimidated by Megan, but he made a complaint to the Secretary of the Board, Angela, and nothing ever came of it.

Matthew says he thinks Megan started to dislike him after he raised a couple of safety concerns with her.

Hiruni speaks to Angela and asks her about the complaint Matthew made against Megan. Angela says that she went to Megan and tried to discuss it with her but Megan accused Angela of trying to sabotage the organisation by supporting Matthew’s “unreasonable expectations”.

Is this bullying?

Megan’s behaviour likely constitutes bullying under the FW Act because:

- it is unreasonable and has occurred repeatedly, including:
 - treating Matthew dismissively, and speaking over him rudely in board meetings, which makes him upset and intimidated,
 - Megan’s creation of a ‘culture of silence’ whereby workers feel that they cannot raise concerns, and
 - Megan’s behaviour has created a risk to health and safety because: workers are at risk of mental harm, particularly Matthew, because he feels upset and intimidated in the workplace.

4.2 When will behaviour not be bullying?

Behaviour will not be bullying when it is reasonable management action that is done in a reasonable way. Management action may include things like performance reviews, conducting a workplace investigation, or modifying a worker’s duties because of a medical condition.

A spontaneous conversation or comment is unlikely to constitute management action.

4.2.1 “Reasonable management action”

The management action must be reasonable in the circumstances. Consider the following example.

EXAMPLE – REASONABLE MANAGEMENT ACTION



Background

Glenda volunteers in the canteen of a not-for-profit community school. Glenda knows that other volunteers complain about her behind her back because she is a bit slower in completing her duties in the canteen. Glenda rolled her ankle recently and she has been medically advised to keep weight off it for at least two weeks. One of the volunteers reports to the Facilities Manager that Glenda is limping and seems to be in pain. The Facilities Manager tells Glenda that she has to go home and won't be able to come back to the canteen until she can provide a doctor's certificate that says she is fit to return to work. Glenda feels that this is unfair.

Is this bullying?

The Facilities Manager choosing to send Glenda home is 'management action'. The school has a duty to make sure all its workers, including volunteers, are conducting their work safely. Glenda is obviously injured, so it is reasonable in the circumstances to take management action to ensure hers and other workers' safety.

4.2.2 “Management action undertaken in a reasonable way”

Management action must also be undertaken **in a reasonable way**. To ensure the manner of management action is reasonable, it may be necessary to consider the worker's particular circumstances. Review Glenda's situation in the above example and the following further information.

EXAMPLE – MANAGEMENT ACTION TAKEN IN A REASONABLE MANNER



On being told that Glenda was injured, the Facilities Manager considered how best to approach the situation, being mindful that Glenda has some difficulty with the other volunteers.

The Facilities Manager consulted the school's work health and safety policy for guidance on the appropriate course of action, and ensured that when she told Glenda she would need to go home it was done in a discreet way to avoid making Glenda feel uncomfortable by attracting attention to the situation. This is reasonable management action taken in a reasonable manner.

EXAMPLE – MANAGEMENT ACTION TAKEN IN AN UNREASONABLE MANNER



After consulting the school's work health and safety policy, the Facilities Manager spots Terri-Anne, another canteen volunteer, walking past. The Facilities Manager calls out to Terri-Anne and tells her that Glenda's injury is “a real health and safety issue” and that they have to get her out of there before she does some damage to herself or someone else. The Facilities Manager tells Terri-Anne that she's busy and so asks Terri-Anne to go tell Glenda to go home till she's better. Terri-Anne promptly returns to the canteen and announces to Glenda in front of the other volunteers and children that the Facilities Manager told her to tell her to go home as she's a health and safety risk. Glenda felt embarrassed and humiliated by receiving this message via Terri-Anne and in such an abrupt and public manner. Although the decision to send Glenda home was reasonable management action, it was taken in an unreasonable manner.

CASE EXAMPLE: MR STANCU



Stancu [2015] FWC 1999 (26 March 2015)

Mr Stancu was engaged as a volunteer with Australian Volunteers International (AVI). Mr Stancu alleged that his AVI country manager, Ms Faktaufon 'bullied him' in the course of his volunteer role as Sanitation Engineer at The Ministry of Public Works and Utilities in Kiribati (the Central Pacific). Mr Stancu was there as part of the Australian Volunteers for International Development Program.

Mr Stancu made an application for a stop bullying order against Ms Faktaufon in the Fair Work Commission. Mr Stancu argued that the manner in which Ms Faktaufon had gone about counselling and warning Mr Stancu about his behaviour was unreasonable, and that the behaviour created a risk to his health and safety.

AVI argued that (amongst other things) the actions of Ms Faktaufon constituted reasonable management action.

Ms Faktaufon met with Mr Stancu, provided written correspondence and issued a warning in relation to complaints about inappropriate behaviour at a State dinner function, excessive drinking, being inappropriately dressed in public (wearing no shirt, and wearing only swimwear in the streets), behaving inappropriately in the office, hitting a pedestrian with his car and using abusive and racist language toward the pedestrian.

The court found that these warnings did not present a health or safety risk to Stancu, and that they constituted reasonable management action carried out in a reasonable manner. The complaints raised had come from many different sources and in most cases it was reasonable that Ms Faktaufon should act on them. Ms Faktaufon also gave Stancu an opportunity to respond to the complaints.

The court also found that Stancu was not working as a volunteer for a constitutional corporation within the Commonwealth. Even though Stancu was engaged through the Australian Volunteers for International Development programme, which was being managed by AVI, his work was being done for the Ministry, which was not a constitutionally covered business and was operating outside the Commonwealth.

4.3 Bullying and your organisations obligations

Your organisation is likely to owe duties to protect volunteers from being bullied (and from bullying others while engaging in volunteer work (under the federal law, state and territory work health and safety legislation, or negligence law).

As we have stated for all other workplace behaviours (Sections 2-4), regardless of whether or not the bullying laws apply to your organisation (or only your employees and not volunteers) it is best practice to comply with the law (as much as is reasonably practicable). Not only is it favourable to your volunteers (and workers, clients and members of the public in contact with your organisation) it will help prevent any reputational or other damage to your organisation that may arise from a complaint of bullying.

TIPS ON ELIMINATING BULLYING BEHAVIOUR



- Have a policy on appropriate workplace behaviour. This policy should cover how your organisation will comply with laws about bullying (where they apply).
- Have a nominated person to whom complaints on inappropriate behaviour can be made.
- Make sure you have a fair and transparent process for resolving complaints.

- Make all volunteers (and all workers) aware of the kind of behaviour that is unacceptable, the policy, and what to do if the process for making a complaint does not resolve the complaint.
- Conduct ongoing training in relation to appropriate workplace behaviour.

4.4 The legal consequences under the Fair Work Act of a volunteer being bullied

The *Fair Work Act* allows a worker (including a volunteer) who has been bullied at work to apply to the Fair Work Commission (**Commission**) for an order to stop bullying. If the volunteer is no longer volunteering for the organisation they cannot apply to the Commission.

If the Commission is satisfied the worker has been bullied at work by an individual or a group of individuals and there is a risk that the worker will continue to be bullied at work by the individual or group, then the Commission may make any order it considers appropriate. It can make orders affecting the organisation generally and/or particular people within the organisation. The purpose of an order is for the worker to be able to continue their work without being bullied. The orders may require monitoring of behaviour, compliance and review of existing policies, further support and anything else the Commission considers appropriate except an order for payment. Your organisation must comply with an order; if not, the person who has been bullied can apply for an order for a financial penalty against your organisation.

4.5 The legal consequences of a volunteer being bullied under other laws

4.5.1 Work health and safety laws

As outlined above, separate to the Fair Work Act provisions, workplace bullying can also breach state and territory WHS Laws.

The table in Section 1.1 lists all of the WHS laws in each state and territory.

Generally speaking, workplace bullying is repeated and unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety. It is seen as a risk to health and safety because it may affect the mental (and physical) health of workers in an organisation, including volunteers.

If the WHS Laws apply to your organisation (see Section 9 below and Part 3 of this Guide), your organisation will have an obligation to ensure the health and safety of workers and other people who might be affected by the work of the organisation. This includes eliminating, or minimising as far as reasonably practicable, any risks to health and safety by for example, taking proactive steps to prevent and respond to workplace bullying.

If an organisation does not comply with these WHS Laws it risks substantial fines, discussed at Section 9 below.

4.5.2 Negligence laws

There are common law duties to provide a safe workplace, which mean your organisation could be held liable for a breach of this law. This is discussed further in Section 10 below and Part 3 of this Guide.

NOTE – ACTIONS OF VOLUNTEER

Your organisation is also in many cases responsible for the actions or omissions of volunteers. If your volunteer is acting in a way that may be classified as ‘bullying’ in the workplace, make sure you take proactive steps to prevent and respond to the behaviour.



NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

[Volunteering Australia's National Standards for Volunteer Involvement](#) promotes as part of **Standard 6: Workplace Safety and Wellbeing** that effective working relationships with employees, and between volunteers should be facilitated by the organisations. This Standard also denotes that processes should be put in place to protect the health and safety of volunteers in their capacity as volunteers, including access to complaints and grievance procedures. For more detail, refer to the Standard and see page 47 of this Guide.



FURTHER READING

There are a number of resources published by the different bodies in each state and at the federal level to which a complaint regarding discrimination, sexual harassment or victimisation may be made. These resources include:

- Fair Work Commission, [Anti-Bullying Guide](#), [Anti-Bullying Benchbook](#)
- Safe Work Australia, [Guide for preventing and responding to workplace bullying](#)
- Australian Human Rights Commission, [What is bullying](#), [Workplace bullying](#)

Also refer to the relevant Work Safe body in your state or territory (refer to the Resources section at the end of this Part). All of these bodies have information on workplace bullying.



5. Victimisation

Laws relating to sexual harassment, bullying and discrimination also prevent victimisation of a person who has made a complaint about such behaviour or exercised other rights under the relevant laws.

Alongside duties that your organisation may owe under victimisation laws, your organisation may have duties under work place health and safety laws (explained in Section 9 of this Part) and under the law of negligence, which contains a duty to take reasonable care to avoid exposing your workers, including volunteers, to reasonably foreseeable risks of injury which could include harm caused by victimisation (explained in Section 10 of this Part).

5.1 What is victimisation?

The specific definition of victimisation varies slightly from each territory and state and federally but for the main part it occurs where a person is subjected to, or threatened with, some form of detriment (which means a loss, damage, or injury to the person making the complaint) because:

- they, or someone associated with them makes a complaint under discrimination law (i.e. discrimination, sexual harassment or victimisation)
- they asserted rights, or another person's rights, under discrimination law
- they assisted with an investigation of a complaint of a matter covered by discrimination law, or
- they refused to do something because it would be discrimination, sexual harassment or victimisation.

The **types of detriment** that might result in victimisation can include bullying and intimidation by other workers, being moved to another volunteer position with lower responsibility, not being given any meaningful volunteer work, or ending the volunteer relationship.

It is also unlawful under the *Fair Work Act 2009* for a person to coerce another person into exercising (or not exercising) a 'workplace right' (such as the right to make a bullying or discrimination complaint). While coercion is different from victimisation (in that coercion occurs before an action is taken whereas victimisation generally arises after the victim takes some action), volunteer organisations should nevertheless be aware of this risk and ensure that this does not occur.

EXAMPLE – VICTIMISATION

Chris is a volunteer at a not-for-profit animal shelter. Whilst volunteering, Chris observed his colleague Anushka being subjected to comments of a sexual nature by their supervisor, Trudi. Chris saw that Anushka was upset by the comments and encouraged her to make a complaint about Trudi's conduct. However, Anushka was reluctant to do so because she feared that Trudi may retaliate against her. Despite this, Chris reported the incident to Trudi's supervisor. Trudi and her supervisor were friends and, following Chris's complaint, both he and Anushka were told that their services as volunteers were no longer required. Both Chris and Anushka have been victimised.



5.2 Victimisation law and your organisation's obligations

Under the same laws that prohibit discrimination, sexual harassment and bullying (where they apply) your organisation should be aware that:

- Victimisation of volunteers, while doing volunteer work, is unlawful
- Volunteers must not victimise others in the workplace (including staff, volunteers, clients, and members of the public)
- Volunteers in your volunteer involving organisation have the same legal rights and protections against victimisation as employees
- Your organisation could be liable (legally responsible) for any harm, injury or loss as a result of the actions of your volunteers (this 'vicarious liability' can generally be avoided if your organisation takes all reasonable steps to prevent victimisation), and
- Your organisation has a positive duty to take reasonable and proportionate measures to eliminate victimisation from the workplace. This includes taking steps to prevent this behaviour and not waiting for a complaint before addressing inappropriate workplace behaviour.

As we have stated for sexual harassment and discrimination, whether or not the victimisation laws apply to your organisation (or only your employees and not volunteers) it is best practice to comply with the law (as far as reasonably practicable). Not only is it favourable to your volunteers (and workers, clients and members of the public in contact with your organisation) it will help prevent any reputational or other damage to your organisation that may arise from a complaint of victimisation.

TIP: VICTIMISATION AND ENDING THE VOLUNTEER RELATIONSHIP

Before you end the volunteer relationship with a volunteer, always make sure there are no outstanding complaints made by the volunteer, to avoid victimisation at this point. If there are outstanding complaints, resolve these appropriately before proceeding with ending the volunteer relationship.

Your organisation should also make sure its policy on appropriate workplace behaviour (as outlined above in relation to sexual harassment and discrimination) makes clear victimisation is unacceptable and will not be tolerated. This policy should cover how the organisation will comply with laws about victimisation (where they apply). The policy should also set out the process for resolving complaints and what to do if the process for making a complaint does not resolve the complaint. All volunteers should be trained on these policies and procedures and the policy must be implemented.



5.3 Federal and state and territory victimisation laws

The provisions of the Federal *Fair Work Act 2009* (Cth) (**Fair Work Act**) that prohibit victimisation generally do not apply to volunteers.

In the states and territories, the same laws that prohibit discrimination and sexual harassment (as discussed above) also broadly (but don't always) prohibit victimisation.

As a summary, volunteers are generally protected by these laws in the **Australian Capital Territory Queensland, South Australia and Tasmania**. This includes protection against victimisation in relation to their volunteer work. However, in **New South Wales, Victoria, Western Australia** and the **Northern Territory**, volunteers are not protected against victimisation in relation to their volunteer work.

In **New South Wales, Victoria, Western Australia** and the **Northern Territory**, a volunteer will be only be protected against victimisation where the victimisation occurs in connection with a breach (or an allegation of a breach) of the relevant anti-discrimination legislation.

As discrimination against a volunteer in relation to their volunteer work does not, in these jurisdictions, breach the relevant anti-discrimination legislation, there is no protection against any resulting victimisation. The end result of this is that volunteers will not be protected against victimisation in relation to their volunteer work.

However, in all jurisdictions, volunteers are protected against victimisation which occurs in relation to unlawful discriminatory conduct taking place in certain areas of public life (such as the provision of goods and services or, for example, in relation to people with disabilities, access to premises).

! CAUTION

In some instances, victimisation can amount to a criminal offence for individuals (e.g. in Queensland there is a maximum penalty of 3 months imprisonment for an individual) and high financial penalties for an organisation (e.g. in Queensland the maximum is 170 penalty units for a corporation which amounts to \$22 193 at October 2018).

VICTIMISATION – GOODS AND SERVICES

Hai Van has multiple sclerosis and is in a wheelchair. She is a client of an organisation that provides crisis accommodation

The organisation runs a kitchen that provides meals to which all clients are entitled. The kitchen is on the second floor of the building that the organisation occupies, and there is no way for Hai Van to get to the second floor in her wheelchair, even though it would not cause the organisation an unjustifiable hardship to install a stair lift.

Under State Discrimination Laws, the organisation has breached the relevant legislation.

Hai Van discusses this with the organisation and alleges that she intends to bring a claim against the organisation. In response, the organisation informs Hai Van that she is barred from utilising the organisation's crisis accommodation.

In this case, the organisation has victimised Hai Van and is exposed to a claim.



VICTIMISATION – ACCESS TO PREMISES



Consider the above example if Hai Van was a volunteer of the organisation rather than a client and, instead of being barred from accessing the organisation's services, she is told that her services as a volunteer are no longer required.

Under ACT, Qld, Tasmanian and SA Discrimination Laws, Hai Van is protected from discrimination in relation to her work as a volunteer and informs the organisation that she has been discriminated against and has a right to make a claim.

By informing Hai Van terminating the volunteering relationship, the organisation has, in addition to unlawfully discriminating against Hai Van, victimised her and is exposed to a claim.

Under Victorian, NSW, WA and NT Discrimination Laws, Hai Van is not protected from unlawful discrimination in the area of her work and so she is not protected by the laws against victimisation.

However, Discrimination Laws in those jurisdictions do prohibit discrimination against a person on the basis of a disability in relation to their access to premises, or parts of premises (unless, for example, providing access would cause an unjustifiable hardship on the organisation) and so she may still be able to make a victimisation claim against the organisation on that basis (i.e. that she was discriminated against in relation to the provision of access to premises).

Regardless of whether a volunteer is themselves protected from victimisation whilst providing volunteer services or in other areas of public life, as indicated in the example below, volunteers may nevertheless expose organisations to victimisation claims as a result of the volunteer's actions.

EXAMPLE – VICTIMISATION BY A VOLUNTEER



A community house runs educational courses. A volunteer tutor fails a student because she did not complete her attendance requirement. The student complains that she is being discriminated against due to her race. The community house tells the student that this is a ridiculous complaint and that any application to re-enrol next year will not be accepted. While the student's discrimination complaint appears weak, she may be able to bring a claim for victimisation based on the actions of the community house after receiving the complaint. In this instance the community house may be liable for the unlawful (victimisation) action of its volunteer.

5.4 State and territory victimisation laws

These are set out below.

5.4.1 Australian Capital Territory

As noted above, volunteers are covered by the provisions of the *Discrimination Act 1991* (ACT) (the '**ACT Discrimination Act**'). The ACT Discrimination Act makes it unlawful for a person to subject, or threaten to subject, another person to any detriment because (ACT Discrimination Act, s 68):

- the other person, or someone associated with the other person, has taken (or proposes to take) discrimination action, or
- the first person believes the other person, or someone associated with the other person has taken (or proposes to take) discrimination action.

The term “discrimination action” includes actions such as making a discrimination complaint, reasonably asserting a right, giving evidence in court or giving evidence as part of an investigation.

5.4.2 New South Wales

As noted above, other than in relation to sexual harassment, the definition of “employment” under the *Anti-Discrimination Act 1977* (NSW) (the '**NSW Anti-Discrimination Act**') does not include volunteers, and volunteers are unlikely to be covered by most provisions of the NSW Discrimination Act. However, in particular circumstances, the NSW Discrimination Act may apply to volunteers in an area of public life covered by the NSW Discrimination Act (e.g. the provision of goods and services). In the event that it applies, the NSW Discrimination Act makes it unlawful for a person to subject another person to any detriment in any circumstances on the grounds that the victimised person has (or intends to) (NSW Discrimination Act, s 50):

- brought proceedings against the discriminator or any other person under the NSW Discrimination Act, or
- given evidence or information in connection with proceedings brought under the NSW Discrimination Act
- alleged that the discriminator has committed an act which would amount to a contravention of the NSW Discrimination Act, or
- otherwise done anything under or by reference to the NSW Discrimination Act in relation to the discriminator or any other person.

The above does not apply to false allegations not made in good faith.

5.4.3 Northern Territory

As noted above, the *Anti-Discrimination Act* (NT), the '**NT Anti-Discrimination Act**') definition of “work” (s4) does not include work undertaken by volunteers. Work includes work in a relationship of employment, under a contract of services, remunerated in full or part, under a statutory appointment, by a person with an impairment in a sheltered workshop and under a guidance program, vocational training program or other occupational training or retraining program. Accordingly, volunteers are unlikely to be covered by most provisions of the NT Anti-Discrimination Act (as outlined above at 2.4.3, the NT Government has recently stated the laws are unclear). In the event it were to apply, the NT Anti-Discrimination Act makes it unlawful for a person to subject another person (or associate of the person) to victimisation because the person has (or intends to) (NT Anti-Discrimination Act, s 23):

- make a complaint under the NT Anti-Discrimination Act, or
- given evidence or information in connection with proceedings brought under the NT Discrimination Act, or

- alleged that a person has committed an act which would amount to a contravention of the NT Discrimination Act
- done anything in relation to a person under or by reference to the NT Anti-Discrimination Act

The above does not apply to false allegations not made in good faith.

As noted in the Note Box (above, page 22) the NT Anti-Discrimination Act is currently under review.

5.4.4 Queensland

As noted above, volunteers are protected under the *Anti-Discrimination Act 1991* (Qld), (the '**Qld Anti-Discrimination Act**') from discrimination and sexual harassment. Under the Qld Anti-Discrimination Act, victimisation occurs where a person does an act, or threatens to do an act, to the detriment of another person (Qld Anti-Discrimination Act, s 130):

- because the second person (or a person associated with that person):
 - refused to do an act that would amount to a contravention of the Qld Anti-Discrimination Act
 - in good faith, alleged, or intends to allege that a person committed a contravention of the Qld Anti-Discrimination Act, or
 - is, has been, or intends to be, involved in a proceeding under the Qld Anti-Discrimination Act against any person, or
- because the first person believes that the second person (or a person associated with that person) is doing, has done, or intends to do one of the things mentioned above.

The term "involvement in a proceeding" includes making a complaint under the Qld Anti-Discrimination Act, being involved in a prosecution for an offence under the Qld Anti-Discrimination Act, and supplying information, producing documents or appearing as a witness as part of the prosecution process.

5.4.5 South Australia

As noted above, volunteers are covered by the *Equal Opportunity Act 1984* (SA), (the '**SA Equal Opportunity Act**') (s5) which prohibits acts of victimisation, including treating the victim unfavourably on the ground that the victim has (or intends to, or is suspected of having) (s 86):

- brought proceedings under the SA Equal Opportunity Act
- given evidence or information in proceedings under the SA Equal Opportunity Act
- made allegations that the victim or some other person has been the subject of an act that contravenes the SA Equal Opportunity Act
- reasonably asserted the victim's right, or the right of some other person, to lodge a complaint or take other proceedings under the SA Equal Opportunity Act, or
- otherwise done anything under or by reference to the SA Equal Opportunity Act.

The above does not apply to false allegations not made in good faith.

5.4.6 Tasmania

As noted above, the *Anti-Discrimination Act 1998* (Tas), the (**'Tas Anti-Discrimination Act'**) covers volunteers. The Tas Anti-Discrimination Act prohibits a person from subjecting, or threatening to subject another person (or an associate of that person) to any detriment because they (Tas Anti-Discrimination Act, s 18):

- have made, or intend to make, a complaint under the Tas Anti-Discrimination Act
- gave, or intend to give, evidence or information in connection with any proceedings under the Tas Anti-Discrimination Act
- allege, or intend to allege, that any person has committed an act which would amount to a contravention of Tas Anti-Discrimination Act
- refused, or intend to refuse, to do anything that would amount to a contravention of the Tas Anti-Discrimination Act, or
- have otherwise done anything under or by reference to the Tas Anti-Discrimination Act.

5.1.7 Victoria

As noted above, the definition of “employee” under the *Equal Opportunity Act 2010* (Vic) (the **'Vic Equal Opportunity Act'**) includes unpaid workers and volunteers, but this is only in relation to the prohibition of sexual harassment. However, in particular circumstances, the Vic Equal Opportunity Act may apply to volunteers in specified ‘areas’ covered by the Vic Equal Opportunity Act (e.g. the provision of goods and services). The Vic Equal Opportunity Act (s 104) prohibits victimisation, which occurs where a person subjects, or threatens to subject, another person to any detriment because that other person (or a person associated with that person) has:

- brought a dispute to the Victorian Equal Opportunity and Human Rights Commission
- made a complaint under the Vic Equal Opportunity Act
- brought any proceeding or dispute under the Vic Equal Opportunity Act against any person
- given evidence or information, or produced a document, in connection with a proceeding or investigation conducted under the Vic Equal Opportunity Act
- attended a compulsory conference or mediation in any proceedings under the Vic Equal Opportunity Act
- alleged that a person that has done an act or has refused to do anything that is unlawful under certain provisions of the Vic Equal Opportunity Act (or believes that they would do so), or
- has otherwise done anything in accordance with the Vic Equal Opportunity Act in relation to any person.

The above does not apply to false allegations not made in good faith.

5.1.8 Western Australia

As noted above, the definition of “employment” in the *Equal Opportunity Act 1984* (WA), (the **'WA Equal Opportunity Act'**) does not include volunteers, unpaid workers or vocational placement by an educational or training authority and for the most part it does not apply to volunteers. The WA Equal Opportunity Act (s 67) provides that it is unlawful for a person (victimiser) to subject or threaten to subject another person (the person victimised) to any detriment because the person victimised has (or intends)

- made a complaint under the WA Equal Opportunity Act
- brought proceedings against the victimiser or any other person under the WA Equal Opportunity Act

- given information, or a document, to a person performing any function under the WA Equal Opportunity Act
- appeared as a witness before the Tribunal in a proceeding under the WA Equal Opportunity Act
- has asserted any rights of the person victimised or rights of any other person under the WA Equal Opportunity Act
- has made an allegation that a person that has done an act that is unlawful under certain provisions of the WA Equal Opportunity Act.

The above does not apply to false allegations not made in good faith.

As the WA Equal Opportunity Act does not protect volunteers in the workplace, they are not protected from victimisation in the workplace in relation to their volunteering.

6. Making a complaint: discrimination, sexual harassment, bullying and victimisation

Where possible and appropriate, complaints about discrimination, sexual harassment, bullying and victimisation should be dealt with internally and in accordance with the organisation's complaint handling policy. For more information on grievance handling policies, see Part 5 of this Guide.

Where it is not possible or appropriate to resolve complaints internally, complaints may be made to the relevant state or federal body. There are different bodies in each state and at the federal level to which a complaint regarding discrimination, sexual harassment, bullying or victimisation may be made. For information on how to make a complaint, and what a complaint should contain, you should contact the relevant body listed in the table below. Equally, if you have been notified that a complaint has been made against you or your organisation, you should also contact the body in the table below.

6.1 Discrimination, sexual harassment and victimisation

<p>Federal</p> <p>Australian Human Rights Commission (AHRC)</p>	<p>The AHRC is able to investigate and resolve complaints of discrimination, harassment or bullying on the basis of, but not limited to: sex; disability; race; or age. Complaints may also be made regarding discrimination, harassment or bullying based on a person's: criminal record; trade union activity; political opinion; religion; or social origin. The complaint made must be with regards to unlawful discrimination. In order to resolve complaints, the AHRC use the method of conciliation, a free and informal process which can occur through a telephone conference, exchange of letters, or a face to face conference between the complainant and respondent. If the complaint cannot be resolved through conciliation, the complainant may apply to have their complaint be heard in the Federal Court or Federal Circuit Court of Australia, but must do so within 60 days (of the end of conciliation) and in some instances, with permission from the Court.</p>
<p>Australian Capital Territory</p> <p>ACT Human Rights Commission (ACT-HRC)</p>	<p>The ACT-HRC's role is to resolve complaints and promote rights. It may decide to take no further action on a complaint; or attempt to resolve it through conciliation or decide that resolution by conciliation is unlikely to be successful. If the ACT-HRC decides that conciliation should be attempted to resolve the complaint, this allows for an opportunity for both parties to discuss and attempt to find a way to resolve the complaint. Outcomes from conciliation may include: a written or verbal apology; introduction of policies and guidelines; financial compensation (agreed to by the other party); or gestures to show the respondent's good will towards the complainant. If the complaint is unable to be resolved through conciliation or the ACT-HRC decides that conciliation will be unlikely to resolve the complaint, the complaint may be referred to the ACT Civil and Administrative Tribunal.</p>
<p>New South Wales</p> <p>Anti-Discrimination Board of NSW (ADB)</p>	<p>The ADB investigates complaints of discrimination that are covered in the <i>Anti-Discrimination Act 1977</i> (NSW). It does not have the power to make an order or award compensation, but actively seeks to resolve complaints via conciliation which is designed to be an informal and cost-effective method of resolving disputes. The ADB may also choose to refuse investigating a complaint if the incident occurred more than 12 months before the complaint was lodged. If a person or organisation wishes to lodge a complaint about events which happened more than 12 months ago, an explanation for the delay in lodging the complaint will need to be provided to the ADB.</p>
<p>Northern Territory</p>	<p>A complaint to the NTADC must be made within 12 months of the incident occurring, however, the NTADC may consider complaints over 12 months if there is good reason. Once the NTADC receives a complaint covered by the <i>Anti-Discrimination Act 2015</i> (NT) the respondent is notified by the NTADC and the matter is set down for a compulsory</p>

Northern Territory Anti-Discrimination Commission	<p>conciliation. If the matter is not resolved the complainant may decide to continue the evaluation process which involves the complaint being referred to the Northern Territory Civil and Administrative Tribunal if the NTADC decides there is merit for the referral.</p>
Queensland Anti-Discrimination Commission Queensland	<p>The ADCQ utilises conciliation in resolving complaints that may arise and ADCQ provide this service free of charge. Complaints to the ADCQ must be made in writing, and set out how the incident involved a breach of the <i>Anti-Discrimination Act 199</i> (QLD). Complaints to the ADCQ must be made within a year of the incident, however the ADCQ may choose to accept a complaint about an incident which occurred over a year ago if the person making the complaint shows good cause. If the complaint is unable to be resolved through conciliation, the complainant may approach the Queensland Industrial Relations Commission for work-related complaints or the Queensland Civil and Administrative Tribunal for all other complaints.</p>
<p>South Australia</p> Equal Opportunity Commission (EOCSA)	<p>EOCSA provide free and confidential services in resolving complaints through the use of conciliation. A 12 month time limit is imposed and the EOCSA generally won't consider complaints about incidents over 12 months ago unless: there is good reason; and it would be fair for the complaint to be taken up despite being late. If the parties are unable to agree to resolve the complaint, the EOCSA may choose to refer the complaint to the South Australian Employment Tribunal (SAET). The SAET hears and determines matters regarding: equal opportunity complaints; exemptions to the <i>Equal Opportunity Act 1984</i> (SA); or a review of refusal to extend time. Equal opportunity complaints must be made in the first instance to the EOCSA before approaching the SAET.</p>
<p>Tasmania</p> Equal Opportunity Tasmania (EOT)	<p>A complaint must be within the scope of the <i>Anti-Discrimination Act 1998</i> (TAS) and within 12 months of the incident. If the EOT decides the complaint is to be handled, an investigation process will occur. At the end of the investigation, the EOT may decide to: dismiss the complaint; or resolve the complaint through conciliation; or refer the complaint to the Anti-Discrimination Tribunal. If the EOT chooses to dismiss the complaint, the EOT will inform the complainant and respondent as to the decision and reasons why. The complainant however has the right to ask the Anti-Discrimination Tribunal for a review of the decision by the EOT. If conciliation occurs, but the complaint is unresolved, the EOT must send the complaint to the Anti-Discrimination Tribunal for inquiry.</p>
<p>Victoria</p> Victorian Equal Opportunity and Human Rights Commission (VEOHRC)	<p>VEOHRC seeks to resolve complaints through the process of conciliation, the aim of which is to reach an agreement between the complainant and the respondent. VEOHRC is unable to make orders or award compensation but common outcomes of conciliation can include: an apology; financial compensation (agreed to by the other party); a job reinstatement; or an agreement to change or stop behaviour. If the issue cannot be resolved through conciliation, a complainant may apply to the Victorian Civil and Administrative Tribunal. The complainant is able to make this application exists regardless of whether a complaint has been made to VEOHRC.</p>
<p>Western Australia</p> Equal Opportunity Commission (EOCWA)	<p>Complaints to the EOCWA must be on a matter under the <i>Equal Opportunity Act 1984</i> (WA) and the incident must have occurred within 12 months of the complaint being lodged. Generally, the EOCWA will refuse complaints about incidents over 12 months ago but may consider them if there is good reason or good cause for the delay. Common outcomes from conciliation can include: an apology; staff training programs; or compensation for a specific loss. If the complaint is unable to be conciliated, the EOCWA may choose to dismiss the complaint or refer the matter to the State Administrative Tribunal for hearing and determination.</p>

6.2 Bullying

Not all organisations are required to comply with the work health and safety legislation. To work out whether or not your organisation is subject to these laws, see Part 3 of this Guide.

<p>Federal</p> <p>Fair Work Commission</p> <p>Australian Human Rights Commission</p>	<p>The role of the FWC is to prevent bullying from occurring in the future. The FWC becomes involved when a person makes an application to the commission for an order to stop bullying. The FWC cannot order that financial penalties be imposed, or make orders for compensation. If a person is eligible to make a stop bullying order (ie they are a ‘worker’ and they are a constitutionally covered business, see section 4.1), they must make an application using Form F72 – Application for an order to stop workplace bullying, accompanied by the appropriate fee. Importantly, this application must be made while the worker is still involved with the organisation. Actions that the Commission might consider could include: requiring the individual or group of individuals to stop the specified behaviour; regular monitoring of behaviours by an employer or principal; compliance with an employer or principal’s bullying policy; the provision of information and additional support and training to workers; review of the employer’s or principal’s bullying policy.</p> <p>As mentioned above, a person may also be able to make a complaint to the AHRC for bullying in the workplace, where the bullying is linked to, or based on, a protected characteristic, such as the person’s age, sex, race or disability or if it based on person’s criminal record, trade union activity, political opinion, religion or social origin.</p>
<p>Australian Capital Territory</p> <p>Access Canberra</p>	<p>Access Canberra's role is to monitor and enforce compliance with the <i>Work Health and Safety Act 2011</i> (ACT) . One of Access Canberra's roles in relation to bullying at work is to ensure that the employer is meeting their obligation to provide a work environment that is safe and that risks to health (including risks to psychological health) are prevented or managed. In the case of <i>bullying</i>, this can include dealing effectively with issues that do arise despite attempts at prevention. If an application is made to Access Canberra, an Access Canberra inspector might:</p> <ul style="list-style-type: none"> • issue an improvement notice requiring specific actions to be taken by the employer where there is a breach of the <i>Work Health and Safety Act 2011</i> (this action may include directions to develop and implement policies and procedures, directions to train staff in relation to acceptable workplace behaviours and/or directions to train supervisors in relation to their role in dealing with bullying at work); • provide advice to the employer about how to comply with health and safety laws • decide that the workplace has taken reasonable steps to prevent bullying at work; • decide that the employer has taken reasonable steps to respond to and manage allegations of bullying at work; and • recommend that the employer engage the services of a suitably qualified person to assist with managing health and safety issues.
<p>New South Wales</p> <p>SafeWork NSW</p>	<p>SafeWork NSW’s role is to ensure that organisations subject to the <i>Work Health and Safety Act 2011</i> (NSW) provide and maintain a work environment that is without risks to health and safety. SafeWork NSW can investigate workplace bullying. If you are a worker you can notify SafeWork NSW by filling in the ‘Workplace bullying form.’ If a SafeWork inspector visits the workplace, they may: provide information and advice on the requirements of WHS or workers compensation law; explain the range of SafeWork products and services available to your business; provide practical advice on how to eliminate or reduce the risk of injury and illness; investigate and/or verify compliance with legislative obligations; issue notices or other instructions to secure compliance with legislation.</p>

<p>Northern Territory NT WorkSafe</p>	<p>The role of NT WorkSafe is to assess whether the workplace concerned, has appropriate systems in place to manage the risk of exposure to workplace bullying. NT WorkSafe responds to workplace bullying complaints only in certain situations that fall within the scope of the <i>Work Health and Safety (National Uniform Legislation) Act</i>:</p> <ul style="list-style-type: none"> • The complaint must (on the face of it) fall within the definition of workplace harassment • The complaint must be in writing. The complainant will be given or sent an information package which must be completed • The complaint should have been raised at the workplace and an attempt made to resolve the complaint internally. <p>For further information or to request a bullying and harassment complaint form contact NT WorkSafe on 1800 019 115 or ntworksafe@nt.gov.au.</p>
<p>Queensland Workplace Health and Safety Queensland</p>	<p>Workplace Health and Safety Queensland (WHSQ) can only respond to complaints in certain situations that fall within the scope of the <i>Work Health and Safety Act 2011</i>, such as:</p> <ul style="list-style-type: none"> • The complaint must (on face value) fall within the definition of workplace bullying. • The complaint must be in writing unless there are exceptional circumstances. • The complainant must contact the Work Health and Safety Infoline on 1300 362 128 for an information package, which includes the address to send the complaint and a checklist which must be completed, signed and attached to the written complaint. • Attempts should be made to resolve the situation within the workplace prior to contacting WHSQ <p>If all of the above has been satisfied, a WHSQ inspector will contact the workplace, advise them of the complaint and may request evidence from the workplace that the risk of injury or illness from workplace bullying is being effectively managed. When persons at the workplace fail to meet their duties under the <i>Work Health and Safety Act 2011</i>, inspectors may use a range of compliance and enforcement options including, but not limited to, advice, verbal directions, improvement and infringement notices.</p>
<p>South Australia SafeWork SA</p>	<p>SafeWork SA's role is to ensure that PCBUs and workers meet their obligations under work health and safety laws, including, psychological health risks from bullying. Workers can contact SafeWork SA to make a complaint on 1300 365 255. If a complaint is made to SafeWork SA, they will:</p> <ul style="list-style-type: none"> • confirm if the complaint has merit under the legal definitions • determine if the PCBU has taken appropriate measures or actions • ensure that the hazards are suitably controlled • issue statutory notices for breaches of work health and safety laws, if required.
<p>Tasmania WorkSafe Tasmania</p>	<p>WorkSafe Tasmania can investigate if it receives a complaint of bullying in the workplace. A worker can make a complaint using the online form to lodge a complaint; or phone the Helpline on 1300 366 322.</p> <p>WorkSafe Tasmania will only investigate when:</p> <ul style="list-style-type: none"> • the bullying is still occurring, and • the victim has exhausted all options within their workplace to stop the bullying <p>It is the role of a WorkSafe Tasmania inspector to investigate and determine if those involved have met their obligations under the <i>Work Health and Safety Act 2012 (Tas)</i> for example, if the organisation has a policy and procedure in place for preventing and responding to bullying.</p>

<p>Victoria WorkSafe Victoria</p>	<p>WorkSafe's Advisory Service can provide information on bullying and how to prevent it, advice on how to raise the issue of bullying in your workplace or refer the matter to an inspector (where appropriate).</p>
<p>Western Australia WorkSafe Western Australia</p>	<p>A person (after taking preliminary steps) can make a complaint about bullying via an Occupational Safety and Health (OSH) enquiry with WorkSafe. Action taken by WorkSafe is targeted at preventing and managing bullying in the workplace. Depending on the outcome of the investigation and the circumstances the Inspector can take one or more of the following actions: No action; provide information; and/or issue improvement notice(s).</p>

8. Your organisation's legal responsibility for the actions of its volunteers

When considering your obligations in relation to unlawful workplace behaviours, your volunteer involving organisation will need to consider the two sides to this obligation:

- your duty to take steps to ensure that the volunteer is not subject to unlawful workplace behaviour; and
- your duty to take steps to ensure that the people your volunteers are interacting with (i.e. clients, other “workers” or the public) are not subject to unlawful workplace behaviour by the volunteer.

Organisations are responsible for the actions of their volunteers. It is essential that organisations understand that they owe duties to others who may be impacted by their volunteers' actions and the impact of failing to meet those obligations on the organisation itself, workers and others in the workplace.

For example, where an organisation fails to meet its duty to ensure the health and safety of a client, such as being aware of a volunteer sexually harassing a client but not doing anything to stop the sexual harassment, there will be an impact on the organisation (including reputational and financial damage) and the client (e.g. physical and or psychological harm).

Organisations can potentially be held responsible for the actions of their volunteers, under the discrimination laws (as explained above) or under the Harmonised WHS Laws, Victorian OHS Law and Western Australian OSH Law, or under the common law (negligence).

For further information on your organisation's legal responsibility for the actions of its volunteers, see Section 10 below and Part 3 of this Guide.

9. Unlawful workplace behaviour and work health and safety laws

As mentioned above, under work health and safety laws, volunteer involving organisations may have obligations to take steps to protect volunteers from unlawful workplace behaviour. This is because unlawful workplace behaviour can pose a risk to the health and safety of your volunteers.

The work health and safety laws in Australia are different in each state and territory in Australia, and not all community organisations are covered by the laws.

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 (**Harmonised WHS Laws**). If the Harmonised WHS Laws apply to your organisation, you will have duties under WHS Law in relation to workplace behaviours. For example, the duty to consult with workers including volunteers who are or likely to be affected by matters relating to WHS, such as decisions on how to minimise risks of bullying.

To work out whether your organisation is legally obligated to comply with the Harmonised WHS Laws, and for greater detail on the law, see Part 3 of this Guide.

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**) is the relevant law and in Western Australia the Occupational Safety and Health Act and Regulations (**Western Australian OSH Law**) is the relevant law. If the Victorian OHS Law, or Western Australia OSH Law apply to your organisation, you will have duties under these laws. For example, a duty to notify the relevant authority about certain injuries or incidents.

To work out whether your organisation is legally obligated to comply with the **Victorian OHS Law** or the **Western Australian OSH Law** and for greater detail on these laws, see Part 3 of this Guide.

Compliance with the Harmonised WHS Laws, Victorian OHS Laws and the Western Australia OSH Laws is important. If your volunteer involving organisation does not comply with these laws it risks substantial fines. Officers of an organisation (this includes a director, committee or board member, a person who instructs the committee on how to perform its duties, other people involved in an organisation in positions of authority) risk further fines and imprisonment if they do not exercise due diligence to ensure that the organisation complies with its duties or obligations these Laws.

Alongside the duties imposed under these Laws, there are also common law (negligence) duties to provide employees and other workers (including volunteers) with a safe workplace (to take reasonable care to avoid exposing workers to reasonably foreseeable risks of injury).

For further information on these laws and common law duties, see Part 3 of this Guide.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT



[Volunteering Australia's National Standards for Volunteer Involvement](#) have a number of standards relevant to the matters discussed in this Part. If your organisation complies with its legal obligations as set out in this Part (or if not obligated, but does so as a matter of best practice), it will help ensure your organisation meets these standards (and can provide evidence that it does so). **Standard 6: Workplace Safety and Wellbeing** states that *health, safety and wellbeing of volunteers is protected in the workplace*. Criteria for meeting this standard includes:

- **6.1 Effective working relationships with employees, and between volunteers are facilitated by the organisation.** Evidence of meeting this includes having structured processes in place for relevant staff to communicate or meet with volunteers, and where requested, volunteers are provided with opportunities to meet collectively regarding their work with the organisation.
- **6.2 Processes are in place to protect the health and safety of volunteers in their capacity as volunteers.** Evidence of meeting this includes having safety and health management policies and procedures that include volunteers; volunteers are insured for personal injury and liability have access to the same post incident debriefing and support provided to employees; and expectations and limits of volunteer roles, including time commitments and any designated hours are agreed with volunteers and individual workloads of volunteers are monitored and managed.
- **6.3 Volunteers have access to complaints and grievances procedures.** Evidence of meeting this includes volunteers being given information on how to make a complaint or raise a concern within the organisation and to relevant external bodies and grievances from volunteers are managed consistently, transparently, equitably and in line with principles of natural justice.

9.1 Volunteers' entitlements to workers compensation

All employers in each state and territory are required to take out a workers compensation insurance policy to cover themselves and their employees. Who is covered by workers compensation insurance policies is determined by the laws in each state and territory relating to workers compensation.

Generally, volunteers are not covered by workers' compensation legislation. There are some exceptions mainly relating to emergency workers (for example, a volunteer firefighter lodges a worker's compensation claim alleging a psychological injury due to bullying by her manager).

For further information on the application of workers compensation to volunteers, and insurance for volunteers, see Part 3 of this Guide.

10. Unlawful workplace behaviour and negligence laws

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. They owe a duty of care to people affected by their activities to take reasonable steps to protect them from reasonably foreseeable harm. If your organisation fails to take reasonable steps to protect your volunteers and others from sexual harassment, discrimination, bullying or victimisation, and this failure causes a recognised legal damage to the person (for example, psychological harm), your organisation may be held liable (legally responsible).

EXAMPLE – LIABILITY UNDER COMMON LAW OF NEGLIGENCE

Swan v Monash Law Book Co-operative [2013] VSC 326

In this case, the employer was a small not-for-profit bookshop. It had one employee and then employed another (Ms Swan). The evidence showed that over a period of time, the first employee bullied Ms Swan including regularly belittling her in front of customers, being constantly hyper critical of her work, even throwing books at her. Ms Swan complained to the board (as she had no-one else to complain to). The board promised to do something about it, discussed it at a board meeting but didn't take action to resolve the situation. The bullying continued and Ms Swan again complained to the Board who again promised to do something but they didn't. In the end Ms Swan made an application to the Court alleging the negligence of her employer caused her injury (psychiatric) by exposing her to an unsafe workplace - she was subject to bullying conduct - and sought damages for pain and suffering and pecuniary loss.

The Court was highly critical of the employer's response to Ms Swan's complaints. It found the employer was negligent because it did not investigate once the complaint was made, assess the risk to Ms Swan, monitor behaviour of its employees, have workplace behaviour policies setting out expectations on appropriate behaviour, have training on appropriate behaviour including on how to make complaints or a procedures on responding to complaints.

When determining that the organisation was liable, the Judge found that the Board's lack of action was 'explained but not excused' by the voluntary nature of the board members' work. The organisation was ordered to pay almost \$600,000 in damages.



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 organisation's 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 (see the example above).

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

More information about negligence law can be found in Part 3 of this Guide.

10.1 Negligent action of a volunteer and civil liability

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. This extends to negligence laws, and 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.

For further information on the civil liability of volunteers, and whether or not a volunteer is entitled to the protection see Part 3 of this Guide.

Summary: volunteers and unlawful workplace behaviour

- ✓ **Laws prohibit sexual harassment.** The laws exist at both state and federal level. Generally, sexual harassment laws apply to volunteers (whilst carrying out volunteer work) in all states except Western Australia and the Northern Territory. We recommend you comply with these laws (as much as reasonably possible) even if strictly speaking you are not legally required to comply - it is a matter of best practice.
- ✓ **Laws prohibit discrimination.** The laws exist at both state and federal level. Generally, the state-based discrimination laws will apply in the Australian Capital Territory, Queensland, South Australia and Tasmania. They may apply in Victoria and New South Wales where volunteering falls within another area covered by the discrimination legalisation, but are unlikely to apply in Western Australia and the Northern Territory. We recommend you comply with these laws (as much as reasonably possible) even if strictly speaking you are not legally required to comply - it is a matter of best practice
- ✓ **Laws prohibit bullying.** Bullying behaviour is prohibited under federal law (e.g. volunteers are protected in the same way as are employees under the *Fair Work Act 2009*) and in each state and territory. We recommend you comply with these laws (as much as reasonably possible) even if strictly speaking you are not legally required to comply - it is a matter of best practice.
- ✓ **Laws prohibit victimisation.** These are the same laws that prohibit discrimination so your organisation will need to be aware of whether victimisation laws apply to volunteers in their state. We recommend you comply with these laws (as much as reasonably possible) even if strictly speaking you are not legally required to comply - it is a matter of best practice.
- ✓ Sexual harassment, discrimination, victimisation and bullying may also be a **work health and safety issue** in which case the relevant federal, state or territory work health and safety legislation may apply to your organisation. Generally, if your organisation is required to take out workers' compensation insurance policy it will not cover your volunteers. You may need to consider separate insurance.

- ✓ Where legislation does not protect a volunteer at work, **a common law (negligence) duty of care may still be owed** to the volunteer to ensure they do not suffer harm as a result of inappropriate workplace behaviour.
- ✓ Your organisation must understand its **legal obligations to protect its volunteers from unlawful workplace** behaviour. It should have a workplace behaviour policy and procedures to help all workers to be protected from unlawful behaviour. It should include details of the person to whom complaints on behaviour can be made, the process for resolving complaints and what to do if the process for making a complaint does not resolve it. Ongoing training on appropriate workplace behaviour should be undertaken.
- ✓ Your organisation must understand it also has legal **obligations to protect the people your volunteers are interacting with are not subject to unlawful workplace behaviour by the volunteer**. Your organisation could be legally responsible (under discrimination laws, work health and safety legislation, and negligence law).
- ✓ **Volunteers may be sued**. Laws in each state and territory protect volunteers from this liability, for things in done in good faith (or honestly and without recklessness in the ACT), however, there are some exceptions.

Resources

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 3: Volunteer safety
- ✔ 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

- ✔ **National WHS Guide** – <https://www.nfplaw.org.au/ohswww.nfplaw.org.au/ohs>

Not-for-profit Law's National WHS Guide can help your organisation understand its obligations under the occupational health and safety laws, whether it is bound by these laws and how it can ensure it complies. A separate Guide also exists for Victorian organisations as their laws differs slightly.

Discrimination, sexual harassment and victimisation complaints

- ✔ [Australian Human Rights Commission](#)
- ✔ [Victorian Equal Opportunity and Human Rights Commission](#)
- ✔ [Anti-Discrimination Board of NSW](#)
- ✔ [Anti-Discrimination Commission Queensland](#)
- ✔ [ACT Human Rights Commission](#)
- ✔ [WA Equal Opportunity Commission](#)
- ✔ [SA Equal Opportunity Commission](#)
- ✔ [Northern Territory Anti-Discrimination Commission](#)
- ✔ [Equal Opportunity Tasmania](#)

Bullying complaints

- ✔ [Fair Work Commission](#)

Work Health and Safety

- ✔ Safe Work Australia – [The Essential Guide to Work Health and Safety for Volunteers](#)
- ✔ Safe Work Australia – [Guide to the Model Work Health and Safety Act](#)

Workplace Health and Safety Regulators

To find out more about workplace health and safety and the workers' compensation scheme that applies to your organisation, contact the regulator in your state or territory:

- ✔ Australian Capital Territory (ACT): [Worksafe ACT](#)
- ✔ New South Wales (NSW): [SafeWork NSW](#)
- ✔ Northern Territory (NT): [NT WorkSafe](#)
- ✔ Queensland (QLD): [WorkSafe Queensland](#)
- ✔ South Australia (SA): [SafeWork SA](#)
- ✔ Tasmania (Tas): [WorkSafe Tasmania](#)
- ✔ Victoria (Vic): [WorkSafe Victoria](#)
- Western Australia (WA): [WorkSafe WA](#)

Legislation

- ✔ [Age Discrimination Act 2004 \(Cth\)](#)
- ✔ [Anti-Discrimination Act 1977 \(NSW\)](#)
- ✔ [Anti-Discrimination Act 1991 \(Qld\)](#)
- ✔ [Anti-Discrimination Act 1992 \(NT\)](#)
- ✔ [Anti-Discrimination Act 1998 \(Tas\)](#)
- ✔ [Disability Discrimination Act 1992 \(Cth\)](#)
- ✔ [Discrimination Act 1991 \(ACT\)](#)
- ✔ [Equal Opportunity Act 1984 \(SA\)](#)
- ✔ [Equal Opportunity Act 1984 \(WA\)](#)
- ✔ [Equal Opportunity Act 2010 \(Vic\)](#)
- ✔ [Fair Work Act 2009 \(Cth\)](#)
- ✔ [Occupational Safety and Health Act 1984 \(WA\)](#)
- ✔ [Racial Discrimination Act 1975 \(Cth\)](#)
- ✔ [Sex Discrimination Act 1984 \(Cth\)](#)
- ✔ [Victorian Occupational Health and Safety Act 2004 \(Vic\)](#)
- ✔ [Work Health and Safety Act 2011 \(Cth\)](#)
- ✔ [Work Health and Safety Act 2011 \(ACT\)](#)
- ✔ [Work Health and Safety Act 2011 \(NSW\)](#)
- ✔ [Work Health and Safety Act 2011 \(QLD\)](#)
- ✔ [Work Health and Safety Act 2012 \(SA\)](#)
- ✔ [Work Health and Safety Act 2012 \(TAS\)](#)
- ✔ [Occupational Health and Safety Act 2004 \(Vic\)](#)
- ✔ [Occupational Safety and Health Act 1984 \(WA\)](#)

Volunteering Australia resources

- ✔ Volunteering Australia 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:

- ✔ Volunteering and Contact ACT – www.vc-act.org.au
- ✔ The Centre for Volunteering (NSW) – www.volunteering.com.au
- ✔ Volunteering Queensland – www.volunteeringqld.org.au
- ✔ Volunteering SA&NT – www.volunteeringsa-nt.org.au
- ✔ Volunteering Tasmania – www.volunteeringtas.org.au
- ✔ Volunteering Victoria – www.volunteeringvictoria.org.au
- ✔ Volunteering WA – www.volunteeringwa.org.au

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A NFP Law Information Hub resource. Access more resources at www.nfplaw.org.au.

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National Volunteer Guide (Part 5)

This part provides guidance on
recruiting, inducting, managing and
ending the volunteer relationship

October 2018

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**Part 5: Recruiting,
Inducting, Managing and
Ending the Volunteer
Relationship**



Introduction to recruiting, inducting, managing performance and ending the volunteer relationship

This part covers:

- the recruitment process
 - inducting your volunteers
 - managing the performance of your volunteers, and
 - ending the volunteer relationship
-

1. Introduction

This Part of the Guide covers the recruitment and induction of volunteers, managing performance and ending the volunteer relationship.

This Part begins by providing a brief overview of the need for volunteer involving organisations to be dedicated to a fair process when recruiting volunteers. Using a Volunteer Position Description is helpful to this process. A sample is included. This Part also makes clear that even if there is no legislative or contractual requirement that checks of volunteers be performed, volunteer involving organisations ought to undertake some level of screening of volunteers as part of their recruitment process. Volunteer recruitment processes must not be discriminatory. A brief summary of discrimination law (also discussed in Part 4 of this Guide) is provided including when discrimination may be lawful. Caution should be exercised if your organisation is relying on exceptions or exemptions to discrimination law. Your organisation may need legal advice.

Volunteers should complete an induction process before commencing any volunteer duties. A Sample Volunteer Induction Checklist is included. A Volunteer Agreement is also an important part of engaging volunteers, helping to make sure the volunteer understands their rights, role and responsibilities along with those of the organisation. A sample is included, along with a detailed explanation as to why we recommend that it is executed (signed) as a deed of agreement. It is important to note that all of these sample documents do not constitute legal advice, and may not meet the needs of your organisation without your organisation obtaining specific legal advice.

This Part then deals with managing the performance of volunteers, which can be problematic if not done correctly. It provides an overview of performance management planning and processes. It also deals with volunteer grievances, including the need for volunteer involving organisations to have established procedures and policies for handling grievances.

This Part concludes by discussing the ending of the volunteer relationship. Sometimes ending the relationship may be necessary to ensure your organisation is acting in accordance with the standard of care required by law. There may be other reasons to end the relationship. Many volunteers do not understand how the relationship can end, and it is important this is understood from the beginning of the relationship – we recommended it is discussed as part of the induction process.

2. Recruitment of volunteers

Overview

Volunteers are essential to the success of community organisations. Your organisation should recruit its volunteers in a fair and non-discriminatory way.

We recommend using a Volunteer Position Description when recruiting volunteers. This should focus on the specific requirements of the position.

Volunteer involving organisations should undertake some level of screening of volunteers even where there is no legislative or contractual requirement that checks be performed.

2.1 Volunteer Position Description

2.1.1 Importance of a Volunteer Position Description

We recommend using a Volunteer Position Description for all volunteer positions in your organisation. It should focus on the specific requirements of the position, being the skills or qualifications needed for the role (and not other attributes of a person). A Volunteer Position Description should be used when your organisation is advertising for volunteers.

A Volunteer Position Description will assist your organisation in making decisions about potential volunteers, for example, when deciding if the volunteer has the skills to undertake the role and what checks might be necessary for the role (and that you are not undertaking unnecessary checks which could lead to an allegation of discrimination (see 2.2 and 2.3 below for more information on screening and discrimination). It is also important that a volunteer is clear on their roles and responsibilities and a Volunteer Position Description will assist in managing a volunteer's expectations about the role. It is also a record of what the volunteer has agreed to contribute to the organisation. This will be helpful when managing the volunteer's performance and dealing with any grievances (dealt with later in this Part).

A Volunteer Position Description can also be helpful in other circumstances. For example, if there is a need to consider whether a volunteer was acting outside the scope of their role, in particular, where injury, loss or harm has resulted from the actions (or inaction) of the volunteer. As discussed in Part 3 (Volunteer Safety), in certain circumstances your organisation could be held liable (legally responsible) for the actions of your volunteers. Generally, your organisation will not be held liable if the volunteer has acted outside the scope of the work organised by the organisation or contrary to any instructions given by the organisation to the volunteer. This is one reason why a Volunteer Position Description is important for volunteer involving organisations.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

[Volunteering Australia's National Standards for Volunteer Involvement](#), have two standards that relate to recruitment of volunteers. These are **Standard 3: Volunteer Roles** and **Standard 4: Recruitment and Selection**. Using a Volunteer Position Description for all volunteer positions in your organisation will help your organisation demonstrate it is meeting these standards and encourage parity of esteem between paid workers and volunteers.



2.1.2 Sample Volunteer Position Description

We recommend a volunteer involving organisation prepare a Volunteer Position Description for each volunteer in the organisation. A sample Volunteer Position Description is provided below. It has been developed as an example only and should be changed to meet the needs and circumstances of your organisation.

The Volunteer Position Description should be reviewed from time to time (for example, as part of any volunteer performance review process), and if necessary amendments should be made.

CAUTION

Similar to the Sample Volunteer Agreement (below at 3.2), a Volunteer Position Description should be clear and consistent in the use of language. It should avoid using 'employment' type language. For example:

- ✓ use terms such as 'volunteer', 'we would be pleased if you would', 'help to', 'provide assistance'
- ✗ avoid terms such as 'job', 'work', 'you must', 'required', 'responsible for'

While both the organisation and volunteer need some certainty on the volunteer's role and when the volunteer will be volunteering, it is also important to remember, a key aspect of a genuine volunteer relationship is that either the volunteer or organisation can walk away from the arrangement at any time (see below at 5.6 – Ending the volunteer relationship).

A copy of the Volunteer Position Description should be provided to the volunteer. We recommend the Volunteer Position Description is discussed as part of the induction process (discussed below). You should also then keep a copy with your other records in relation to your volunteer. For further information on volunteer record keeping refer to Part 6: Organisational issues applicable to volunteers.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

As outlined above, [Volunteering Australia's National Standards for Volunteer Involvement](#), have two standards that relate to recruitment of volunteers, including **Standard 3:**

Volunteer Roles: "Volunteers are engaged in meaningful and appropriate roles which contribute to the organisations purpose, goals and objectives". The criteria for meeting this standard includes:

- 3.1 "Volunteer roles are designed to contribute to the organisation's purpose, goals and objectives".
- 3.2 "Volunteer roles are appropriate for the community, service user or stakeholder groups with which the organisation works".
- 3.3 "Volunteer roles are defined documented and communicated". Evidence of meeting this includes that the relationship between volunteers is clearly defined; volunteer's roles have written descriptions that include duties, responsibilities and accountabilities, and that volunteer role descriptions are readily available to all relevant employees.
- 3.4 "Volunteer roles are reviewed with input from volunteers and employees".

Sample: Volunteer Position Description

Volunteer Client Enquiry Officer

Purpose

The Volunteer Client Enquiry Officer helps provide an effective and efficient response to client enquiries.

Supervision

[Name of supervisor] will supervise volunteers, and provide ongoing support, with focused supervision to be provided by the social workers co-ordinating the task being undertaken by the volunteer.

Volunteer duties and responsibilities

As a Volunteer Client Enquiry Officer at [Name of organisation], you will help by performing the following duties:

- answer phone calls from members of public
- record client personal information in database
- liaise with relevant staff and social workers about client inquiries
- provide clients with general information only, in accordance with social workers instructions
- sit in on client interviews social workers and assist with note-taking
- drafting client correspondence under social workers supervision
- filing and other administrative duties related to client files and
- other duties as directed social workers volunteer coordinator or [Name of organisation] staff

Skills, qualifications or experience required (or desirable) for role

We are looking for a volunteer with the following skills, qualifications or experience to fill this volunteer role:

- social workers, social work graduates, or 3-5th year social work students
- an understanding of the issues experienced by people who are marginalised and disadvantaged
- ability to deal with challenging client behaviours
- a demonstrated interest in social issues in Australia or internationally
- an understanding of issues of client confidentiality and the sensitive nature of clients' personal and health information
- experience in an office and / or client service environment – particularly a charitable organisation, and
- attention to detail and the ability to follow directions carefully

Background checks for role

[Name of organisation] is very serious about its duty to provide clients with a professional service and to providing all people working at [Name of organisation] with a safe and healthy working environment. We are a child safe organisation.

We are committed to recruiting dedicated, professional volunteers who have the skills and experience appropriate for this role.

For this reason, should you be interested in this role, we will need to collect the following information prior to you commencing in the role [insert details such as resume, a qualification check, a Working with Children Check, police check]*.

You will only have to provide this information following the initial meeting with the Volunteer Manager, and, if required, we will help to arrange for checks or help you apply for them.

If you have any questions about these background checks, please do not hesitate to contact [*insert contact information*]. Please note that we treat all information as sensitive and handle it in accordance with privacy laws. You can access a copy of our privacy policy here (or we can provide you with a copy).

Also note that we will require you to sign the attached Volunteer Agreement**

* Note that these checks are discussed below at 2.2

** Note that Volunteer Agreements are discussed below at 3.2 and a Sample Volunteer Agreement is provided at 3.2.1.

2.2 Volunteer Screening as part of the recruitment process

It is important that volunteer involving organisations screen potential volunteers in a systematic way. Certain background screening checks are required by law (under legislation or contract) and others are optional. Even when not required, volunteer involving organisations ought to undertake some level of screening for volunteers. This is because all organisations have a responsibility to ensure they maintain a safe environment for all workers (paid and unpaid) and clients. Due to this overarching duty of care (which is discussed in more detail in Part 3), organisations should always try to be well informed about the people they choose to be part of their organisations.

When considering the types of checks your organisation requires in order to minimise risks associated with your volunteers you should consider whether the volunteer's role and responsibilities will include contact with vulnerable clients or children, access to sensitive information, handling monies, or operating certain machinery (including vehicles). This consideration should already be completed as part of the preparation of a Position Description (above at 2.1) as the first step of the recruitment process and the subsequent advertising for volunteers.

2.2.1 Working with Children Checks

The laws regarding working with children requirements vary between all of the states and territories. While there are plans to develop a nationally consistent approach to working with children checks and child safe organisations across jurisdictions, currently your organisation will need to comply with the law in your state (or one or more other jurisdictions depending on where your organisation operates). In this Part, the screening checks for people working with children are referred to as **Working with Children Checks**, although we note that terminology differs across the states and territories.

While the working with children screening requirements and obligations differ across the states and territories they all generally set out:

- **When Working with Children Checks are legally required.** They are generally required for all individuals who will be carrying out child-related work. The definition of 'child related work' is different across the states and territories.
- **Any exemptions to the legal requirement for a check.** In some states and territories, exemptions are allowed where the volunteer is under 18 years of age or where the volunteer is a parent of a child and the volunteering involves an activity undertaken by that volunteer's child.
- **The legal obligations of an organisation working with children.** This generally includes an obligation to ensure that its workers who work with children have undergone a working with children check, and in many jurisdictions before any child related work is commenced.
- **How to apply for a Working with Children Check and other relevant matters.** For example, what the results of a check might mean, when a person who has applied for a working with children check can begin work, what to do if a volunteer already has a working with children check obtained when volunteering at another organisation, and the limits of what a working with children check can achieve.

Your organisation must understand your legal obligations when it comes to Working with Children Checks. These are set out in detail in the Annexure to this Part.

2.2.2 Police Checks

Police Checks are different to Working with Children Checks. For example, not all criminal offences will be relevant for a working with children check, only those the legislation has set out on the basis those offences pose a risk to children. A Police Check allows an organisation to be aware of all (releasable) previous convictions – child-related or not – and this may be appropriate if you are seeking a volunteer who, for example, may be transporting clients (you may want to be certain they do not have any relevant driving-related offences.). Police Checks are generally not mandatory, however, some legislation requires criminal record- checks as part of people’s qualifications (e.g. security guard) and sometimes a not-for-profit organisation may be under a contractual agreement to get police checks for certain positions (e.g. an agreement with the Department of Human Services for the delivery of services to children). You should comply with any obligations in any funding agreements your organisation may have.

Differences between Police Checks and Working with Children Checks include:

- what is checked
- what is revealed by the checks
- the outcome
- length of validity of the checks (a police check is a ‘point in time’ single check), and
- whether the check is transferable across jurisdictions.

Where there is no legal obligation to undertake a Police Check (or a Working with Children Check), your organisation may want to consider if there is still a need for a Police Check of a volunteer. This is another reason why having a Volunteer Position Description is important – your organisation can consider the roles and responsibilities set out in the Position Description and decide what convictions for prior offences, if any, would preclude a person from being suitable for that role. You can then decide if your organisation is going to get a Police Check for the position and you can make this clear in the volunteer position description (see the Sample Volunteer Position Description above). If you do decide that the position requires a Police Check, then your organisation should also consider the process it will follow if the Police Check comes back showing an offence, including discussing the check with the volunteer. This process should allow the volunteer to confidentially explain the result of the check and should ensure the privacy of the person and that the record of the Police Check is stored appropriately (refer to Part 6).

There are legal protections preventing discrimination on the basis of a criminal record. You must not refuse an applicant simply because he or she has a prior conviction revealed for an offence that has no relevance to the available position. An example of this is the case of *Mr GC v State of New South Wales (Rail Corporation New South Wales)* [2012] AUsHRC 48, whereby the Australian Human Rights Commission found an organisation had discriminated on the basis of a criminal record (see the example on page 15).

However, your organisation has obligations to create a safe and effective environment, and you can refuse a potential volunteer on the basis of a criminal record when you believe that a prior offence prevents the applicant from performing the ‘inherent requirements’ of the volunteer position (refer to the discussion below at 2.3 and Part 4 of this Guide). If this situation arises your organisation may need to seek legal advice.

Police Checks (in each state and territory) are explained in more detail in the Annexure to this Part.

2.2.3 Other checks

In addition to screening required by law, it may be in the best interests of a volunteer involving organisation to ensure other background checks are undertaken. Asking for referee details and performing licence and qualification checks (and possibly asking for details of any potential conflicts of interest) enables an organisation to assure itself that it is making the right choice when recruiting a volunteer. Background checks are addressed in more detail in the Annexure to this Part.

2.2.4 People on visas

Work restrictions may apply to the holders of temporary visas, such as tourist and student visas. These may affect whether the visa holder can engage in unpaid work (that is volunteer for your organisation) restrictions are indicated by particular visa conditions. An overview of visas is provided in more detail in the Annexure to this Part.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

As outlined above, [Volunteering Australia's National Standards for Volunteer Involvement](#), have two standards that relate to recruitment of volunteers, including **Standard 4: Recruitment and Selection**, *Volunteer recruitment and selection strategies are planned, consistent and meet the needs of the organisation*. Criteria for meeting this standard include:

4.3 *"Volunteers are selected based on interest, knowledge, skills, or attributes relevant to the role and consistent with anti-discrimination legislation"*. Evidence of meeting this criteria is that:

- Volunteer recruitment and selection complies with anti-discrimination legislation

4.4 *"Screening processes are applied to volunteer roles that help maintain the safety and security of service users, volunteers and the organisation"*. Evidence of meeting this criteria is that:

- Volunteer screening requirements are documented, applied and meet legislative requirements
- Volunteer reference checks are undertaken as appropriate to the role
- Guidelines are applied to determining the type of convictions or disciplinary actions that preclude people from becoming volunteers, and to informing people about how their personal history may be used for decision making.



2.3 Recruitment and discrimination law

Anti-discrimination law protects workers, including volunteers, in a number of ways. For detailed information about what constitutes unlawful discrimination and whether volunteers are protected from unlawful discrimination in the workplace, see Part 4 (Workplace Behaviour). Regardless of whether an organisation or its volunteers are covered by anti-discrimination laws, best practice dictates that organisations extend any protections available to employees to its volunteers, including in the area of recruitment. Set out below is an overview of discrimination law in the context of recruitment of volunteers.



TIP

An organisation undertaking a recruitment process for volunteers, should ask all potential volunteers the same questions and record their responses in writing. This will not only be helpful to compare all potential volunteers but also if an allegation of discrimination is made.

What is discrimination?

Discrimination is treating, or proposing to treat, someone unfavourably because of a personal attribute which is protected by law. Generally, there are two types of discrimination: direct and indirect. Anti-discrimination laws prohibit both kinds of discrimination when they occur because of a 'protected attribute' of the person (age, sexuality, gender identity, disability, race, etc.). The particular protected attributes that are covered vary under the different state and federal laws, and this is explained further in Part 4.

As a general rule, when you are recruiting your volunteers, using a Volunteer Position Description (as discussed above at 2.1) which focuses on the roles and responsibilities of the position should assist your organisation to ask questions that focus on the requirements of the role rather than the personal attributes of the potential volunteer. For example, your organisation should be asking "Would you require any support that would assist in performing this role? This job requires lifting. Is there anything that will prevent you from performing such duties?" Your organisation should not be asking "Do you have a disability? You look a bit old – are you going to be able to lift boxes of donated goods?"

EXAMPLE – FOCUSING ON PERSONAL ATTRIBUTES



In the case of *Smith v Commonwealth of Australia (2000)* EOC 93-077, Ms Smith lodged a complaint with the Human Rights and Equal Opportunity Commission (**Commission**) alleging she had been discriminated against on the grounds of her sex, marital status and pregnancy. Ms Smith had applied for a position as a part-time director on the board of the Red Meat Producer Corporation.

During the interview process, Ms Smith made the shortlist out of 30 applicants, but her application was ultimately unsuccessful. She claimed that interview panel members asked her if she was married and if she had children. When she stated that she was married with children, the interviewing panel suggested to her that the role may conflict with her family commitments as it involved a lot of travel.

Ms Smith claimed the personal and family life questions caused her to feel uncomfortable, affected her confidence and made it hard for her stay focussed on industry issues. At the time of the interview, Ms Smith was seven months pregnant, however, she did not mention this in the interview.

The Red Meat Producer Corporation claimed that Ms Smith's application was unsuccessful because there were already five people on the board from NSW, Ms Smith was less experienced than other applicants and her reference checks had not turned out well. Witnesses acknowledged that Ms Smith had been asked questions about marriage and

children during the interview and that she appeared uncomfortable with these questions. However, the interview panel agreed to not take them into account.

The Commissioner found Ms Smith had not been treated less favourably on the grounds of her sex or marital status. In fact, Ms Smith had been able to move into the top group of applicants following the interview. However, the Commissioner found that the asking of the interview questions was a breach of section 14(1)(b) of the *Sex Discrimination Act 1984* (Cth) (this section of the law deals with discrimination in employment) as it constituted less favourable treatment of Ms Smith, placed her under greater stress and made her feel uncomfortable. Ms Smith was awarded \$2500 in damages.

EXAMPLE – FAILURE TO FOCUS ON INHERENT REQUIREMENTS



In the case of *Mr GC v State of New South Wales (Rail Corporation New South Wales) [2012] AUsHRC 48* the Australian Human Rights Commission investigated a complaint by Mr GC that he was discriminated against on the basis of his criminal record when applying for a job as a market analyst with the Rail Corporation of New South Wales (**RailCorp**).

Mr CG was convicted of middle range drink driving in 2001 and with low range drink driving in 2008. Although Mr CG met all of the selection criteria and was the selection panel's preferred candidate for the market analyst role, he was advised that he was not offered employment on the basis of his criminal record (being the 2 drink driving offences).

RailCorp argued that Mr CG could not, in light of his criminal record, meet the inherent requirements of the market analyst role. The Commission rejected this argument noting that, amongst other things, Mr CG was not required to drive as part of his employment with RailCorp nor was he required to engage in any safety critical activities.

The Commission found that RailCorp had unlawfully discriminated against Mr CG on the basis of his criminal record.

2.3.1 Anti-discrimination procedures in recruitment

We recommend that your volunteer involving organisation should proactively work to prevent discrimination by taking a number of steps:

- Having an anti-discrimination policy with a section on discrimination in recruitment that covers all workers (volunteers as well as paid workers).
- Preparing a Position Description that focuses on the skills required for the volunteer role rather than the personal attributes that may be desirable.
- Using the same language in the Position Description across advertisements and in the interview process (see the Sample Volunteer Position Description at 2.1 above).
- Giving proper consideration to the language you use in the volunteer recruitment process (as outlined above you should avoid focusing on personal attributes such as “Do you have kids: we really need someone reliable”. The focus should be on the requirements of the role, for example “Are you able to commit to volunteering regularly between 8 am and 4 pm on Tuesdays?”
- Conducting regular training for all volunteers and workers in relation to the policy so that people recognise discriminatory practices and are aware of processes for addressing them.

Organisations that have an anti-discrimination policy and procedures (as a matter of best practice, if not otherwise required by law) help all of their workers in the organisation to be protected from discriminatory behaviour.

These policies and procedures will also help the organisation in the event that a complaint of discrimination is made.

2.3.2 Anti-discrimination policy

We recommend that volunteer involving organisations have a policy against discrimination across the whole organisation. A good anti-discrimination policy should include the following:

- A policy statement outlining the organisation's commitment to preventing and addressing discrimination in the workplace
- Those covered by the policy (volunteers as well as paid workers)
- The relevant laws that apply
- What constitutes discrimination (including direct and indirect discrimination and examples of both)
- The attributes that are protected
- When discrimination is lawful (see below at 2.4 for further information)
- What workers should do if they experience or witness unlawful discrimination
- How to make a complaint
- How discrimination complaints will be handled
- The consequences of breaching the policy, and
- Where to go for further information (e.g. relevant websites such as the Australian Human Rights Commission and the relevant state or territory anti-discrimination body – see the Resources section at the end of this Part).

We recommend that your organisation also makes sure that all of its workers (paid and unpaid) have a good understanding of the anti-discrimination policy, which may require organisations to have regular training sessions.

2.4 When might discrimination be lawful in recruitment?

Lawful discrimination

Generally, discrimination will be lawful when it does not contravene any relevant anti-discrimination legislation. Not all discrimination is against the law, either because the discrimination is not on the basis of a protected attribute or because it is excused or exempted by law. The discriminatory conduct that is excused or exempted differs between the states and territories as set out on the following pages.

CAUTION

The lists of types of lawful discrimination set out below are not exhaustive. There may be other situations in which discrimination is lawful. For more information, see the Australian Human Rights Commission website at www.humanrights.gov.au.

Volunteer involving organisations should be careful relying on exceptions or exemptions and may need to seek legal advice.



2.4.1 Australian Capital Territory

Generally, discriminatory conduct will not be against the *Discrimination Act 1991* (ACT) if:

- a person discriminates against someone else in relation to a position as an employee or contract worker if the duties of the position involve doing domestic duties on the premises where the person lives;
 - a person discriminates against someone else in relation to a position as an employee or contract worker if the duties of the position involve the care of a child where the child lives;
 - it is for the provision of accommodation if:
 - the person who provides or proposes to provide the accommodation, or a near relative or carer of the person, lives and intends to continue to live on the premises; and
 - the accommodation provided in the premises is for not more than 6 people and any near relative or carer of the person;
 - it is for the the provision of accommodation by a religious body for members of a relevant class of people;
 - it is for the provision of accommodation by a charitable or voluntary body for members of a relevant class of people;
 - a person discriminates on the ground of accommodation status in relation to the provision of accommodation if the discrimination is reasonable, having regard to any relevant factors;
 - an employment agency discriminates in the selection of people as suitable for a job vacancy if, had the proposed employer discriminated against the person in the same way, the discrimination would not have been unlawful;
 - the purpose of the act is:
 - to ensure that members of a relevant class of people have equal opportunities with other people; or
 - to give members of a relevant class of people access to facilities, services or opportunities to meet the special needs they have as members of the relevant class;
 - a voluntary body discriminates against a person in relation to:
 - the admission of people as members of the body; or
 - the provision of benefits, facilities or services to people, whether the people are members of the body or otherwise;
 - a person (the **first person**) discriminates against someone else in relation to:
 - employment as a member of the staff of an educational institution; or
 - a position as a contract worker that involves doing work in an educational institution;
- if the institution is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, and the first person so discriminates in good faith to avoid injury to the religious susceptibilities of adherents of that religion or creed; or
- it is necessary to comply with an order of a court or tribunal, or is authorised by legislation.

For further information, see Part 4 and <http://hrc.act.gov.au/discrimination/>.

NOTE & CAUTION – AUSTRALIAN CAPITAL TERRITORY



As well as the exceptions that are already expressly provided for by the *Discrimination Act 1991* (ACT), an organisation can make an application to the Australian Human Rights Commission (**Commission**) under section 109 of the Act to be granted a temporary exemption for conduct that would otherwise contravene certain discrimination provisions. The Commission will only grant an exemption for conduct that promotes acceptance and compliance with the Act, and the exemption will be subject to any conditions the Commission sees fit. If you are considering applying to the Commission for an exemption for your organisation, we recommend that you seek independent legal advice as the above information is just a guide. For further information on how to apply for an exemption, see <http://hrc.act.gov.au/discrimination/exemptions-granted-unlawful-discrimination/>

2.4.2 Queensland

Generally, discriminatory conduct will not be against the *Anti-Discrimination Act 1991* (QLD) if:

- a special measure would need to be taken to promote substantive equality for a disadvantaged group;
- it is a genuine occupational requirement for the position e.g. employing only women applicants for positions involving body searches of women;
- it is lawful to discriminate in order to protect public health or the health and safety of people at a place of work;
- the employer can demonstrate that it would impose unjustifiable hardship on the organisation to make reasonable adjustments to accommodate the impairment;
- a religious body discriminates (except on the basis of age, race or impairment), in the area of employment, against a person who openly acts in a way contrary to the employer's religious beliefs;
- the role or service is targeted towards people who are married if you would like the role to be done by a married couple;
- the role involves working with children and the discrimination is on the basis of gender identity or lawful sexual activity (where the discrimination is reasonably necessary to protect the child) or against people with a conviction for a child sex offence or those disqualified from working with children under any Act in Australia;
- a person is acting in compliance with pre-existing industrial awards and agreements, other pre-existing legislation and court orders; or
- discrimination is on the basis of gender and the role is a live-in job where sleeping accommodation is provided for one sex only and supplying separate accommodation would impose unjustifiable hardship on an employer.

For further information, see Part 4 and <https://www.adcq.qld.gov.au/complaints/discrimination>.

NOTE & CAUTION – QUEENSLAND



If an organisation can show that their proposed actions are likely to contravene the *Anti-Discrimination Act 1991* (Qld) and the actions are not covered by the specific or general exemptions in the Act, they may apply to the Queensland Industrial Relations Commission (QIRC) for a work-related exemption, or to the Queensland Civil and Administrative Tribunal (QCAT) for all other exemptions. QCAT may grant a temporary exemption, under section 113 of the Act, from the operation of a specified provision to allow conduct that might otherwise be discriminatory. This might include, for example, restricting accommodation to single people, or recruiting for women or men only. If you are considering applying to either QIRC or QCAT for an exemption for your organisation, we recommend that you seek independent legal advice as the above information is just a guide. For further information on how to apply for an exemption, see <https://www.adcq.qld.gov.au/resources/legal-information/exemptions#content>

2.4.3 Northern Territory

Generally, discriminatory conduct will not be against the *Anti-Discrimination Act 1996* (NT) if:

- an educational authority, in accordance with the doctrine of a particular religion, excludes applicants on the grounds of religious belief or activity, or sexuality and is in good faith to avoid offending the religious sensitivities of people of the particular religion;
- it is based on a genuine occupational qualification or requirement in relation to a particular position;
- the person's inability to adequately perform the inherent requirements of the work even where the special need of the other person has been or were to be accommodated;
- in offering work where the work is to be performed in the person's home;
- it is on the grounds of irrelevant criminal record if the work principally involves the care, instruction or supervision of vulnerable persons and the discrimination is reasonably necessary to protect the physical, psychological or emotional well-being of those vulnerable persons; and
- it is necessary to comply with an order of a court or tribunal, or it is authorised by legislation.

For further information, see Part 4 and http://www.adc.nt.gov.au/discrimination/what_is_discrimination.html.

NOTE & CAUTION – NORTHERN TERRITORY



As well as the exceptions that are already expressly provided for by the *Anti-Discrimination Act 1996* (NT) (**Act**), an organisation can make an application to the Anti-Discrimination Commissioner under section 59 of the Act to be granted a temporary exemption for conduct that would otherwise contravene certain discrimination provisions.

The Commissioner may grant an exemption on the basis that the proposed discriminatory conduct seeks to redress past discrimination, and the exemption will be subject to any conditions the Commissioner sees fit. If you are considering applying to the Commissioner for an exemption for your organisation, we recommend that you seek independent legal advice as the above information is just a guide. For further information on exemptions, see <http://www.adc.nt.gov.au/index.html>

2.4.4 New South Wales

Generally, discriminatory conduct will not be against the *Anti-Discrimination Act 1977* (NSW) if:

- it is necessary to protect the health and safety of any person, including the person being discriminated against (where discrimination is on the basis of disability, pregnancy or physical features);
- it is necessary to protect property (where discrimination is on the basis of disability or physical feature);
- the person is unable to carry out the 'inherent requirements' (essential duties) of the role (and taking steps to accommodate the person would cause 'unjustifiable hardship' to the organisation);
- the role or service is targeted towards people of one sex only, towards a particular age group or towards a particular race or ethnic group, where being that particular sex, within that particular age group or of the race or ethnic group is a 'genuine occupational qualification' essential for doing the role;
- the role or service is targeted towards all people with disabilities, all people who are transgender and all gay men and lesbians – it is not against the law to discriminate against people who don't have disabilities, are not transgender and not homosexual (only those that are);
- the role or service is targeted towards people who are married if you would like the role to be done by a married couple;
- it is a special (or positive) measure being taken to promote substantive equality for a group of people who have one or more of the protected attributes;
- a religious body or organisation discriminates in:
 - ordaining or appointing priests, ministers of religion or members of a religious order (or training or educating those people seeking appointment), or
 - selecting or appointing people to perform functions relating to, or participating in, any religious observance or practice, or
- your organisation has obtained an exemption from the President of the NSW Anti-Discrimination Board to allow discrimination on any ground and in any area covered by NSW anti-discrimination laws

For further information, see Part 4 and <http://www.antidiscrimination.justice.nsw.gov.au/>

NOTE & CAUTION – NEW SOUTH WALES

There are two ways to apply for an exemption under the *Anti-Discrimination Act 1977* (NSW). The first is to apply to the President of the Anti-Discrimination Board of NSW under section 126 of the Act. Under this section, the President can grant an exemption to allow discrimination on any ground and in any area covered by the Act. Section 126 exemptions generally relate to employment and recruitment. The second way is to apply to the Minister (currently the Attorney General) under s 126A of the Act for a certificate that a special needs program or activity can operate in a discriminatory manner. The Minister cannot grant a certificate for race or age discrimination. Section 126A exemptions apply to special



needs programs, activities or facilities which promote access for certain groups of people affected by unlawful discrimination.

If you are considering applying for an exemption for your organisation, we recommend that you seek independent legal advice as the above information is just a guide. For information regarding how to apply for exemptions and specific timeframes, see <http://www.antidiscrimination.justice.nsw.gov.au/service-providers/exemptions>.

2.4.5 South Australia

Generally, discriminatory conduct will not be against the *Equal Opportunity Act 1984* (SA) if:

- it is a special measure being taken to achieve equal opportunity for people of a particular disability, race, age, sex, marital status, or for pregnant women, people with caring responsibilities and people of a chosen gender;
- it is a genuine occupational requirement for the position i.e. employing only women applicants for positions involving body searches of women;
- it is discrimination based on sexual orientation, gender identity or intersex status in relation to employment or engagement for the purposes of an educational institution if:
 - the educational institution is administered in accordance with the precepts of a particular religion and the discrimination is founded on the precepts of that religion;
 - the educational authority administering the institution has a written policy stating its position in relation to the matter;
 - a copy of the policy is given to a person who is to be interviewed for or offered employment with the authority or a teacher who is to be offered engagement as a contractor by the authority; and
 - a copy of the policy is provided on request, free of charge to employees, contractors and prospective employees and contractors of the authority; to students, prospective students and parents and guardians of students and prospective students of the institution; and to other members of the public.
- it is discrimination on the ground of gender identity for the purpose of enforcing standards of appearance and dress reasonably required for employment;
- if the person has an attribute which means that they would not be able:
 - to perform their work adequately without endangering themselves or others; or
 - to respond adequately to situations of emergency that should reasonably be anticipated in connection with the employment;
- the employer can demonstrate that it would impose unjustifiable hardship on the organisation to make reasonable adjustments to accommodate the impairment; and
- it is necessary to comply with an order of a court or tribunal, or is authorised by legislation.

For further information, see Part 4 and <https://eoc.sa.gov.au/what-discrimination>.

NOTE & CAUTION – SOUTH AUSTRALIA



As well as the exceptions that are already expressly provided for by the *Equal Opportunity Act 1984* (SA), an organisation can make an application to the South Australian Employment Tribunal to grant a temporary exemption from certain discrimination provisions (including outside of employment situations) under section 92 of the Act. An exemption may be granted if, for example, your program or service aims to promote equality of opportunity between people, prevent certain kinds of discrimination or helps people to participate in the economic and social life of the community. If you are considering applying for an exemption we recommend that you seek independent legal advice as the above information is just a guide. For further information on how to apply for an exemption, see <https://eoc.sa.gov.au/resources/discrimination-laws/exceptions-rules/applying-exemption>.

2.4.6 Tasmania

Generally, discriminatory conduct will not be against the *Anti-Discrimination Act 1998* (TAS) if:

- it is a special measure being taken to promote substantive equality for a group of people who have one or more of the protected attributes;
- it is required by the doctrines of the religion of an institution;
- it is for the purpose of the residential care of persons under the age of 18 years;
- it is based on a genuine occupational qualification or requirement in relation to a particular position;
- it is a live-in job where sleeping accommodation is provided for less than 5 adult persons;
- if the person has an attribute which means that they would not be able:
 - to carry out the inherent requirements of the employment; or
 - in order to carry out those inherent requirements would require services or facilities not reasonably required by another person, the provision of which would impose unjustifiable hardship;
- the employer can demonstrate that it would impose unjustifiable hardship on the organisation to make reasonable adjustments to accommodate the impairment; and
- it is necessary to comply with an order of a court or tribunal, or is authorised by legislation.

For further information, see Part 4 and <https://equalopportunity.tas.gov.au/discrimination>.

NOTE & CAUTION – TASMANIA



As well as the exceptions that are already expressly provided for by the *Anti-Discrimination Act 1998* (Tas), an organisation can make an application to the Anti-Discrimination Commissioner (the Commissioner) under section 56 of the Act to be granted a temporary exemption for conduct that would otherwise contravene certain discrimination provisions of the Act.

The Commissioner will only grant an exemption for conduct that furthers the purposes of the Act, and the exemption can be subject to any conditions the Commissioner sees fit. If you are considering applying to the Commissioner for an exemption for your organisation, we strongly recommend that you seek independent legal advice as the above information is

just a guide. For further information on how to apply for an exemption, see <https://equalopportunity.tas.gov.au/exemptions>.

2.4.7 Victoria

Generally, discriminatory conduct will not be against the *Equal Opportunity Act 2010* (Vic) if:

- it is necessary to comply with an order of a court or tribunal, or is authorised by legislation;
- a religious body or organisation discriminates in:
 - ordaining or appointing priests, ministers of religion or members of a religious order (or training or educating those people seeking appointment);
 - selecting or appointing people to perform functions relating to, or participating in, any religious observance or practice;
- conforming to the doctrines, beliefs or principles of the religion or where it is reasonably necessary to avoid injury to the religious sensitivities of people who follow the religion (where discrimination is on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity);
- it is necessary to protect the health and safety of any person, including the person being discriminated against (where discrimination is on the basis of disability, pregnancy or physical features);
- it is necessary to protect property (where discrimination is on the basis of disability or physical feature);
- the person is unable to carry out the 'inherent requirements' (essential duties) of the role (and no reasonable adjustments can be made to accommodate the person);
- avoiding the discrimination causes unjustifiable hardship on the organisation;
- your organisation is providing special services, benefits or facilities to meet the special needs of people with a particular personal characteristic; or
- it is a special measure being taken to promote substantive equality for a group of people who have one or more of the protected attributes.

For further information, see Part 4 and <https://www.humanrightscommission.vic.gov.au/home/our-resources-and-publications/victorian-discrimination-law>.

NOTE & CAUTION – VICTORIA

If your organisation's planned action does not fall within one of the statutory exceptions in the *Equal Opportunity Act 2010* (Vic), section 89 of the Act allows the Victorian Civil and Administrative Tribunal (**VCAT**) to grant temporary exemptions, allowing discrimination to be legal in some circumstances if it believes that this would further the Act's goal of promoting equal opportunity.

Exemptions apply for the period of time set by VCAT, which cannot be longer than 5 years. VCAT may also attach conditions when granting an exemption, such as a requirement to provide periodic reports on how often the exemption is applied. You may also wish to apply



for an exemption in cases where you are unsure whether an exception or special measure applies.

If you are considering applying to VCAT for an exemption for your organisation, we strongly recommend that you seek independent legal advice as the above information is just a guide. For further information on how to apply for an exemption, see

<https://www.humanrightscommission.vic.gov.au/discrimination/exceptions-exemptions-and-special-measures/exemptions/applying-for-an-exemption>

2.4.8 Western Australia

Generally, discriminatory conduct will not be against the *Equal Opportunity Act 1984* (WA) if:

- it is an act a purpose of which is to afford a person with a particular family responsibility or of a particular family status access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare, or any ancillary benefits;
- an employer who provides accommodation to its employees, provides accommodation of different standards to different employees where:
 - the standard of the accommodation provided to each employee is determined having regard to the number of persons in the household of the employee; and
 - it is not reasonable to expect the employer to provide accommodation of the same standard for all employees.
- an employer restricts the employment of a person if:
 - that person is a relative of an employee of the employer; or
 - that person is a relative of an employee of another employer,

and the first-mentioned employer can demonstrate, after making reasonable enquiries, that there is a significant likelihood of collusion between that person and that person's relative which would result in damage to the business of the first-mentioned employer.

- the purpose of the act is:
 - to ensure that persons with a particular attribute have equal opportunities with other persons in circumstances in relation to which provision is made by this Act; or
 - to afford persons with a particular attribute access to facilities, services or opportunities to meet their special needs in relation to employment, education, training or welfare.
- it is based on a genuine occupational qualification or requirement in relation to a particular position;
- carried out by an employer, principal or person:
 - where the employer or principal is a private educational authority; or
 - in the case of employment or work in a hospital or other place where a medical or other health related service is provided, where the employer or principal is a religious body,

if the duties of the employment or work are for the purposes of, or in connection with, or otherwise involve or relate to, the participation of the employee in any religious observance or practice.

- carried out by an employer on the ground of the holding or not holding of any political conviction or the engaging in or refusal or failure to engage in any lawful political activities with respect to the offering of employment or work;
- carried out by an employer on the ground of the impairment of that person if it is reasonable for the employer to conclude that the person with the impairment, because of that impairment:
 - would be unable to carry out work reasonably required to be performed in the course of the employment or engagement concerned; or
 - would, in order to carry out that work, require services or facilities that are not required by persons who do not have an impairment and the provision of which would impose an unjustifiable hardship on the employer.
- carried out by an employer on the ground of the other person's age when an engagement is offered or access to goods, services or facilities are provided if it is to ensure compliance with health and safety considerations; or
- it is necessary to comply with an order of a court or tribunal, or is authorised by legislation.

For further information, see Part 4 and <http://www.eoc.wa.gov.au/your-rights/what-is-discrimination>.

NOTE & CAUTION – WESTERN AUSTRALIA

As well as the exceptions that are already expressly provided for by the *Equal Opportunity Act 1984* (WA), an organisation can make an application to the State Administrative Tribunal (the Tribunal) under section 135 of the Act to be granted a temporary exemption from certain discrimination provisions.

The Tribunal may grant a temporary exemption for a period not exceeding five years and subject to any conditions it sees fit. If you are considering applying to the Tribunal for an exemption for your organisation, we strongly recommend that you seek independent legal advice as the above information is just a guide. For further information on how to apply for an exemption, see https://www.sat.justice.wa.gov.au/E/equal_opportunity.aspx.



3. Inducting your volunteers

Overview

Providing volunteers with a proper induction process is a good way to show your organisation’s commitment to its volunteers – it is the first impression the new volunteer will get of your organisation.

The ‘induction’ is the process of welcoming new volunteers to the organisation and familiarising them with their role, the role of other workers (paid and unpaid) and the workplace more broadly. All volunteers should complete the induction process before commencing any volunteer duties. After completing the induction, volunteers should know where to access your organisation’s policies and procedures, and also have copies of those that are particularly relevant to them and their role, for example, health and safety, privacy and volunteer grievance policies.

3.1 Checklist: Volunteer Induction

We recommend an induction checklist be completed for each new volunteer. A sample checklist is provided on the next page. This sample checklist is not exhaustive and should be changed to meet the needs of your organisation. It should be reviewed to make sure it is consistent with the volunteer Position Description (for example, if a volunteer is going to be using your organisation’s vehicles you may wish to make sure that an overview of any relevant vehicle policies and procedures are included as part of the induction process). Note the sample induction checklist does not constitute legal advice.

This sample induction checklist is also for use generally with volunteers. It may be appropriate that you have a completely separate checklist for different volunteer positions. For example, all of your committee members (also called board members or directors) may be volunteers. We recommend that new committee members have an induction to the role of the committee - it is important they understand the role of a committee generally, their specific role on the committee and how that role differs to the roles of other people in the organisation.

Once the induction checklist is completed you should provide a copy to the volunteer. You should also keep a copy with other records in relation to your volunteer. Part 6 of this Guide provides further information on volunteer record keeping.

RELATED RESOURCES

For further information on the process of inducting new board members refer to Not-for-profit Law’s facts sheets called *“Introduction to the board member role for new board members”* and *“Board Inductions – bringing on a new board member”* which are at: www.nfplaw.org.au/governance.

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 at 5.1 that *“Volunteers are provided with orientation relevant to their role and responsibility”* and *“Orientation for all volunteer roles are documented and implemented”*. A volunteer induction (and checklist) is a way of meeting this criteria. It is also important volunteers are effectively supported with appropriate training, coordination and/or management where appropriate.



Sample: Volunteer Induction Checklist

Checklist of Items	Completed	Follow up required? Who is to follow up?
Welcomed and introduced to other workers (paid and unpaid)	<input type="checkbox"/>	
Provided background about organisation	<input type="checkbox"/>	
Work station prepared and relevant safety considerations undertaken	<input type="checkbox"/>	
Walk through of the workplace and discussed work premises, facilities and Work Health and Safety (emergency procedures, first aid, safety considerations in the role, reporting health and safety concerns, critical incident policies)	<input type="checkbox"/>	
Discussed Volunteer Position Description, expectations and reporting structure	<input type="checkbox"/>	
Volunteer Agreement discussed including important issues like the nature of the relationship and how it can end (and signed)	<input type="checkbox"/>	
Consent and release form discussed (and signed)	<input type="checkbox"/>	
Key contact person allocated (to go to with any concerns, feedback or queries about role and duties)	<input type="checkbox"/>	
Policies provided and read by the volunteer (with confirmation in writing):	<input type="checkbox"/>	
• Privacy policy	<input type="checkbox"/>	
• Workplace behaviour policies	<input type="checkbox"/>	
• Health and Safety policy	<input type="checkbox"/>	
• Volunteer grievance policy	<input type="checkbox"/>	
• [Add other key policies and procedures, e.g. conflict of interest]	<input type="checkbox"/>	
Conducted training in relation to the role, including any machinery and equipment use	<input type="checkbox"/>	
Conducted/scheduled training in relation to workplace behaviour policies and risk management	<input type="checkbox"/>	
Discussed insurance coverage as a volunteer (what cover is available under the organisation's insurance)	<input type="checkbox"/>	
Signature of volunteer _____		
Date:		
Signature of volunteer manager _____		
Date:		

3.2 Volunteer Agreement

A Volunteer Agreement is an important part of engaging volunteers, helping to make sure the volunteer understands their rights, role and responsibilities. It is also important in helping your organisation manage its obligations in relation to health and safety. As set out in Part 3, the workplace health and safety (WHS) legislation enacted throughout Australia creates obligations for most organisations to ensure the health and safety of their volunteers. In addition to any obligations under the WHS laws your organisation also has a general duty of care towards your volunteers. There are other reasons in which a volunteer agreement is important, including the ownership of intellectual property (discussed below and also in Part 6 of this Guide).

A sample Volunteer Agreement is provided on the next page. This sample Volunteer Agreement may not be appropriate for every volunteer involving organisation. It should be changed to meet the needs of your organisation (see tips below). The sample Volunteer Agreement does not constitute legal advice. Your organisation may need to consider seeking legal advice on its Volunteer Agreement.

Once the sample Volunteer Agreement has been discussed with your volunteer and signed (see below), you should provide a copy to the volunteer. You should also then keep a copy with your other records in relation to your volunteer. For further information on volunteer record keeping, refer to Part 6: Organisational issues applicable to volunteers.

TIP – VOLUNTEER AGREEMENT DRAFTING

Our tips for drafting a Volunteer Agreement are as follows:

- be clear that you have engaged the person as a volunteer
- include a statement that the parties do not intend to enter into a legally enforceable contract in relation to the carrying out of the work (refer to below, 3.2.1)
- be clear and consistent in the use of ‘non-employment’ type language
- use terms such as ‘help to’ and ‘we would be pleased if you would’
- avoid terms such as ‘pay, payment, salary, contract, work, appointment’ or ‘you must’
- be clear that the volunteer will not be receiving payment for work but may receive reimbursement for reasonable expenses and that any other non-monetary benefits provided to the volunteer are done so on a gratuitous basis only and are not payment in lieu of salary
- outline what the volunteer can expect from the organisation (e.g. an induction, supervision and applicable insurance coverage)
- outline what the organisation expects from its volunteers (e.g. compliance with policies and procedures including WHS, privacy, confidentiality and workplace behaviour), and
- ask the volunteer to notify you if they are unable to attend to any allocated work.

3.2.1 Volunteer Agreement and the non-legal nature of the volunteer relationship

What is a legally binding relationship?

A legally binding relationship is one where the parties have agreed they have legal obligations to each other. Generally, this means that they intend that the promises made by each party will be binding, and if one party breaches the terms of the agreement, the other one has a right to seek damages against the breaching party or, in some circumstances, force the other party to perform certain obligations under the agreement.

The nature of a volunteer relationship requires that there is no legally binding relationship between the parties regarding the volunteer work to be carried out. For example, if the organisation does not provide the volunteer with work, the volunteer has no recourse against the organisation. Similarly, if the volunteer fails to report for duty as agreed, the organisation has no recourse against the volunteer. This is also explained in Part 2 (which deals with the differences between a volunteer and other workers, like employee relationships).

What are legally binding obligations?

There may be situations where a volunteer involving organisation wants to create legally binding obligations on the volunteer. Common situations when this is done is to protect the organisation's confidential information or intellectual property (as explained in Part 6 of this Guide). Provided such legally binding obligations go no further than this (i.e. create obligations around other tasks or the work), having a legally binding agreement in relation to such matters will not affect the nature of the volunteer relationship. The sample Volunteer Agreement below includes a paragraph which asks the volunteer to agree that a section of the agreement is binding. This section (paragraph 11) deals with intellectual property and confidential information. It also asks the volunteer to agree that it will be binding for the duration of the agreement and after the end of the agreement. The reason for it being binding after the volunteer agreement comes to an end is because it is important that your organisation is protected by any claims which could be made by the former volunteer in relationship to the ownership of IP or the use of (including disclosure of) confidential information.

3.2.2 Volunteer Agreement being 'executed' (signed) as a 'deed'

CAUTION – UNINCORPORATED ASSOCIATIONS

If your organisation is an unincorporated association (which means that it has not formalised its structure through a process of registration government), it cannot enter into contracts in its own name. The sample Volunteer Agreement is not appropriate for use by unincorporated associations.



'Deed of agreement'

A deed is a special type of binding promise or commitment to do something. It is not the same as a contract. A deed does not require "consideration" (which is one of the four requirements for a contract to be valid and enforceable, and generally refers to the exchange of something of value, such as the exchange of labour for payment). Deeds are sometimes used when there is no consideration or it is open to question. Executing (or signing) the Volunteer Agreement as a deed will help overcome any difficulty that may arise if there is no consideration (such as payment) provided for the undertakings in the document. This is particularly important in relation to the undertaking being made by the volunteer in relation to the organisation's confidential information and intellectual property (paragraph 11) as your organisation will want to be sure the volunteer is legally bound by this particular undertaking.

FURTHER READING

For more information on understanding contracts refer to Not-for-profit Law's guide at www.nfplaw.org.au/contractsoverview

'Execution'

Execution means signing an agreement, and where required doing so with any required formalities, including having a witness to the signing.

In relation to the signing of the sample Volunteer Agreement (below), the person signing it on behalf of your organisation must be authorised to do so. Your organisation may have a Volunteer Manager, and the organisation may have given authorisation to that person (in writing) so that they can execute the Volunteer Agreement. The signing should be witnessed by a third person (not the volunteer or the person authorised to sign on behalf of the organisation).

We suggest that your organisation obtains legal advice to ensure that the signature clause (the part of the Volunteer Agreement which the parties sign) is appropriate for your organisation and to ensure that your Volunteer Agreement will be considered a valid deed.

Sample: Volunteer Agreement

This is a Deed of Agreement made on between (insert volunteer name) (referred to in this document as 'the **volunteer**' or '**you**') and (insert organisation name).

1. You are a volunteer

The position of (insert volunteer role title) at (insert organisation's name) is a volunteer position. This means that you are not an employee of, or contractor to, (insert organisation's name) and, if you accept the role, you perform all duties on a voluntary basis and you will not receive remuneration or payment for your work, other than reasonable reimbursement of expenses (see below at paragraph 9).

2. What you can expect when volunteering at (insert organisation's name)

Neither (insert organisation's name) nor (insert name of volunteer) intend any employment or (other than in relation to paragraph 11) contractual relationship to be created (i.e. you are not an employee, independent contractor or consultant at (insert organisation's name)). If this changes at any time, and there is a possibility that you might undertake paid work for the organisation or be involved in vocational training, we will discuss this and document the arrangement in a formal employment contract, contract for services or other arrangement.

(Insert organisation's name) values its volunteers and we will endeavour to provide you with:

- a written position description so you understand your role and the tasks you are authorised to perform;
- a full induction, orientation and any training necessary for the volunteer role;
- a safe environment in which to perform your role;
- respect for your privacy, including keeping your private information confidential;
- a supervisor, so that you have the opportunity to ask questions and get feedback (see para. 4 below);
- reimbursement for your reasonable expenses so you are not out-of-pocket as a result of volunteering for us (for further information see para. 9 below); and
- insurance to cover you for the volunteer duties you are authorised to perform (see para. 10 below).

3. What (insert organisation's name) asks of its volunteers

We ask that you:

- support (insert organisation's name)'s aims and objectives;
- participate in all relevant induction and training programs;

- only undertake duties you are authorised to perform and always operate under the direction and supervision of nominated staff and obey reasonable directions and instructions;
- understand and comply with the organisation's policies and procedures including (insert policies, for example: equal opportunity, health and safety, privacy and confidentiality policies, and grievances policy);
- notify your supervisor or another member of staff of any health and safety issues or potentially hazardous situations that may pose a risk to you or others and report any accidents or incidents relating to staff, volunteers, or the workplace;
- behave appropriately and courteously to all staff, clients and the public in the course of your role;
- use any property or equipment given to you in your role safely and only for purpose of the role and return it to the organisation when you finish your volunteer role;
- let us know if you wish to change the nature of your contribution (e.g. hours, role) to (insert organisation's name) at any time;
- let us know immediately if there is anything, or anything arises, that makes you unsuitable or unable to legally carry out your volunteer role (e.g. your role requires you to drive and you lose your licence);
- comply with the law at all times; and
- be open and honest in your dealings with us and let us know if we can improve our volunteer program and the support that you receive.

4. Contact person

Your contact person at (insert organisation's name) will be (insert volunteer manager's name and contact details). If you have any questions or concerns about your role, your health and safety, or if there is any assistance you need to help you undertake your role, please contact (insert volunteer manager's name and contact details) as soon as possible.

5. Role description and details

(Insert role tasks and estimated hours and time commitment or roster details and location. Alternatively, attach details of these via a separate role description.)

It is important that you only perform the tasks in this role description and that you follow the instructions of (insert volunteer manager's name and contact details) and (insert organisation's name) staff.

In your induction session, we will explain our liability to you as a volunteer of the organisation as well as, your liability to third parties. However, one of the key factors in ensuring you are protected is that you are performing voluntary community work that is directed or supervised by an incorporated community organisation. It is therefore important that you only perform the tasks in the role description and as instructed by the organisation. To be covered by these laws it is also important that you are not affected by drugs or alcohol when you are volunteering.

If you are unsure whether a particular task or work is authorised, please do not hesitate to talk to your contact person.

6. The health and safety of you and others

At (insert organisation's name) volunteer safety, and the safety of everyone who is involved in our organisation, is a priority.

In (insert state), the (insert relevant OHS Act) (**OHS Act**) applies. Also, there may be other legal actions (such as negligence claims) that mean we always need to consider workplace health and safety issues.

Under the OHS Act and other laws, (insert organisation's name) has a duty of care to minimise risks to everyone affected by its conduct (including paid employees and volunteers).

It also means that as a volunteer, you may have OHS duties too. These include:

- to take reasonable care for your own health and safety
- to take reasonable care for the health and safety of others
- to comply with any reasonable instruction by (**insert organisation's name**)
- to let (**insert organisation's name**) know of any concerns you may have about safety and/or fitness in undertaking our role, and
- to cooperate with any reasonable policies and procedures of (**insert organisation's name**).

We will provide you with a full induction, safety equipment and role training (insert other safety measures here) when you commence as a (insert volunteer role) with our organisation. However, please do not hesitate to talk to your contact officer at any time if you have any health and safety concerns.

7. Induction and training required before you start in the volunteer role

(Insert organisation's name) is committed to providing suitable training in support of our health and safety, discrimination and privacy policies. For this reason, it is our policy that all volunteers undertake induction and/or training at (insert organisation's name) prior to commencing their volunteer position.

We will be holding the next volunteer induction session at (insert induction session details). Please contact (insert volunteer manager's name and contact details) to confirm you are able to attend this session or for details of alternative sessions.

8. Information we require before you can start in the volunteer role

Before you can commence the volunteer role, we need the following information: (insert background checks required including CV, ID checks, reference checks, police checks, licence checks, etc.)

All background check information will be conducted in accordance with our 'Background Check' policy and our privacy policy.

9. Volunteer expenses and other benefits

As a volunteer, (insert organisation's name) will provide you with reimbursement for any reasonable out-of-pocket expenses that you incur when performing authorised tasks associated with your role.

We do this to ensure that you are not financially disadvantaged as a result of your volunteer position with us. These payments are not remuneration or wages. You might need prior approval and will always need to produce receipts.

We may sometimes provide you with other benefits as part of your volunteering role (examples include: training, free food, accommodation, event entry, clothing or equipment). Where this occurs, it is on a gratuitous basis at the discretion of (insert organisation's name) and is not payment in lieu of salary.

10. Insurance

We are committed to providing adequate insurance cover for volunteers whilst carrying out their volunteering roles that have been approved and authorised by us.

(Insert organisation's name) has the following insurances: (list insurances)

To ensure this insurance covers you for any incidents that occur while you are volunteering with us, you need to: (include details of what the volunteer needs to do, e.g. report an incident as soon as it has occurred, sign in each time you volunteer etc.)

We want to let you know that the following events are unlikely to be covered by our insurance:

- actions that are beyond the scope of your volunteer role, or that occur without appropriate authority or permission from us;
- criminal activity (including criminal charges arising out of driving incidents); and
- dishonest or reckless activities.

Continue to list depending on exclusions in insurance policies.

11. Confidential information and Intellectual Property

Volunteers are likely to be given access to (insert organisations' name)'s confidential information as part of, or to assist them with, their role. Confidential information includes any information about (insert organisation's name), its business, services and clients which has been designated by (insert organisation's name) as confidential or which is, by its nature, confidential or proprietary to (insert organisation's name).

You are not permitted to use or disclose any confidential information for any purpose other than the proper discharge of your duties as a volunteer of (insert organisation's name).

All volunteers at (insert organisation's name) agree to transfer all intellectual property rights and interests (including copyright) in any ideas or materials they create relating to their provision of voluntary services at (insert organisation's name) to (insert organisation's name).

If you have any moral rights (i.e. the right of attribution of authorship, the right not to have authorship falsely attributed and the right of integrity of authorship, as defined in the *Copyright Act 1968* (Cth)) in any intellectual property owned by (insert organisation's name), you:

- irrevocably consent to any act or omission by (insert organisation's name) which infringes those moral rights;
- agree that your consent extends to acts and omissions by (insert organisation's name)'s licensees and successors in title; and
- agree that your consent is a genuine consent given under Part 9 of the *Copyright Act 1968* (Cth) and has not been induced by duress or any false or misleading statement.

You agree that, despite anything else in this Volunteer Agreement, the terms of this paragraph 11 are binding on you and continue after this Agreement ends.

12. Consent to use photographs and images

You agree that (insert organisation's name) may take photographs and video footage of you carrying out your volunteer work and use it for the purposes of marketing and promotion of (insert organisation's name) and its goods or services. This may include printed and digital marketing, including the use of your image on social media platforms.

Please sign to acknowledge that you have read this Volunteer Agreement and have had an opportunity to ask questions.

Executed as a deed on (Date) by:

Signed as a deed by)
[Volunteer name])

.....
in the presence of:

)

.....
Witness

Signed as a deed for and on behalf of

)

[Organisation]

)

ACN/ABN [number] by its authorised
representative

)

.....
Signature of authorised representative

)

in the presence of:

)

.....
Name of authorised representative
(BLOCK LETTERS)

Witness

4. Managing the performance of volunteers

Overview

Managing the performance of volunteers can be problematic if not done correctly. A well-structured performance management system provides a number of benefits both to the volunteer involving organisation and the volunteer.

The benefits of performance management include:

- Establishing the volunteer performance objectives and how these objectives align with both the organisation's values, purposes and activities and the volunteer's roles and responsibilities as set out in the Volunteer Position Description
- Improved guidance and assistance in developing the potential of the volunteer and their capabilities
- Identification of training needs of the volunteer, and
- Improved communication and relationships between a volunteer and their manager, including an agreed process for feedback from the volunteer.

EXAMPLE

Sarah, a long-standing volunteer at the organisation, gets angry about a misunderstanding and upsets a member of staff. On another occasion, she is short-tempered with another volunteer in front of peers, shocking them also. Her supervisor reviews the organisation's volunteer performance management policy and decides to ask Sarah to attend a volunteer performance management meeting. Her supervisor clearly outlines the 2 incidents which have occurred. Sarah admits that the 2 incidents have occurred and is quite upset about her conduct. Sarah apologises to the shift supervisor and says that she is very overwhelmed in her personal life. Sarah acknowledges that she can no longer commit to the organisation as a volunteer. Sarah and the shift supervisor agree to end the volunteer relationship. The shift supervisor took clear notes of the meeting with Sarah. Both Sarah and the shift supervisor signed the notes from the meeting. The organisation provided a letter to Sarah thanking her for her time at the organisation and confirming the volunteer relationship had ended.



4.1 Organisational Performance Management Plan

A volunteer involving organisation should have in place a plan as to how it will manage the performance of all of its workers. Although managing the performance of employees involves risks that do not apply to volunteers (e.g. unfair dismissal), best practice dictates the management of volunteers should not differ significantly from the management of employees. This provides for consistency of treatment and workers with some certainty as to the process they may expect where issues arise.

A useful way to think about performance management is to think in both terms of conduct and performance. "Performance" generally refers to the quality of work. For example, only partly recording a client's contact details in the organisation's systems or failing to collect necessary information from a client. This differs to 'conduct' which generally refers to the deliberate breaking of workplace rules, such as misuse of the organisation's equipment (e.g. using a vehicle without permission or in breach

of the organisation's policies), disclosure of confidential information, or inappropriate workplace behaviour (i.e. bullying or sexual harassment).

A performance management plan should include:

- **A review of the volunteer's performance after a set period of time** – although volunteers do not generally have a formal probationary period, it is a good idea for the organisation to set a timeframe following which it will turn its mind to whether the volunteer arrangement is working out as expected. If not, it is better for the organisation and, potentially, its clients, if arrangements which are not working out are addressed and, if necessary, ended at an earlier time than was anticipated.
- **Periodic appraisal of performance** – where possible, this should be a formal and documented process which clearly outlines aspects of the volunteer's work that is both satisfactory and unsatisfactory, how unsatisfactory aspects of work performance might be improved, identifies any training required or desirable and allows for goal setting for the upcoming appraisal period. Generally, appraisals are carried out at least annually but may be more often, depending upon the nature of the work. Periodic performance appraisal should not be confused with performance management procedures which are aimed at addressing specific performance or conduct issues as and when they arise.
- **Performance management procedures** – where specific issues arise that relate to either performance or conduct (or both) they should be addressed immediately (see 4.2 below). Failure to do so may result in damage to the organisation's reputation or property, damage or distress to clients, discontent amongst other volunteers and the creation of vicarious liability for the organisation (see Part 3: Safety).
- **Ending the relationship** – where volunteers do not respond appropriately to performance management procedures it may be necessary for the organisation to end the volunteer relationship (see 6.1 below).

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

[Volunteering Australia's National Standards for Volunteer Involvement](#) are relevant to much of the above discussion on performance management. For example:

Standard 7: Volunteer Recognition *"Volunteer contribution, value and impact is understood, appreciated and acknowledged"*. Criteria for this standard includes 7.2: Volunteers are informed about how their contributions benefit the organisation, service users and the community. Evidence of this includes that volunteers are provided with feedback on the value on the impact and value of their contribution to the organisation and its work. Periodic appraisals of volunteers performance is one way to provide a volunteer with the opportunity for feedback.

Standard 8: Quality Management and Continuous Improvement: *"Effective volunteer involvement results from a system of good practice, review and continuous improvement"* This involves at 8.2 "Volunteer involvement is regularly reviewed in line with the organisation's evaluation and quality" and at 8.3 "The organisation's performance with volunteer involvement is monitored". Evidence of meeting these criteria includes obtaining feedback from volunteers, from a range of methods. Periodic appraisals of a volunteers' performance is one way to provide a volunteer with the opportunity for feedback.

4.2 Performance Management Procedures and Process

Your organisation should develop specific procedures on how it will manage specific issues which arise that relate to either performance or conduct (or both). As outlined above this should be separate to any process in place for performance appraisal.

Where an issue relating to performance or conduct arises, the volunteer should be notified of the issue and a meeting arranged. It is good practice to ask the volunteer if they would like to have a support person present at the meeting and to ensure that a record of the offer having been made is kept (particularly if the offer is declined). The meeting process should be as follows:

- Clearly outline the relevant performance or conduct issues
- Give the volunteer an opportunity to respond to the issues raised
- Clearly and specifically outline why the current performance level or conduct is not acceptable and how the performance or conduct needs to improve
- If appropriate, discuss with the volunteer any reasonable support to be provided to help the volunteer improve (e.g. further instructions or specific training)
- Advise the volunteer of the consequences should the performance level or conduct not improve within the specified timeframe (i.e. ending the volunteer relationship)
- Seek the volunteer's agreement to improved performance and or conduct

Written notes should be kept of both the performance or conduct issues and of the meeting itself. It may also be useful to have another person from the organisation in the meeting.

Following the meeting, an objective consideration should be given to the responses given by the volunteer to the issues raised and the need for continued monitoring of the volunteer's performance and conduct. In some cases, it may be preferable or appropriate to simply end the volunteering relationship. For more information, see section 6.1 below.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

[Volunteering Australia's National Standards for Volunteer Involvement](#), in particular **Standard 5: Support and Development** "*Volunteer contribution, value and impact is understood, appreciated and acknowledged*" is relevant to much of the above discussion on managing performance and conduct. As stated by Volunteering Australia, "Volunteers understand their roles and gain knowledge, skills and feedback needed to safely and effectively carry out their duties. Support and development ensures that the organisation has processes to equip volunteers to perform their roles well and in line with the organisation's needs. Meeting this standard assists the organisation to identify and provide orientation, skill development and ongoing support needed by volunteers, and to manage situations fairly and consistently where a volunteer may not be meeting".

Evidence of meeting this standard includes that discussions are held with individual and/or teams of volunteers on achievements and areas for development and that volunteer performance or misconduct issues are promptly identified, recorded and addressed in line with principles of natural justice.



5. Managing volunteer grievances

Overview

Volunteers have the right to express grievances with the volunteer program, or your organisation. Your organisation should ensure that the volunteer's grievances are heard and dealt with in an appropriate manner.

Grievances occur in most volunteer involving organisations. They can be raised on topics including workload and work distribution, work conditions, and management-volunteer relations.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT

[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 at 6.3 "Volunteers have access to complaints and grievance procedures" and evidence of meeting this criteria includes:

- Volunteers are given information about how to make a complaint or raise a concern within the organisation and to relevant external bodies
- Grievances from volunteers are managed consistently, transparently, equitably and in line with the principles of natural justice.

If your organisation follows the advice set out below in relation to the handling of grievances, including having a grievance policy, this will help your organisation meet this criteria.



5.1 Handling volunteer grievances

To ensure volunteers' grievances are heard and dealt with in an appropriate manner, a volunteer involving organisation should:

- **Develop and implement a policy** for managing volunteer grievances (see 5.2 below).
- **Provide the policy to your volunteer** (attaching the policy to the Volunteer Agreement is a good way to ensure the volunteer has a copy, and the policy can also be discussed as part of the induction process).
- **Ensure all volunteer managers and those involved in supervising volunteers are aware of the policy** and understand their roles and responsibilities in relation to the policy.
- **Have a process for making sure grievances are addressed in a fair and appropriate manner**, which includes a review the outcome of the grievance to ensure appropriate decisions were made.

RELATED RESOURCES

Further information on complaint handling by volunteer involving organisations is on Not-for-profit Law's page www.nfplaw.org.au/complainthandling.



EXAMPLE



Bill, a volunteer, makes a complaint that the workplace is unsafe. Bill's complaint is that the stairs that lead into the donation shop are very steep and hard to identify. He claims that patrons of the donation shop have had near accidents on many occasions. The workplace supervisor receives the complaint and is immediately concerned for the safety of the volunteers, staff and customers. The workplace supervisor reviews the volunteer grievances policy and refers the complaint to the organisation's workplace health and safety officer. The workplace health safety officer organises a contractor to install a hand rail and to paint the stairs a brighter colour so that they are more easily identifiable. Bill is informed in writing of the outcome of his complaint. Bill is satisfied with the response of the organisation and does not take any further action.

5.2 Volunteer Grievance Policy

A volunteer grievance policy is a written document that outlines the process of making a complaint, how it is resolved and who is responsible for resolving it. The policy should be short and concise so that it is easy to understand and follow. It should include the following:

- **Purpose.** A brief description (e.g. the purpose of the policy is to provide a framework for the handling of grievances in a fair and timely manner).
- **Scope.** A statement on who the policy applies to. For example, student placements or internships may have slightly different processes which involve the student's school or university.
- **Definitions.** What is meant by a 'work related grievance' (e.g. any problem, or concern or complaint in relation to the volunteer's work environment, including changes to the volunteer's role, their safety, or the behaviour of others in the workplace).
- **Roles and responsibilities:** The role of managers (and supervisors) to manage a grievance complaint as well as the expectations of the volunteer who made the complaint.
- **How to raise a grievance:** The process the volunteer is to take i.e. raise the complaint with the volunteer's immediate supervisor in the first instance.
- **Procedures:** This should include mechanisms to ensure the fair resolution of the complaint (e.g. opportunities to be heard and use of supports).
- **Outcomes of the grievance resolution process:** The volunteer should receive written advice of the outcome of their grievance.
- **Further action:** Options to pursue the grievance through other appropriate internal or external processes.
- **Documentation:** All documentation relating to the grievance should be placed on the volunteer's file (also refer to Part 6 which deals with the keeping of volunteer records, including the requirements of confidentiality and privacy).

CAUTION

Some organisations will have volunteers who are also legal members of the organisation. If your organisation has any volunteers who are also members, it is important to ensure that any member's grievances are dealt with under the correct process. Depending on the subject matter of the grievance, this may be the volunteer grievance procedure or the grievance procedure in your organisation's roles or constitution. If your organisation is an incorporated association, you should check the grievance procedure requirements in your relevant incorporated association legislation.

For further information, see the resources on the Not-for-profit Law website at www.nfplaw.org.au/internalconflict.



6. Ending the volunteer relationship

Overview

There may be a number of reasons your organisation may choose to end a volunteer relationship. It is important to manage the process of ending a volunteer relationship well. This will help your organisation avoid any potential legal consequences or reputational damage.

Ending a genuine volunteer relationship is different to ending an employment relationship by termination of an employee (which involves certain legal rights, obligations and processes). It is important that both your organisation and the volunteer understand these differences. Your organisation should have processes for the ending of a volunteer relationship which include the keeping of volunteer records once the relationship has come to an end.

6.1 Ending the relationship

It is important your organisation is clear on the nature of the relationships with its workers (both paid and unpaid) as the rights and obligations differ. This is discussed in Part 2 of this Guide, which sets out how the *Fair Work Act 2009* (Cth) (**Fair Work Act**) does not apply to volunteer. This includes when ending the relationship.

A genuine volunteer is unable to bring a claim against your organisation for unfair dismissal. The provisions in relation to unfair dismissal do not apply to volunteers.

This is different to an employee, because under the Fair Work Act employees have certain rights, for example, in relation to redundancy or the ability to bring a claim for ‘unfair dismissal’ or ‘unlawful termination’. Unlike an employee, your organisation has no legal rights against a volunteer who does not turn up, walks out, and or does not return to your organisation. This is part of the nature of a true volunteer relationship. It is important that both organisations that use volunteers and volunteers themselves understand that the protections that apply in an employer-employee relationship are not the same as in an organisation-volunteer relationship.

FURTHER READING

For more information dismissing an employment (if it is appropriate, how to terminate lawfully and fairly) refer to Not-for-profit Law’s pages on employees at:

www.nfplaw.org.au/termination-andresignation

TIP

When discussing your organisations’ Volunteer Agreement with your volunteer it is a good time to make clear that relationship is not an employment relationship, as set out in paragraph 2 of the Volunteer Agreement. It will be helpful to explain that this means the protections that apply in an employer-employee relationship are not the same as in an organisation-volunteer relationship, and this means that the volunteer or organisation may end the relationship at any time.

When talking about ending the relationship you should avoid terms “dismiss”, “letting go” or “fire” as these are more suitable for an employment relationship. ‘End’ or ‘walk away’ are better terms to use.

6.2 Managing the process of ending the volunteer relationship

6.2.1 Reasons for ending the volunteer relationship

There may be a number of reasons why a volunteer involving organisation chooses to end a relationship with one of its volunteers. These include:

- there is no longer a need for the volunteer's services
- the volunteer's performance
- the volunteer's conduct is not satisfactory (or has not improved following a review process) or there has been serious misconduct, or
- the volunteer's presence may be detrimental to the health and safety of others in the organisation.

As outlined in Part 3 (Safety), a volunteer involving organisation has a duty of care to provide a safe work environment and could be held legally responsible for the actions of its volunteers.

If keeping a volunteer in the organisation is a risk to the health and safety of others (including members of the public), ending the relationship may be necessary to ensure you are acting in accordance with the standard of care required by law.

EXAMPLE

Your organisation has a number of soup vans that travel around the Adelaide Hills area feeding homeless people. You have a loyal volunteer that has been serving soup in the vans for the last 20 years. The volunteer is now in his 80s and recently there have been a number of incidents where his increasing fragility and instability has resulted in soup spills, and on one occasion, a minor burn to his hand and to another volunteer. You are concerned that continuing in the role poses a serious risk to his safety, other volunteers and the public that are being served. You discuss these concerns with the volunteer and explain that you have duty of care to take steps to minimise risks to health and safety.

There are a number of other suitable roles (i.e. calling suppliers and administration work) that you offer the volunteer. The volunteer does not accept this as he has his heart set on staying with the soup vans. You suggest that instead of serving, he hands out blankets, cutlery and napkins. He agrees this is a sensible compromise and you are now comfortable that you are not placing him or anyone else at risk. However, you should ensure he understands that he is no longer authorised to serve soup under any circumstances.



6.2.2 The process of ending the volunteer relationship

When ending a volunteer relationship you should think very clearly about your approach.

- **Be aware of other relationships.** As outlined above, and in Part 2, if the person has been engaged by your organisation as a paid worker your organisation will have different legal obligations including processes to be followed (and the person will have certain legal rights). Also be aware if the person is a member of your organisation as they will continue to have member rights (you should check your organisation's rules or constitution).
- **Be careful about ending a volunteer arrangement if there has been a recent complaint made by the volunteer.** This could be construed as 'victimisation' against the complainant, even if your

RELATED RESOURCES

Not-for-profit Law has fact sheets on members rights for both members of a company limited by guarantee and of incorporated associations (for each jurisdiction) at www.nfplaw.org.au/members.

organisation decided to end the relationship for completely unrelated reasons. For more information about victimisation, refer to Part 4 of this Guide (Workplace Behaviours).

- **Make sure the process is as fair and transparent as possible.** You do not need to give reasons why the relationship is ending, however, it is good practice to do so. Think about your organisation's reputation - the former volunteer may tell other volunteers in your organisation who could think you were being unfair and they may stop volunteering. They could also tell family and friends.
- **Confirm the arrangement has come to an end in writing and keep a record** of the documentation provided to the volunteer.
- **Maintain your organisation's obligations of confidentiality and privacy** of the volunteer.
- **Ensure all property of the organisation is returned** by the volunteer (documents, uniforms etc.).
- **Consider if security changes are needed** including to any buildings (access codes), IT systems and other electronic accounts (e.g. Facebook login details) and email passwords).

EXAMPLE

Confirming the end of the arrangement in writing not only provides finality for the volunteer and organisation but may be relied on by your organisation to avoid any liability (legal responsibility) that might arise as a result of the volunteer's future actions. This may be relevant if you need to show they were not a volunteer at the time of their actions and not a representative of your organisation. Consider the following hypothetical example:

The Ocean Voice is an organisation that runs a program providing media and public speaking training for people who are interested in environmental activism. The organisation matches the volunteers with media and speaking opportunities to help raise awareness and change attitudes about environmental issues. At a recent speaking event, a volunteer called Sarah became violent and harassed a camera person. There were some informal discussions between Kylie and the volunteer manager about ending her involvement in the program while she obtains some care in relation to issues in her personal life. However, Kylie continues to be approached directly by journalists and other organisations for media and public speaking opportunities. Kylie takes up these opportunities and continues to represent that she is a volunteer at Ocean Voice. At one event, she again has a violent episode and physically abuses an interviewer resulting in their hospitalisation. As a result, Ocean Voice's reputation is tarnished and the relationships it has built with the media suffers.

In this example, the interviewer does not make a claim against the organisation but this is a potential outcome where a volunteer causes harm to someone while volunteering. As the ending of the volunteer relationship had not been formalised or documented, it would be difficult to show Sarah was no longer a volunteer, and therefore that Ocean Voice is not liable for her actions.

6.2.3 Volunteer records at the end of the volunteer relationship

Whilst organisations have limited legal obligations to keep specific records relating to volunteers we recommend a volunteer involving organisation keep records of its volunteers for at least 7 years. Part 6 of this Guide sets these reasons out in more detail which include that legal action can generally be brought up to 6 years after an event to which the legal action relates (for example, a former volunteer alleges your organisation's negligence was the cause of the injury to the person while they were volunteering for your organisation). Some claims have even longer limitation periods. If your

organisation is also bound by work health and safety laws in most jurisdictions these laws generally require certain records be kept for five years.

Keeping volunteer records for seven years is also consistent with any obligations your volunteer involving organisation has under the Fair Work Act in relation to employee records. This obligation does not specifically extend to volunteer records, however, as we have set out in this Part, best practice dictates that the management of volunteers should not differ significantly from the management of employees, which includes record keeping.

NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT



[Volunteering Australia's National Standards for Volunteer Involvement](#) sets out that evidence to meet **Standard 1 Leadership and Management**: *the governing body and senior employees lead and promote a positive culture towards volunteering and implement effective management systems to support volunteer involvement*, includes that:

1.4 “*Volunteer records are maintained*”: required information to be collected from volunteers is identified; information is documented and secured; and the organisation has documented and implemented processes that comply with privacy legislation for securely managing volunteer personal and confidential information.

Summary: recruiting, inducting, managing and ending the volunteer relationship

Recruitment of volunteers: You should recruit your volunteers in a fair and non-discriminatory way.

A *Volunteer Position Description* should be used for all volunteer positions in your organisation. It should focus on the specific skills or qualifications needed for the role (and not other attributes of a person). It should be used when advertising for volunteers and in making decisions about potential volunteers, for example, when deciding if the volunteer has the skills to undertake the role and what checks might be necessary. In some instances, checks will be required by law. If your organisation and its workers are involved in child related work then generally a Working with Children Check will be required. Even when not required, your organisation ought to undertake some level of screening for volunteers. This is because all organisations have a responsibility to ensure they maintain a safe environment for all workers.

Organisations that have an anti-discrimination policy and procedures (as a matter of best practice, if not otherwise required by law) help all of their workers be protected from discriminatory behaviour and will also help prevent damage that may arise from a complaint of discrimination.

Inducting volunteers: Volunteers should complete an induction process before commencing any volunteer work. We recommend using a *Volunteer Induction Checklist*. After completing the induction, volunteers should know where to access your organisation's policies and procedures, and have copies of those most relevant to them and their role, for example, health and safety, privacy and volunteer grievance policies.

A *Volunteer Agreement* is also an important part of engaging volunteers, helping to make sure the volunteer understands their rights, role and responsibilities, along with those of the organisation. A genuine volunteer relationship requires there is no legally binding relationship between the organisation and the volunteer in relation to the work to be carried out. A *Volunteer Agreement* will also assist with situations where a volunteer involving organisation wants to create legally binding obligations on the volunteer, for example, to protect the organisation's confidential information or intellectual property. Provided such legally binding obligations go no further than this, having a legally binding agreement in relation to such matters will not affect the non-binding nature of the volunteer relationship.

Managing performance: If not done correctly, performance management can be problematic. A well-structured performance management system provides a number of benefits both to the organisation and the volunteer. A management system should include a management plan and processes to be followed.

Managing volunteer grievances: Volunteers have the right to express grievances with the volunteer program or your organisation. Your organisation should ensure volunteers' grievances are heard and dealt with in an appropriate manner. A volunteer grievance policy should be in place and should outline the process of making a complaint, how it is resolved and who is responsible for resolving it.

Ending the volunteer relationship: Sometimes ending the relationship may be necessary to ensure your organisation is acting in accordance with the standard of care to its workers that is required by law. There may be other reasons to end the relationship. Many volunteers do not understand how the relationship can end, and it is important this is understood from the beginning of the relationship – we recommended it is discussed as part of the induction process.

7. Annexure

7.1 Screening requirements by State and Territory

The links will take you to the Not-for-profit Law website (to the page concerning recruitment). You will need to scroll to the end of the page and select your jurisdiction. Screening Guides for each jurisdiction were reviewed in August 2018.

7.1.1 [Australian Capital Territory](#)

7.1.2 [New South Wales](#)

7.1.3 [Northern Territory](#)

7.1.4 [Queensland](#)

7.1.5 [South Australia](#)

7.1.6 [Tasmania](#)

7.1.7 [Victoria](#)

7.1.8 [Western Australia](#)

7.2 Overview of visas

Refer to the following page for an Overview of Visas

7.2 Annexure: recruiting, inducting, managing performance and ending the volunteer relationship

Overview of Visas:

Work restrictions may apply to temporary visas, such as tourist and student visas. These may affect whether the visa holder can engage in unpaid work (that is volunteer for your organisation) restrictions are indicated by particular visa conditions. The most common work conditions are:

Visa condition	Description of work restriction
8101	"No work" – found on a variety of visas
8104	"Maximum 40 hours work a fortnight whilst in Australia (except for 573/574 visa holders and where the primary visa holder is studying a Masters or Doctorate degree). People with this condition can only start work once the primary visa holder has started their course" – found on dependent student visas
8105	"Maximum 40 hours work a fortnight whilst the holder's course of study or training is in session, once they have started their course. Subject to course requirements, work may be unlimited when the course is not in session or when they have finished the course for which they were enrolled in" – found on primary student visas
8107	"Only work for sponsored employer (or associated entity) in approved occupation, must start work within 90 days of arrival or visa grant and cannot cease work for more than 90 days" – found on the temporary skilled work visa (former Subclass 457 visa and (from March 2018) Subclass 482)
8115	"No work – found on visitor visas. "Visa holder must only undertake business visitor activities" – found on business visitor visas
8539 / 8549	"Must only live, study and work in designated regional areas "
8547	"Must not be employed with one employer for more than 6 months" – found on working holiday (Subclass 417) and work and holiday (Subclass 462) visas

NOTE ON TEMPORARY PROTECTION VISAS

Currently, Temporary Protection Visas (TPVs) allow the holder (of the visa) to work in Australia. The work rights of holders of TPVs have changed regularly over the years. We recommend that your organisation check the work rights of workers with TPVs from time to time using the Visa Entitlement Verification Online (VEVO) system.



Can a person with work restrictions volunteer?

Understandably, there can be confusion around whether volunteering is considered working in relation to the above visa restrictions. Both the terms 'work' and 'volunteer' are defined in the *Migration Regulations 1994* (Cth).

A person with work restrictions (including 'no work' condition 8101) wishing to undertake voluntary work may do so, if:

- the person does not receive remuneration for performing the duties of the position, other than the following:
 - reimbursement for reasonable expenses incurred by the person in performing the duties, or
 - prize money, and
- the duties would not otherwise be carried out by an Australian citizen or an Australian permanent resident in return for wages.

A person wishing to undertake voluntary work may do so on a Tourist stream visa (for persons who wish to visit or stay in Australia for up to 12 months for non-work purposes other than business or medical treatment), but only if the voluntary work:

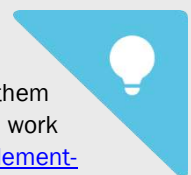
- would not otherwise be undertaken in return for wages by an Australian resident (that is, it is a designated volunteer role)
- is not undertaken in a commercial organisation
- is genuinely voluntary (for example, no financial payment is received. Board and lodging is acceptable)
- is short term (generally 3 months), and
- is of benefit to the community.

A person wishing to undertake voluntary work may do so on a student or student dependent visa that is not counted towards their 40 hours of work a fortnight if:

- their main purpose is to study in Australia and any voluntary work remains incidental to this
- the work involved would not otherwise be undertaken by an Australian resident in return for wages, and
- the work is genuinely voluntary for a not-for-profit organisation and that no remuneration, in cash or kind, is received in return for the activity.

TIP

We recommend that organisations run a VEVO check of a person's work rights before taking them on as a volunteer if they are not an Australian citizen or permanent resident with unrestricted work rights. VEVO is found at [https://www.homeaffairs.gov.au/busi/visas-and-migration/visa-entitlement-verification-online-\(vevo\)](https://www.homeaffairs.gov.au/busi/visas-and-migration/visa-entitlement-verification-online-(vevo))



We also recommend the organisation seek independent immigration legal advice where required. More information is provided in Section 3 below.

What are your volunteer involving organisation's obligations in relation to visa holders?

When dealing with people who are not permanent residents, it is important to check that visa conditions are not breached due to their involvement with your organisation. Under the *Migration Act 1958* (Cth) (**Migration Act**), penalties apply to organisations that engage an 'illegal worker' (a non-citizen who is working without a valid visa or working/volunteering in breach of a visa condition), unless it can show that reasonable steps at reasonable times were taken to make sure the person was in fact legal.

Under the law, it does not matter if the organisation did not know the person's work rights. Organisations may be penalised for simply having such a person on their premises. Therefore, it is important that organisations verify a person's immigration status and work rights before and during the volunteer work period. A person is a legal worker if they are:

- an Australian citizen
- an Australian permanent resident
- a New Zealand citizen, or
- a foreign national with a visa with permission to work in Australia (and who is not in breach of their visa conditions, for example, the visa has expired)

In order to confirm the above, an organisation must sight an Australian or New Zealand passport or conduct a VEVO check. For a full list of documents an organisation must sight and keep copies of, go to the Department's [Employing legal workers guide](#).

If you believe or know that a potential volunteer is in Australia on a visa, then you should check that they have permission to work. These checks are important to avoid inadvertent breaches of visa conditions.

The easiest and quickest way to ensure an organisation is taking reasonable steps to ensure it is engaging legal workers, is to use the Department's [VEVO system](#). Using this system, your organisation can either:

- register as a VEVO organisation and, with the individual's consent, conduct the search yourself, or
- ask the individual to send their current visa details directly from the VEVO Enquiry Form.

! CAUTION

It is important that your organisation checks the VEVO results were recently generated and continues to complete VEVO checks during the person's volunteer work with your organisation. This is because visa status and work rights may change. It is not enough to view results of a VEVO search conducted by a third party (unless, completed by a Migration Agent) or a printed copy held by the individual as these could be out of date.

The VEVO search will reveal the visa status and work entitlements for the visa holder. It will also only state if the person does not have permission to work or has work restrictions. If the visa has no work restrictions then the individual is free to work and volunteer while they hold a valid visa. However, VEVO checks are only current at the time conducted. Therefore, it is important that regular ongoing checks are conducted, relevant dates tracked (eg. work and expiry dates) and records kept on file confirming the organisation has verified the person's immigration status and work rights.

NOTE

It is important that your organisation checks the VEVO results were recently generated and continues to complete VEVO checks during the person's volunteer work with your organisation. This is because visa status and work rights may change. It is not enough to view results of a VEVO search conducted by a third party (unless, completed by a Migration Agent) or a printed copy held by the individual as these could be out of date.



TIP

Add VEVO checks to your volunteer recruitment process (as explained at 2. Volunteer Recruitment of this Part of the Guide) and include a copy of the VEVO Results in the volunteers's file (as explained in Part 6 of the Guide)



EXAMPLE

An organisation is recruiting volunteers to assist in its after school homework program for disadvantaged youth in Adelaide. A University student on exchange from Italy applies for one of the volunteer positions. She is a wonderful fit for the program, especially as she would be able to assist the students with their Italian homework.

The organisation is unsure whether the student can volunteer on her Student Visa and doesn't want to put her status in jeopardy. It also wants to ensure the organisation is complying with its own obligations. It takes the following steps before engaging the student:

1. registers with VEVO online
2. obtains consent from the student to conduct a VEVO search
 - the search reveals the student visa with condition 8105 (she cannot work more than 40hrs a fortnight while her course is in session).
 - the student is concerned as she already has paid work of 30 hours a fortnight and this volunteering role may push her over the threshold in breach of her visa condition.
3. the organisation assures the student the position is a **genuine voluntary position (it would not be performed by an Australian in return for wages in her absence)**, and thus **it will not be counted towards her 40 hours.**

The organisation may have some paid interpreter work available during school holidays while the afterschool program is not running. It would like to offer this to the student. It ensures the role is limited to 10 hours a fortnight while she is attending university classes, so as not to breach her visa condition.



FURTHER READING

The Department of Home Affairs' [website](#) features with information on engaging legal workers, including the [Visa Entitlement Verification Online](#) system. The relevant legislation is the [Migration Act 1958 \(Cth\)](#) and [Migration Regulations 1994 \(Cth\)](#)

The Fair Work Ombudsman website features information on [Unpaid work](#).

Resources

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, employee or independent contractor?
- ✔ Part 3: Volunteer safety
- ✔ Part 4: Volunteers and unlawful workplace behaviour
- ✔ Part 6: Organisational issues applicable to 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

- ✔ **Recruitment** - www.nfplaw.org.au/recruitment

For more information about recruitment including Not-for-profit Law's Screening Guide Checks.

- ✔ **The People Involved** - www.nfplaw.org.au/people

For more information relationships between an organisation and their employees, volunteers, clients and members.

- ✔ **Risk and insurance** - www.nfplaw.org.au/riskinsurance

You can download Not-for-profit Law's Risk Management and Insurance Guide.

- ✔ **Privacy** - www.nfplaw.org.au/privacy

You can download Not-for-profit Law Privacy Guide, which includes information about obligations under privacy law.

State and territory anti-discrimination and equal opportunity regulators

- ✔ [Australian Human Rights Commission](#)
- ✔ [Victorian Equal Opportunity and Human Rights Commission](#)
- ✔ [Anti-Discrimination Board of NSW](#)
- ✔ [Anti-Discrimination Commission Queensland](#)
- ✔ [ACT Human Rights Commission](#)
- ✔ [WA Equal Opportunity Commission](#)
- ✔ [SA Equal Opportunity Commission](#)
- ✔ [Northern Territory Anti-Discrimination Commission](#)
- ✔ [Equal Opportunity Tasmania](#)

Anti-discrimination and equal opportunity legislation

- ✔ [Age Discrimination Act 2004 \(Cth\)](#)
- ✔ [Anti-Discrimination Act 1977 \(NSW\)](#)
- ✔ [Anti-Discrimination Act 1991 \(Qld\)](#)
- ✔ [Anti-Discrimination Act 1992 \(NT\)](#)
- ✔ [Anti-Discrimination Act 1998 \(Tas\)](#)
- ✔ [Disability Discrimination Act 1992 \(Cth\)](#)
- ✔ [Discrimination Act 1991 \(ACT\)](#)
- ✔ [Equal Opportunity Act 1984 \(SA\)](#)
- ✔ [Equal Opportunity Act 1984 \(WA\)](#)
- ✔ [Equal Opportunity Act 2010 \(Vic\)](#)
- ✔ [Racial Discrimination Act 1975 \(Cth\)](#)
- ✔ [Sex Discrimination Act 1984 \(Cth\)](#)

Other relevant legislation

- ✔ [Fair Work Act 2009](#) (Cth)
- ✔ [Privacy Act 1988](#) (Cth)

Volunteering Australia resources

- ✔ Volunteering Australia 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:

- ✔ Volunteering and Contact ACT – www.vc-act.org.au
- ✔ The Centre for Volunteering (NSW) – www.volunteering.com.au
- ✔ Volunteering Queensland – www.volunteeringqld.org.au
- ✔ Volunteering SA&NT – www.volunteering-sa-nt.org.au
- ✔ Volunteering Tasmania – www.volunteeringtas.org.au
- ✔ Volunteering Victoria – www.volunteeringvictoria.org.au
- ✔ Volunteering WA – www.volunteeringwa.org.au

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A NFP Law Information Hub resource. Access more resources at www.nfplaw.org.au.

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National Volunteer Guide (Part 6)

This part provides guidance on organisational issues applicable to volunteers: intellectual property, privacy and record keeping

October 2018

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**Part 6: Organisation
issues applicable to
volunteers**



Introduction to the key organisational issues applicable to volunteers

This part covers:

- ✔ introduction to the key organisational issues
 - ✔ intellectual property
 - ✔ privacy law, and
 - ✔ record keeping.
-

1. Introduction

This Part of the Guide covers some of the key organisational issues that volunteer involving organisations often come across. For example:

- Who owns photographs taken by a volunteer for use on our social media sites?
- Are obligations regarding use of confidential information the same for volunteers as they are for employees?
- What are our privacy obligations towards our volunteers?
- What records need to be kept in relation to volunteers? What about records involving personal information (for example, a copy of the volunteer's Working with Children Check)? For how long should we keep these records?

This Part begins by providing a brief overview intellectual property. Each form of intellectual property is different in terms of what it covers, the duration of the coverage and a number of other matters. Volunteer involving organisations need to understand the difference between these forms of intellectual property because in some circumstances the law treats volunteers differently.

A volunteer involving organisation must make their volunteers aware of the organisation's obligations, where applicable, in relation to personal information it may collect from people, including clients, workers and members.

Volunteer involving organisations must also be aware of the obligations they owe to their volunteers in relation to the personal information of those volunteers.

While there are other laws that apply in relation to the keeping of records about volunteers, even where these laws do not apply it is good idea to keep records of your volunteers for a number of reasons including internal organisational reporting, possible disputes or legal action, and requirements under insurance policies.

2. Intellectual property

Overview

As part of undertaking its activities, your organisation will develop, hold and use intellectual property. This can include your organisation's name, its logo and the names and logos of programs and services which it provides. Your organisation may produce training materials or a report on the organisation's activities, it may create photos or other artistic materials and use these in the organisation's publications or on social media.

It is important that your volunteer involving organisation understands how intellectual property is created, who owns it and how ownership can be changed. This understanding (and the taking of any necessary action) will help ensure that your organisation's intellectual property rights in material produced by volunteers are protected and your organisation does not unwittingly infringe a volunteer's intellectual property. Infringement of IP rights, even unintentionally, may lead to undesirable consequences (e.g. legal action against your organisation).

2.1 What is intellectual property?

Intellectual property or 'IP' is a legal term used to describe the property of your 'mind'. It can take many forms, with the most common being an invention, trademark, design or the expression of an idea. These forms are all different in what they protect, how they are protected, how they are enforced and exploited, and the duration of the protection.

It is important to understand that intellectual property rights can be described as a series of 'negative rights' meaning they give the owner of the intellectual property the right to 'exclude' others from the use of the intellectual property (e.g. the creator of a literary work has a right to prevent others from publishing the work). An IP owner will also need to take certain steps to exploit their own rights, for example, by publishing the literary work or by licencing or assigning the work.

In Australia, IP rights are protected under Commonwealth legislation, as well as by common law (law which is developed through the decisions made by judges, rather than through legislation passed by the Parliament). In some instances, IP protection will be automatic and will not require any formal registration (e.g. copyright), while in other cases, you must formally apply to register the IP to protect it (e.g. patents).

Whether a person works for your organisation as an employee, contractor or volunteer will, at law, have consequences for the ownership of the intellectual property created by that person.

2.2 Copyright

Copyright includes original ideas and information which are written down or 'fixed' in material form (i.e. not simply ideas). This can include writing, drawings, diagrams and patterns. It is the expression of the idea, not the idea itself that is protected by copyright. In Australia, the relevant law is the *Copyright Act 1968* (Cth). There is no need to 'register' copyright material like there is other forms of intellectual property.

For the majority of material, copyright protection will last for 70 years from the end of the calendar year in which the author of the material dies. The owner of the copyright has the exclusive right to do a number of things with the material, including:

- copying or reproducing the copyright material in any format (e.g. scan, print or photocopy)
- publishing the material (e.g. in hardcopy or electronic form)
- performing the material in public (e.g. present at a conference or training session)
- making an adaptation of the material (e.g. translate it into a different language, or updating it over the years), and
- communicating the material to the public (e.g. publish or broadcast on the internet).

2.2.1 Ownership of copyright

There is potential for misunderstanding about whether copyright is owned by an organisation as a whole, or by the individual within the organisation who created it. This is a common issue faced by volunteer involving organisations. It is particularly important given the default position at law - as a general rule, copyright is owned by the creator of the material. There are exceptions to this rule.

Examples include:

- Employers will own copyright in certain work produced by employees in the capacity of their employment.
- Works subject to an agreement with a government department. Unless the agreement specifies otherwise, there is a presumption that the copyright in any work produced under the agreement belongs to the government department. This rule applies even where the government department is not the creator of the material.

Transfer of ownership of copyright (Assignment)

It is possible for a creator to agree (by clear written agreement) to transfer ownership of copyright in a work to another person or organisation. This is called an assignment of copyright. This may be relevant where work is created on commission for your organisation (for example, a logo or website design).

If your organisation wishes to own the copyright in material created by a volunteer (or in work it commissions from another person or organisation), it should enter into a written agreement with the creator of the material that clearly states that the copyright in the material created will be held by your organisation. The agreement should be signed by the volunteer or other person creating the material, and by your organisation.

In the absence of a written agreement to this effect, the copyright will be owned by the volunteer who created the work and the organisation will have no legal right to use, copy, duplicate or publish the work.

Authorised use of copyright (Licence)

It is also possible for one person to retain the copyright ownership in a work but to grant another person a licence to use the work as they need to. For example, your organisation might commission an academic to produce a report on behalf of your organisation. You could enter into an agreement with

EXAMPLE

Justin volunteers at a local environmental protection organisation.

Justin is a keen photographer and takes some artistic photographs of trees and other local plants in the area for the organisation to use on its website and on its social media sites (e.g. Facebook and Twitter).

Unless Justin and the organisation have agreed in writing otherwise, Justin owns the copyright in those photographs.

the academic that provides that your organisation retains the copyright in the report but the academic can use the work within certain terms – such as publishing the report within a broader academic study. This is called a ‘non-exclusive licence’.

Use of licences may often be inappropriate because your organisation will want to be the only party allowed to use the copyrighted material (depending on the nature of the copyrighted material) and it will likely want to make additions to the copyrighted material over time. Who owns these additions can become a complex question and lead to disputes.

As with transfers of copyright ownership, any agreement to grant a licence should be made in writing and ensure that the organisation which owns the copyright is not prohibited from also using the copyright i.e. the licence to the person who created it is non-exclusive.

Agreements with volunteers in relation to ownership of copyright

If you have had volunteers producing material for you but have not had an agreement in place which deals with the ownership of copyright in material produced by the volunteer (such as a volunteer agreement) before the volunteer has begun developing material, it is still possible for the volunteer to assign its copyright to the community organisation, such as under a Deed of Assignment.

If the volunteer does not agree to assign its ownership in the copyright to your organisation, then you should cease using any material in which the volunteer owns all the copyright **immediately** to prevent your community organisation potentially infringing the volunteer’s copyright.

2.2.2 Infringement of copyright

Copyright is generally infringed if someone who is not the owner of copyright exercises one of the copyright owner's exclusive rights (such as publication, see above at 2.2) without the owner’s permission.

A person may also be liable for copyright infringement if they are found to have authorised another person to infringe the copyright. ‘Authorising’ can mean requesting someone to infringe copyright, or allowing someone working under your supervision or to infringe copyright.

Examples of uses of material that may infringe copyright include:

- photocopying, emailing, broadcasting or printing material
- recording a video that incorporates music that is subject to copyright protection, or
- communicating material to the public by making it available on a website.

There are a limited number of exceptions to copyright infringement, including research and study, parody and satire. However, there is no general exception for not-for-profit community organisations.

If your organisation wants to use the copyrighted work of another person or organisation, it must first seek and obtain permission from the copyright owner before doing so. When seeking permission from the owner you should be clear about the copyright material in question, how you will use the content, where you will use the content and for how long your organisation intends to use the content. The permission should be documented in writing.

EXAMPLE

Sam drafts an original training manual for a community organisation in 2018, while completing a volunteer placement. Sam passes away in 2021. His copyright in the work will therefore continue to exist until the start of 2092.

2.3 Trade marks, patents and designs

The other main forms of intellectual property are set out below. In all instances, the best way for a volunteer involving organisation to protect these forms of intellectual property is to register them with IP Australia.

2.3.1 Trade marks

Trade marks are words and images used in relation to a particular good or service e.g. logos and brand names. In Australia, the relevant law is the *Trade Marks Act 1995*, which sets out the criteria for registration along with other matters including the length of protection (10 years from date the registration is filed).

An organisation can use a word or logo as a trade mark without it being registered with IP Australia. However, registration confers a number of rights (which are legally enforceable) on the holder of a registered trade mark, including:

- the exclusive right to use and authorise the use of the trade mark in relation to the goods or services for which the trade mark is registered
- the right to obtain relief if the trade mark is infringed (e.g. an injunction, or an order to the infringer to cease using the infringing trademark)
- the right to assign or licence the trade mark, and
- the protection of trade mark rights being infringed by third parties through the imposition of penalties including criminal penalties (i.e. falsifying a registered trademark or falsely applying a trademark).

If a trade mark is not registered, the owner has limited rights in the event it is misused or infringed, such as a claim of misleading or deceptive conduct under Australian Consumer Law or 'passing off' under the common law.

A trade mark should be registered in the name of the organisation itself, being the legal entity having ownership of the trademark, even if a volunteer has assisted in the creation of the trade mark, patent or design. The position at law is different if the organisation is an unincorporated association (see below).

2.3.2 Patents and Designs

- A **patent** generally means an invention or innovation. In Australia, the relevant law is the *Patents Act 1990* (Cth). Once registered with IP Australia, protection lasts up to 8 years for an innovation patent, 20 years for a standard patent and 25 years for patent of a pharmaceutical substance.
- A **design** generally means a shape, configuration, pattern and ornamentation, which gives a product a unique appearance. In Australia the relevant law is the *Designs Act 2003* (Cth), and once registered, protection lasts five years from the filing date of the application to register.

In both cases, a patent or design should be registered in the name of the organisation itself, being the legal entity having ownership of the patent or design, even if a volunteer has assisted in the creation of the trade mark, patent or design. This is unless the organisation is an unincorporated association.

Unincorporated associations

FURTHER READING

For more information on Trademarks, patents and designs, go to Not-for-profit Law's webpage on [Intellectual Property](#) or refer to [IP Australia](#).

While registration of a design, trademark or patent will usually be in the name of the organisation, this cannot be the case where the organisation is an unincorporated association. This is because an unincorporated association is not a separate legal entity - it cannot own IP in its own name. In this situation, it is common for registration to be under the name of a member of the governing body of the unincorporated association. In this instance, it is important to document in writing that the member of the governing body does not hold the registration for his or her own benefit but for the benefit of the unincorporated association.

2.4 Moral rights: what are they?

“Moral rights” are the rights of a creator to be attributed as the author of a work, and to have their works treated with respect. They are personal to a creator which means the rights cannot be transferred or assigned. Moral rights mean that a creator can insist on being given credit for the work, not have someone else be attributed as a creator, and that their work not be changed or added to in a manner that would have a negative impact on the creator’s reputation. However, a creator can waive their rights or give consent to certain things that may otherwise breach their moral rights. Creators have moral rights in a work *even if* they do not own copyright in their work.

In the context of volunteers, this means that even if a volunteer assigns his or her copyright in a work to an organisation, he or she must also waive their moral rights in writing. Otherwise, the volunteer may insist that the organisation attribute him or her as an author and not change the work in a way that would negatively impact on the volunteer’s reputation.

2.4.1 Avoiding infringing moral rights

To avoid infringing a volunteer's moral rights in works they may create for your organisation, your organisation should ensure that it has a written consent from the creator of material to use the material in the way it intends without attribution. This means your organisation should consider written agreement with the volunteer that provides your organisation with consent to do certain things that otherwise might infringe the creator’s moral rights. For example, not naming them on your organisation’s website as an author of material used on your website. In many circumstances your organisation may not wish to identify the person (e.g. a volunteer) as an individual author of the work or your organisation may wish to modify the work in future. Written agreement can occur under a volunteer agreement signed at the commencement of the volunteering arrangement (see Part 2) or it can occur at a later time. In the absence of the author’s consent, failing to identify the author will infringe the author’s moral rights.

EXAMPLE

Kayla volunteers at a local dog rescue home.

Kayla writes an article on canine enrichment for adopted dogs for publication on the home’s website.

Unless Kayla has waived her moral rights, she can insist that she be recognised as the author of the article and that the article not be changed in a manner that may negatively affect Kayla’s reputation.

2.5 Confidential information

Strictly speaking, confidential information is not “property” although it may be the subject of separate IP rights, for example, a patent. Confidential information creates an obligation in law to maintain the confidentiality of information when it is disclosed to someone on a condition of confidentiality. For example, employers often reveal confidential information to employees or volunteers so that they can undertake activities as part of their role, for example, an organisation's client and contact lists or

funding information. The employee or volunteer will be prevented by the law of confidential information from using or disclosing the information in a way that was not intended by the employer.

While the law requires that certain information must be treated as confidential, the obligation to treat information in confidence does not necessarily extend to volunteers unless the confidentiality of the information is made very clear.

The best way to ensure that people understand they are receiving confidential information is to mark the information as confidential and to make sure they understand that it must be treated in confidence. Confidential information should be stored securely and access restricted.

The law may provide a remedy if a person who receives confidential information breaches their duty of confidence. Often this remedy will be damages (monetary) or an injunction (a Court order to prevent a person who has threatened to make confidential information public). This could happen if a person discloses (tells others about, or threatens to tell others) information in circumstances where:

- the information is, and is treated as confidential information (e.g. confidential documents are marked confidential and access to them is restricted and secured)
- the information has been disclosed to someone in circumstances which indicate that it is confidential and must be treated in confidence, or
- the use or disclosure of the information was not authorised.

Protection of confidential information lasts as long as the information stays confidential.

However, once confidential information has been disclosed (i.e. made public) it will no longer be confidential and cannot be confidential again.

TIP

It may be appropriate to include a disclaimer, such as the following example, on particularly sensitive material to help demonstrate that there is no intention to disclose the material publicly, and to remind the recipients of the information about its confidential nature:

IMPORTANT NOTICE: The information contained in this document is confidential information of XYZ Community Organisation and all copyright subsisting in any copyright works in this document is owned by XYZ Community Organisation. The information in this document is provided only for the purposes of [insert authorised purpose] and must not be disclosed, reproduced, published, performed, communicated to the public or adapted by any person for any other purpose, except with the prior written consent of XYZ Community Organisation. This notice must be retained on any copies or adaptations of all or any part of this document.

2.5.1 Using confidentiality agreements

A confidentiality agreement is an agreement between two parties (e.g. a volunteer and your organisation) which sets out the terms and obligations applicable to confidential information which is received or shared between a volunteer and your organisation. A confidentiality agreement provides a clear way for your organisation protect your rights in respect of confidential information. It is a good idea to ask volunteers to sign a confidentiality agreement before they start volunteering, if it is expected that will have access to confidential information. The confidentiality agreement may be a separate agreement or part of an existing, larger agreement (e.g. the volunteer agreement). If an agreement is not put in place prior to confidential information being disclosed to a volunteer, then you should immediately request the volunteer enter into an agreement which obliges the volunteer to not

disclose or use any confidential information received to date (and which may be received in the future) otherwise than in their role as a volunteer for your organisation.

EXAMPLE

HealthyHeads is a suicide-prevention charity. It has developed a unique therapy treatment. Kylie is volunteer who takes initial phone calls from potential clients. As part of her role, Kylie receives some training in how the therapy works. To ensure Kylie cannot disclose the workings of its unique therapy, which is similar to a trade secret, HealthyHeads makes sure her volunteer agreement contains a provision which obliges her to not disclose or use confidential information (including details of the therapy) to anyone outside HealthyHeads.

If the volunteer does not agree to sign the agreement, then your organisation will have to rely on the volunteer's obligation of confidence. As outlined above, this obligation will arise where in disclosing the information the organisation must have clearly communicated the information in confidence i.e. the volunteer was aware that the information is confidential. An obligation of confidence will not always arise and will depend on the facts of each case. Also, as outlined above, you may need to go to court to enforce an obligation of confidence. For these reasons, it is better to ensure all volunteers enter into an agreement which contains a confidentiality provision at the beginning of the volunteering relationship.

TIP

A confidentiality agreement should:

- define the information that is considered confidential
- confirm that the confidential information must be kept confidential, and
- clearly define the limited purpose(s) for which the confidential information may be used.

You should also be aware that even if all steps are taken to protect the confidentiality of information, there are some circumstances in which disclosure can be required by law. For example, courts can impose an obligation that information (including confidential information) be produced to the court through a request (a subpoena) if disclosure of the information is considered to be in the interests of justice.

2.6 Accusations of infringement of another person or organisation's intellectual property

If a volunteer accuses your organisation of infringing his or her intellectual property, you should:

- try to negotiate with the volunteer to identify what intellectual property the volunteer thinks has been infringed and how,
- if feasible, either stop using the intellectual property immediately, or come to an agreement with the volunteer to assign the intellectual property to your organisation,
- seek legal advice to determine whether the volunteer's claim has merit (meaning that it is substantial enough that it could be pursued in the courts) and how to resolve the dispute.

If you are accused of infringing another person or organisation's intellectual property, you should:

- if you consider the accusation has merit, stop carrying out the allegedly infringing activity as soon as possible, and
- seek legal advice.

2.7 Summary: Ownership of intellectual property

Understanding the different forms of intellectual property is critical to ensuring any IP produced by volunteers is protected. As outlined above, only after your organisation understands who owns IP can it consider how to best protect the organisation (e.g. transfer of ownership). The below is a short summary of the law in relation to ownership and each form of IP.

2.7.1 Table: Overview of Ownership of intellectual property

Creator - author of materials	Copyright	Trademarks / patents / designs	Confidential Information	Moral rights
Volunteer	If a volunteer creates copyright material for your organisation, they will continue to own the copyright in the material <i>unless</i> there is a written agreement to the contrary. It is important to reach an agreement with volunteers about copyright ownership before they begin creating material for your organisation to ensure copyright is owned by the organisation upon its creation. However, if this does not occur, the volunteer can agree in writing to assign ownership in the copyright to the organisation.	Trademarks, patents and designs generally only exist once they have been registered with IP Australia under the relevant legislation. For this reason, a volunteer will not own or have any rights in relation to a patent or design or a trade mark registered with IP Australia in the name of your volunteer involving organisation. However, where a volunteer may develop a trade mark, for example, by drawing a logo or packing the works may be protected by copyright. It is important to reach an agreement with volunteers about all intellectual property ownership before they begin creating material for your organisation that it may want register with IP Australia.	The obligation to keep some information confidential may arise in a volunteer relationship. This will generally be the case where information disclosed to the volunteer was done expressly in confidence.	Volunteers will have moral rights in respect of any literary, dramatic, musical or artistic work which they produce for your volunteer involving organisation, unless they expressly waive their moral rights.
Unpaid work - work experience, vocational placement and internships.	Copyright material created by students during unpaid work experience (vocational placements and internships) may be owned by the student or by the tertiary institution where the student is enrolled unless there is a written agreement to the contrary. Your organisation should discuss copyright with the student and their institution before the student joins your organisation and arrange for a written agreement assigning copyright to your organisation if you wish to retain the rights to any work created by that student.	The position is the same as for volunteers.	The position is the same as for volunteers.	The position is the same as for volunteers.

An employee	It is an implied term of employment that an employer owns copyright created by their employees ' <i>in the course of their employment</i> '. To remove uncertainties, your organisation should be clear whether it is hiring someone as an employee. You should sign a written agreement with the person which clearly defines their status as an employee, defines the scope of their employment and confirms that copyright, created by the employee, belongs to your organisation.	It is an implied term of employment that an employer owns a trade mark/patent/design created by their employees ' <i>in the course of their employment</i> '. To remove uncertainties, your organisation should be clear that it is hiring someone as an employee. Your organisation should sign a written agreement with the person which clearly defines their status as an employee, defines the scope of their employment and confirms that all intellectual property, created by the employee, belongs to the organisation.	The employer-employee relationship has been recognised by the courts as a special relationship for the purpose of confidential information, meaning that the law requires an employee to maintain the confidentiality of information disclosed in the course of, or acquired as a result of, employment, irrespective of whether there is a confidentiality provision in an employment contract.	Employees will have moral rights in respect of any literary, dramatic, musical or artistic work which they produce for their employer, unless they expressly waive their moral rights (i.e. a contract or separate deed of agreement).
Contractor	Copyright created by an independent contractor will automatically be owned by the independent contract <i>unless</i> there is a written agreement to the contrary e.g. contractor agreement or agreement for services. The contractor agreement should state that any copyright which the contractor creates during the provision of services to the organisation automatically becomes the copyright of the organisation on its creation. In the absence of this, the contractor can assign his or her copyright after its creation to the organisation.	A trademark/patent/design created by an independent contractor will be owned by an independent contractor <i>unless</i> there is an agreement in place which provides that the IP created by the contractor will be owned by the organisation they are providing services to. While these types of IP generally rely on registration with IP Australia, registration will not prevent a contractor from making a claim for ownership of intellectual property. This means that contractor agreements should provide that any IP created by the contractor as part of their services is owned by the organisation to prevent a future dispute about ownership. A contractor can also assign his or her ownership of IP to an organisation after its creation if the contractor agreement does not contain a suitable clause.	As with a volunteer, a contractor will only be obliged to keep certain information confidential where the information has been communicated in confidence to the contractor or the contractor has agreed to keep the information confidential (i.e. a contract or separate deed of agreement).	As with a volunteer, a contractor will have moral rights in respect of any literary, dramatic, musical or artistic work which they produce for a party to which they are providing services, unless they expressly waive their moral rights (i.e. a contract or separate deed of agreement).

3. Privacy

Overview

Your volunteer involving organisation is likely to collect, use, and store and or disclose information about individuals – for example, in the delivery of services or in gathering information about new memberships - or volunteers - of your organisation. This information will often be classified ‘personal information’ under privacy laws, and may include ‘sensitive information’ and ‘health information’, which are subcategories of personal information requiring special treatment.

It is important to consider your legal obligations under privacy laws in all your dealings with personal information, including the sub-categories of sensitive information or health information.

Handling personal information in a lawful, transparent and respectful way is an important part of your organisation’s reputation as well as avoiding any legal consequences of a data breach, including monetary penalties. This means all of your organisation’s workers, including volunteers, must understand the organisation’s obligations under privacy laws and implement related policies and practices which reflect those obligations. Workers must be adequately trained to ensure your organisations ongoing compliance under the privacy laws.

Your organisation may be subject to all - or only some - of the privacy laws, either directly or through contract. However, even if the laws do not apply directly, it is a matter of best practice to follow them.

If your organisation is bound by or otherwise follows privacy laws (as a matter of best practice) this means your organisation should only:

- collect and store a volunteer’s personal information with their consent
- use the volunteer’s personal information for the purpose for which it was collected (if in doubt seek their consent)
- treat volunteer information as confidential information (as described above at 2.5), and
- store volunteer information securely (and be extra careful with ‘sensitive’ or ‘health information’ of volunteers – as described below at 3.1).



TIP

If your organisation uses the Sample Volunteer Agreement (Part 5) it makes clear that your organisation will respect your volunteers’ privacy, including keeping the volunteers’ private information confidential.

Volunteers should also be able to access any personal information you have about them and have the same rights as others (i.e. clients whose information you collect) to have it modified or amended.

CAUTION

The information contained in this part of the National Volunteer Guide is of a generic nature and is not intended to replace legal advice but rather provide an overview of the Commonwealth and state laws on privacy.

More detailed information is available in our Privacy Guide at www.nfplaw.org.au/privacy.

Privacy Laws are complex and are not always easy to apply in practice. If you have any doubts, seek legal advice.



3.1 What are the privacy laws?

In this Guide, the following legislation is collectively referred to as **Privacy Laws**:

- Commonwealth (**Cth**) law: *Privacy Act 1988* (Cth) (**Privacy Act**) which, from 12 March 2014, sets out the 13 Australian Privacy Principles (**APPs**)
- Australian Capital Territory (**ACT**) law: *Information Privacy Act 2014* (ACT), *Health Records (Privacy and Access) Act 1997* (ACT)
- New South Wales (**NSW**) law: *Privacy and Personal Information Protection Act 1998* (NSW), *Health Records and Information Privacy Act 2002* (NSW)
- Northern Territory (**NT**) law: *Information Act 2003* (NT)
- Queensland (**Qld**) law: *Information Privacy Act 2009* (Qld)
- South Australia (**SA**) has no legislative scheme for privacy law, however, it has an administrative direction on handling personal information that binds the public service: PC012 – Information Privacy Principles (IPPs) Instruction
- Tasmanian (**Tas**) law: *Personal Information Protection Act 2004* (Tas)
- Victorian (**Vic**) law: *Privacy Data and Protection Act 2014* (Vic), *Health Records Act 2001* (Vic), and
- Western Australia (**WA**) currently has no legislative scheme for privacy law, however, some privacy principles (dealing with access to information and correction of information) are provided for in the *Freedom of Information Act 2001* (WA)

RELATED RESOURCES

For more information on Privacy go to Not-for-profit Law's Information Hub page on [Privacy](#). The page includes a Guide to Privacy Laws along with a Fact Sheet on the Notifiable Data Breaches scheme which sets out an organisations obligations if there is a data breach and how an organisation can comply with the scheme.

The **Privacy Act** applies to organisations with revenue over \$3 million, Commonwealth government agencies and government contracted services providers. There are some exemptions which are discussed in Not-for-profit Law's Guide to Privacy Laws.

The **state and territory privacy legislation** applies to agencies of the state and territory governments. It does not generally apply to community organisations unless they agree to be bound by the legislation under a contract e.g. a funding contract with a department, or (in some states) health service providers. Some state and territory government funding contracts require the organisation receiving the funding to comply with the relevant privacy principles for the purpose of the funded project.

3.2 The Privacy Act (Cth)

3.2.1 Information covered by the Privacy Act

The Privacy Act does not regulate or apply to *all* of the information a volunteer involving organisation gathers or deals with. In understanding if your volunteer involving organisation has obligations under the Privacy Act, consideration needs to be given to whether the information you hold, or want to collect, falls into one of the following categories of information. It should also be noted that the Privacy Act applies to these categories of information in different ways. The way the Privacy Act applies to your organisation also depends on the size and type of your organisation, which is discussed further below.

1. Personal information

'Personal information' is information or an opinion about an identified individual, or about an individual who is 'reasonably identifiable'. Personal information can be true or false, verbal, written, or photographic, and recorded or unrecorded. Personal information includes a person's name, address, contact details (such as telephone number or email), date of birth, gender, sexuality and race.

WHEN WILL SOMEONE BE 'REASONABLY IDENTIFIABLE'?

Whether someone is 'reasonably identifiable' from the information you hold depends on a few things, including:

- the nature and extent of the information
- how the information was received, and
- whether it is possible for you to identify the person from the resources you hold (including other information available to you).

Personal information does not include: anonymous information, aggregated information (e.g. data that reflects trends without identifying the sample), de-identified information and information about companies or other entities which does not identify individuals, or information which does not reveal a person's identity.

EXAMPLE

Consider a car licence plate. Most people would not be able to identify the owner of a car simply from the registration number. To most people, then, knowing a car's licence plate number would not make the owner of the car 'reasonably identifiable'.

But if you work for an agency responsible for car registration, you may have access to other information that enables you to identify the owner of the car. Holding information about the car registration would make the person 'reasonably identifiable' to you from the information you hold, so the registration number would be considered personal information.

2. Sensitive information

'Sensitive information' is a special category of personal information and is subject to stricter legal requirements for collection, storage use and disclosure. Under the Privacy Act, information will be considered 'sensitive information' where it is information or an opinion about a person's: racial or ethnic origin, political opinions, membership of a political association, religious beliefs or affiliations, philosophical beliefs, membership of a professional or trade association, membership of a trade union, sexual preferences or practices, or criminal record.

Health information (discussed below at 3.2.2) or genetic information or biometric information is also a form of 'sensitive information'. Identifying sensitive information is important as different requirements and thresholds apply to this kind of information under the Privacy Act.

3. Health information

'Health information' is a type of personal information that includes information or opinion about a person's: physical and mental health, disability (at any time), health preferences (including future provision of health services), use of health services, bodily donations (e.g. blood, organs), and genetics.

You need to establish when you are collecting, using, storing or disclosing information that is considered 'health information' as this type of information is generally afforded a higher level of protection under the Privacy Act and some state privacy legislation.

EXAMPLE

Examples of 'health information' include: notes of a person's symptoms or diagnosis and treatment, specialist reports or test results, appointment and billing details, dental records, a person's healthcare identifier when it is collected to provide a health service, prescriptions and other pharmaceutical purchases, and any other personal information (such as information about a person's sexuality, religion, date of birth, gender) collected to provide a health service.



3.2.2 Is my organisation bound by the Privacy Act?

Once you have established the information you collect, store, use or disclose that may be considered 'personal', 'sensitive' or 'health' information, you then need to determine whether your organisation meets the qualifying criteria under the Privacy Act. It will depend on a number of factors which are beyond the scope of this Guide. However, even if your organisation is not legally obligated to do so, it is a good idea to follow the privacy laws. The APPs set out in the Privacy Act are considered best practice.

By way of a brief summary, the APPs require an organisation to:

1. Take reasonable steps to make individuals aware that it is collecting 'personal', 'sensitive' or 'health' information about them
2. Notify those individuals about the purpose/s for which it is collecting the information and who it might share that information with (among other things)
3. If the personal information is sensitive information, ensure that consent for such collection, use or disclosure is obtained (expressly or impliedly)
4. Comply with restrictions on how personal information can be used and to whom it can be disclosed, including at any offshore location where the information may be disclosed, and
5. Give individuals the right to access the information held about them and to have that information corrected or modified.

3.3 State-based privacy law

Australian state and territory information privacy principles (IPPs) apply to their respective government agencies (including public sector agencies, local councils, courts, state police etc.). The state and territory IPPs regulate how government agencies may deal with the personal information of individuals in a similar way that the APPs regulate how private entities deal with personal information. The laws and directions containing the various state and territory IPPs are:

- **ACT:** *Information Privacy Act 2014* (ACT) sets out 13 Territory Privacy Principles in Schedule 1
- **NSW:** *Privacy and Personal Information Protection Act 1998* (NSW) sets out 12 Information Protection Principles in Part 2, Division 1
- **NT:** *Information Act 2003* (NT) sets out 10 Information Privacy Principles in Schedule 2

- **Qld:** *Information Privacy Act 2009* (QLD) sets out 11 Information Privacy Principles in Schedule 3 and 9 National Privacy Principles which apply to health agencies and their contracted service providers in Schedule 4
- **SA:** Part II of the administrative instruction, PC012 – Information Privacy Principles (IPPs) Instruction provides a set of Information Privacy Principles
- **Tas:** *Personal Information Protection Act 2004* (Tas) sets out 10 Personal Information Protection Principles in Schedule 1
- **Vic:** *Privacy Data and Protection Act 2014* (Vic) sets out 10 Information Privacy Principles in Schedule 1
- **WA:** There is currently no legislative privacy scheme, however, some privacy principles (dealing with access to information and correction of information) are provided for in the *Freedom of Information Act 2001* (WA)

3.3.1 Is my organisation bound by the state based laws?

Each set of IPPs are very similar to the APPs under the Privacy Act. While the IPPs only apply to government agencies, it is not uncommon for a funding contract with a state or territory public agency (e.g. Department of Health) to require the recipient of funding comply with the relevant IPPs for the purpose of the funded project.

If your organisation is contractually bound to comply with any of the state or territory IPPs, your organisation should ensure:

- volunteers are appropriately trained regarding the organisation's obligations under the relevant IPPs and the funding contract, and
- your organisation complies with the requirements of the relevant IPPs when dealing with the personal information of volunteers.

3.3.2 Health specific privacy legislation

Private health service providers are also subject to additional privacy legislation in New South Wales, Victoria and the Australian Capital Territory, with the following legislation setting out Health Privacy Principles (HPPs).

- **NSW:** *Health Records and Information Privacy Act 2002* (NSW) sets out 15 Health Privacy Principles in Schedule 1.
- **Vic:** *Health Record Act 2001* (Vic) sets out 11 Health Privacy Principles in Schedule 1.
- **ACT:** *Health Records (Privacy and Access) Act 1997* (ACT) sets out 12 Health Privacy Principles in Schedule 1.



TIP

Volunteer involving organisations should always check contracts with state or territory government bodies to confirm if they are obligated to comply with the IPPs and/or HPPs.

This legislation generally applies to the collection, use, storage and disclosure of *health information* of people receiving *health services* from health service providers, and so will not apply to the utilisation of volunteers by health service providers.

If your organisation is bound by any of the HPPs, it should ensure its volunteers are appropriately trained regarding the organisation's obligations under the relevant health specific privacy legislation.

NOTE

This above is a short summary of the types of the above information which is relevant to the application and obligations of the privacy laws. However, you should refer to our National Privacy Guide for more detailed explanations. Our Privacy Guide is available at www.nfplaw.org.au/privacy.



3.4 Volunteer involving organisations' obligations under the Privacy Laws and volunteers

3.4.1 Your organisation, its volunteers and the privacy laws

If your organisation is required to comply with Privacy Laws (or chooses to comply as a matter of best practice) and engages volunteers, it will need to take steps to ensure people within the organisation are constantly mindful of their obligations when dealing with personal information. Because volunteers are not always engaged with an organisation to the same extent as employees, it can be more difficult for organisations to develop this same culture among volunteers. For this reason, organisations should ensure that volunteers are trained in privacy compliance from the very outset. Your organisation should ensure all volunteers are appropriately trained regarding:

- The organisation's **obligations under the Privacy Act** and state and territory-based laws in relation to the collection, use, disclosure and storage of that personal information and/or health information (where applicable or as a matter of the organisation's practice)
- **How the organisation (and its volunteers) collects, uses, discloses and stores personal information** as part of its activities
- The organisation's **practices and requirements** regarding the collection, use, disclosure and storage of individuals' personal information
- The **types of information, particularly sensitive and health information**, which the volunteer may be required to deal with and the organisation's obligations in respect of that information
- **The organisation's policies in relation to privacy**, such as a privacy policy, a data breach policy and response plan and the how a person can make a complaint to the organisation in relation to their personal information
- The **rights of individuals to their privacy**, including their rights under privacy laws (where applicable or as a matter of the organisation's practices)
- How to direct people to the organisation's privacy policy (which may be required by privacy law to be as available as practically possible, such as on the organisation's website), or how to provide people with a copy of the policy. The Privacy Act requires certain information be contained within the policy including:
 - the kinds of personal information that the organisation collects and holds
 - how personal information is collected and held
 - the reasons why the organisation collects, holds, uses and discloses personal information
 - how an individual can access their information

- the procedures for collecting, holding, using and disclosing the information, and
- an explanation of whether personal information will be disclosed overseas.

EXAMPLE

HelpingHands is a large charity that provides outreach services to the elderly. HelpingHands relies on volunteers to undertake welfare checks of their clients. As part of their role, volunteers receive the personal information (such as the name and address) of clients that they then go visit. Before they commence any activities, volunteers of HelpingHands are trained regarding HelpingHands' obligations under the Privacy Act, including their practices and procedures, to ensure that volunteers do not breach HelpingHands' obligations.



3.4.2 Information about your volunteers and the privacy laws

Organisations which engage volunteers need to treat the personal information of the volunteers in the same way they are required to treat personal information of third parties under the Privacy Act (and the relevant state privacy law if the organisation is required to comply with the state legislation).

This is different to how the law applies under the Privacy Act toward an organisation's employees. If an employer handles information that is part of an employee record directly related to a person's current or former employment relationship, the employer's conduct is exempt from the APPs under the Privacy Act. This exemption does not extend to volunteers. This means if your volunteer involving organisation is required to comply with the Privacy Act (or chooses to comply as a matter of best practice), your organisation will need to comply with the APPs in relation to the personal information of your volunteers.

TIP

The [Office of the Privacy Commissioner](#) has a number of useful guides and templates on its website that provide practical information about complying with the Privacy Act. This includes:

- Australian Privacy Principles and Information Privacy Principles – Comparison Guide
- APP quick reference tool
- Guide to developing an APP Privacy Policy
- What to look for in developing a Privacy Policy
- Guide to securing personal information
- Handling privacy complaints
- Privacy Management Plan Template (for organisations)

You can access them at www.oaic.gov.au/agencies-and-organisations/guides/



4. Record Keeping

Overview

Organisations should keep appropriate records of their volunteer programs. In some circumstances, keeping records of your volunteers will be required by law.

Organisations have limited legal obligations to keep records relating to volunteers, which are explained further below. While the law may not require records be kept, it may be both necessary for your organisation to keep records relating to your volunteer for a number of other reasons including:

- internal organisational reporting (e.g. human resources)
- current or anticipated disputes, or legal action
- requirements under insurance policies, or
- requirements under funding agreements.



Check your organisation's insurance policies and funding agreements to determine whether your organisation is under a contractual obligation to retain volunteer files or certain records for a specific period of time.

4.1 Keeping records and for how long

We recommend a volunteer involving organisation keep records of its volunteers and for at least 7 years. This is because it is consistent with some regulator requirements (e.g. the Australian Charities and Not-for-profits Commission for registered charities) and because legal action (civil claims) can generally be brought up to 6 years after an event to which the claim relates occurred (for example, a former volunteer alleges your organisation's negligence was the cause of the injury to the volunteer). Some claims have even longer limitation periods such as claims brought in relation to harm suffered by a person when they were a child. If your organisation works with children or more vulnerable persons, ideally volunteer records should be kept indefinitely or as long as possible, especially in light of the recent child safety reforms and removal of limitation periods for bringing actions (meaning they can be brought at any time – there is no six year limit) founded upon child abuse.

Your organisations should treat information that it holds about both current and former volunteers with care and in accordance with obligations under the Privacy Laws, as discussed above.

Note the obligations for keeping records under the *Fair Work Act 2009* (Cth), for seven years, do not apply to volunteers. As outlined in Part 2, it is important that your organisation understand the differences between paid workers (i.e. employees and independent contractors) and unpaid workers given that in some instances the law treats them differently.

4.2 Volunteer safety and record keeping

Workplace health and safety (**WHS**) laws (sometimes referred to as occupational health and safety (**OHS**) laws) require community organisations to keep certain records in relation to workers, including volunteers. See Part 3 which deals with volunteer safety, including what WHS or OHS laws apply to your organisation. As we have stated in that Part, even if these laws do not apply, your organisation

has similar obligations arising under the common law (for example, in relation to negligence). The keeping of records will assist you showing you are meeting these obligations.

4.2.1 Harmonised WHS laws (QLD, NSW, TAS, ACT, SA, NT)

Most states and territories (Queensland, New South Wales, Tasmania, the ACT, South Australia and the Northern Territory) have adopted the model WHS laws.

In these states and territories, organisations to which the legislation applies must notify the relevant regulator immediately after the organisation becomes aware of the occurrence of an incident that is considered a '*notifiable incident*'. A notifiable incident is the death of a person, a serious injury or illness of a person or a dangerous incident. The organisation must keep a record of each notifiable incident that has occurred for at least 5 years from the day that notice of the incident. A failure to keep these records may lead to individuals incurring fines of up to \$5,000 and organisations incurring fines up to \$25,000.

The laws also require the keeping of a "*Register of Injuries*" where any workplace incidents or injuries should be recorded no matter how serious they appear to be at the time.

Under the model WHS laws, volunteers are included in the definition of 'workers'.

4.2.2 Victoria and Western Australia OHS/WHS laws

Victoria: the OHS law is in many respects reasonably consistent with the model WHS law. An organisation that is bound by the OHS laws must, so far as is reasonably practicable, keep information and records relating to the health and safety of its workers. The organisation is required to notify WorkSafe, the Victorian regulator, of certain incidents and must keep a copy of the record for at least 5 years. There are also requirements for records under the OHS laws in regard to asbestos, lead, carcinogenic substances and other hazardous substances.

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

The Western Australian occupational safety and health laws do not currently place an obligation on employers to keep records of safety incidents. However, there are requirements to keep records in relation to asbestos, lead, carcinogenic substances and other hazardous substances.

4.3 Commonwealth and state regulator record keeping

4.3.1 The Australian Charities & Not-for-profits Commission

The Australian Charities & Not-for-profits Commission (ACNC) currently requests information relating to a charity's volunteers in its Annual Information Statement, which most charities must submit annually. The requested information is currently limited to the number of volunteers a charity utilises in its activities. For this reason, a volunteer involving organisation that is a registered charity should retain accurate records regarding its volunteers so that it can report accurately.

FURTHER READING

The ACNC has detailed information on its website in relation to record keeping for charities. See [here](#).

Our "[Running a Charitable CLG Guide](#)" also has information in relation to record keeping records of charities.

Under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) your organisation is required to keep its records for seven years.

4.3.2 The Australian Taxation Office

The Australian Taxation Office (**ATO**) requires that records are kept for five years. Many of the documents that are relevant to tax affairs will also be kept for the purposes of the ACNC's record-keeping requirements, including an organisation's governing documents, financial reports, cash books, tax invoices, employee records, bank records, grant documentation and contracts.

Clear records should be kept if payments are made to volunteers, such as reimbursements. Records of payments will also be important if a volunteer changes their status with an organisation and becomes an employee or independent contractor of the organisation. For more information, refer to Part 2.

4.3.3 State and territory incorporation regulators

All community organisations incorporated under state or territory law will need to keep documents and records. Requirements to keep certain documents and records may be set out in your organisation's rules, as well as in the relevant incorporation legislation. While associations laws do not explicitly require you to keep specific records about volunteers, in some circumstances the organisation may, and be legally required to, because of the position held by the volunteer (e.g. where the management committee are all volunteers).

RELATED RESOURCES

Not-for-profit Law has Fact Sheets on *Keeping and accessing documents, records and registers* for each State and Territory at www.nfplaw.org.au/recordkeeping.

4.3.4 Other incorporation regulators (ASIC and ORIC)

If your volunteer involving organisation is incorporated under a Federal law, such as a company limited by guarantee under the *Corporations Act 2001* (Cth) or an Indigenous organisation incorporated under the *Corporations (Australian and Torres State Islander) Act 2006* (Cth), it will need to keep financial documents and records for seven years. Neither of these laws explicitly require the organisation to keep specific records of its volunteers, although in some cases records about volunteers will be kept by virtue of the position held by the volunteer (e.g. where the board of directors are all volunteers).

4.3.5 Fundraising regulators

Fundraisers undertaking regulated fundraising activities must meet certain obligations under the state and the ACT fundraising laws. These are usually the same regulators as the state and territory incorporation regulators (see 4.3.3. above).

These laws differ in each state and territory (except the Northern Territory which does not have any specific fundraising law). If your organisation is fundraising in several states or territories, you will need to consider the laws in each of those places and whether they apply (for example, registered charities in the ACT and SA do not require permission from their respective state and territory regulators to fundraise). Fundraising laws are complex. You may need to seek legal advice in determining with if the laws apply to your volunteer involving organisation.

CAUTION

Just because your organisation may be exempt from a requirement to seek permission from the state regulator to fundraise in that state, it does not mean your organisation will be exempt in the other states and the ACT. If you are conducting fundraising activities in other states or the ACT you should check with the local regulator, and if required seek legal advice.

In some circumstances the fundraising laws require you to make and keep records of individuals involved in a fundraising activity, including as a 'collector'. These include:

- **Queensland:** where a community organisation engages in street collections, each collector must be issued with a distinctive armband or badge. A record of each collector issued with an armband or badge must be kept and a written itinerary provided for each paid collector and lodged with the regulator 14 days before collection. There is currently no similar equivalent requirement in the other states and territories.
- In **Victoria** the fundraising law requires that the name and address of each person who participates in the appeal as a supervisor or manager must be recorded – in your organisation this person may be a volunteer.
- In **New South Wales**, the obligations that come with a fundraising licence include to ensure that high standards of governance and risk management are applied to any campaign, including considering whether people involved in administering the campaign are suitably qualified and of proper character (you may like to consider screening volunteers, see Part 3), and whether appropriate safety measures have been taken to protect staff and volunteers involved in the fundraising campaign. The keeping of volunteer records will assist your organisation in demonstrating it meets this requirement.
- In **Western Australia**, an organisation involved in street collections (that has the relevant permit) is obliged to consecutively number all of the collection boxes and keep a record of which boxes are issued to each collector - in your organisation this person may be a volunteer.

In the other states (**South Australia**, the **ACT** and **Tasmania**) the fundraising laws do not explicitly require record keeping of individuals involved in a fundraising activity (e.g. collector). However, in the ACT it is within the power of the regulator (AccessCanberra) to require information it considers necessary to decide whether the licensee has complied with the relevant legislation. In South Australia, a fundraising licence may be granted subject to conditions, including compliance with the Code of Practice. The Code of Practice includes a requirement to monitor the health and safety of collectors who work alone - in your organisation this person may be a volunteer. The keeping of records may serve to demonstrate the monitoring is of an adequate standard.

Also note in **Victoria** and **New South Wales** there are additional reasons why you should keep records of your volunteers. In these states there are exemptions from the need to obtain permission (to register as a fundraiser in Victoria and to obtain a licence in New South Wales) where only volunteers are used to collect funds and only a certain amount of money is collected within the financial year.

While your organisation may not be legally obliged to make and keep records of each individual involved in a fundraising activity (e.g. collector), such as their name and address and their identifying number (if any), as outlined above, there are many reasons why it is a good idea to keep records. These records of volunteers involved in fundraising should be kept and maintained with the other records of the organisation and with the requirements (if any) set out in the relevant fundraising legislation and, where applicable, other relevant laws (including privacy laws, as discussed above).

RELATED RESOURCES

For more information on fundraising Laws in Australia see our fundraising page at www.nfplaw.org.au/fundraising. For more information on running fundraising events, see our page on events at www.nfplaw.org.au/events.



NATIONAL STANDARDS FOR VOLUNTEER INVOLVEMENT



[Volunteering Australia's National Standards for Volunteer Involvement](#) have a number of standards relevant to the matters discussed in this Part. If your organisation complies with its legal obligations as set out in this Part (or if not obligated, but does so as a matter of best practice), it will help ensure your organisation meets these standards (and can provide evidence that it does so).

Standard 8: Quality Management and Continuous Improvement states that *effective volunteer involvement results from a system of good practice, review and continuous improvement.*

A criteria for meeting this standard is “Policies and procedures are implemented to effectively guide all aspects of volunteer involvement”, with evidence of meeting this standard being that volunteers are made aware of and understand an organisation’s policies and procedures.

Standard 1: Leadership and Management states that *the governing body and senior employees lead and promote a positive culture towards volunteering and implement effective management systems to support volunteer involvement.*

Criteria for meeting Standard 1 includes:

- 1.2 “Policies and Procedures applying to volunteers are communicated, understood, and implemented by all staff across the organisation”. Evidence of meeting this includes regular monitoring of compliance with organisations volunteer policies and procedures.
- 1.4 “Volunteer records are maintained”. Evidence of meeting this includes identifying the required information to be collected from volunteers; information is documented and secured; and the organisation has documented and implemented processes that comply with privacy legislation for securely managing volunteer personal and confidential information.

Standard 2: Commitment to Volunteer Involvement states that *commitment to volunteer involvement is set out through vision, planning and resourcing and supports the organisations strategic vision.*

Criteria for meeting Standard 2 includes:

- 2.1 “The organisation publicly declares its intent, purpose and commitment to involving volunteers”. Evidence of meeting this includes that the organisation’s commitment to volunteer involvement complies with legislation, industry standards, guidelines and codes of practice.

Summary: considerations for organisational issues that are applicable to volunteers

Intellectual property: Your organisation needs to understand that IP can take many forms. The forms of IP are all different in what they protect, how they are protected and enforced and exploited, and the duration of the protection.

Copyright material created by your volunteer is likely to be owned by the volunteer unless you have a specific agreement with the volunteer that copyright in the material created will on its creation be held by your organisation. Material already owned by a volunteer could be transferred to your organisation under assignment arrangements, or a volunteer could allow your organisation to use its copyright material under a licence arrangement (in this instance the volunteer will still 'own' the copyright material).

Moral Rights are rights of a creator to be attributed as the author of a work, and to have their works treated with respect. This means that even if a volunteer assigns his or her copyright in a work to an organisation, he or she must also waive their moral rights in writing. An agreement with the volunteer is recommended.

Your organisation can protect its trade marks, designs and patents by registering them with IP Australia.

Confidential information creates an obligation in law to maintain the confidentiality of information when it is disclosed to someone on a condition of confidentiality. The obligation does not extend to your volunteers in the same way as your employees (if any). It is a good idea to ask volunteers with access to confidential information to sign a confidentiality agreement.

Privacy: Your organisation may be subject to all or some of the privacy laws - even if not - it is good idea to follow them as a matter of best practice in relation to the:

- (i) personal information of your volunteers: only collect and store the volunteer's personal information with their consent, only use it for the purpose it was collected, treat it as confidential information, store it securely and be extra careful with 'sensitive' and 'health' information of volunteers, and
- (ii) dealings by your volunteers of the personal information of others (such as clients, other volunteers) that your organisation may collect, store, use, disclose and manage.

Record Keeping: It is a good idea to keep records of your volunteers, even if your organisation does not have obligations at law that require you to keep records of your volunteers.

Registered charities are required to provide annual information on the number of their volunteers, and some fundraising laws require you to keep details of those involved in fundraising activity (i.e. volunteers or paid workers).

Other reasons to keep records include your organisation's own reporting, requirements under insurance policies (check them!) or potential future legal action, for example, by a volunteer alleging your organisation failed to keep them safe while volunteering for your organisation.

We recommend you keep records of your volunteers for at least seven years and that they be kept and maintained with the organisation's other records.

Resources

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 3: Volunteer safety
- ✔ Part 4: Volunteers and unlawful workplace behaviour
- ✔ Part 5: Recruiting, inducting and managing 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

- ✔ **Intellectual property** – www.nfplaw.org.au/ip

Not-for-profit Law's Intellectual Property Guide can help your organisation understand the different types of intellectual property, how it is created, its ownership and how to protect it.

- ✔ **National Privacy Guide** – www.nfplaw.org.au/privacy

Not-for-profit Law's National Privacy Guide can help your organisation understand its obligations under the Privacy Laws, including whether it is bound by the Privacy Law and how it can ensure it complies.

- ✔ **National WHS Guide** – www.nfplaw.org.au/ohs

Not-for-profit Law's National WHS Guide can help your organisation understand its obligations under the occupational health and safety laws, whether it is bound by these laws and how it can ensure it complies. A separate Guide also exists for Victorian organisations as their laws differs slightly.

- ✔ **Keeping and accessing documents, records and registers** – www.nfplaw.org.au/recordingkeeping

Not-for-profit Law has fact sheets on keeping and accessing documents, records and registers.

- ✔ **Record keeping for charities** – www.nfplaw.org.au/recordingkeeping

Not-for-profit Law has a fact sheet relating to the record keeping required of charities registered by the Australian Charities and Not-for-profits Commission (ACNC) under the ACNC Act 2012.

- ✔ **Fundraising laws** – www.nfplaw.org.au/fundraising

Not-for-profit has comprehensive guides including: Applications to Fundraise, Fundraising Laws in Australia, Guides' to Fundraising Laws in each State and Territory and auditing of fundraising accounts.

Incorporation and other related Regulators

- ✔ Australian Capital Territory, Access Canberra: www.accesscanberra.act.gov.au
- ✔ New South Wales, Fair Trading: www.fairtrading.nsw.gov.au

- Northern Territory, Licensing NT: www.nt.gov.au
- Queensland, Office of Fair Trading: www.qld.gov.au
- South Australia, Consumer and Business Services: www.cbs.sa.gov.au
- Tasmania, Consumer, Building and Occupational Services: www.cbos.tas.gov.au
- Victoria, Consumer Affairs: www.consumer.vic.gov.au
- Western Australia, Consumer Protection: www.commerce.wa.gov.au
- Australian Charities and Not-for-profits Commission; www.ato.gov.au
- Australian Taxation Office: www.acnc.gov.au
- Office of the Registrar of Indigenous Corporations: www.oric.gov.au

Other resources on privacy

- Office of the Australian Information Commissioner (OAIC): www.oaic.gov.au
- Office of the Information Commissioner, Queensland: www.oic.qld.gov.au
- Commissioner of Privacy and Data Protection, Victoria: www.dataprotection.vic.gov.au
- The Information and Privacy Commission, New South Wales: www.ipc.nsw.gov.au
- Office of the Information Commissioner, Northern Territory: www.infocomm.nt.gov.au

Other resources on intellectual property

- Intellectual Property Australia: www.ipaustralia.gov.au
- Australian Copyright Council: www.copyright.org.au
- Arts Law Centre of Australia: www.artslaw.com.au

Privacy legislation

- Commonwealth law: [*Privacy Act 1988*](#) (Cth)
- Australian Capital Territory law: [*Information Privacy Act 2014 \(ACT\)*](#), [*Health Records \(Privacy and Access\) Act 1997 \(ACT\)*](#)
- New South Wales law: [*Privacy and Personal Information Protection Act 1998 \(NSW\)*](#), [*Health Records and Information Privacy Act 2002 \(NSW\)*](#)
- Northern Territory law: [*Information Act 2003 \(NT\)*](#)
- Queensland law: [*Information Privacy Act 2009 \(Qld\)*](#)
- Tasmanian law: [*Personal Information Protection Act 2004 \(Tas\)*](#)
- Victorian law: [*Privacy Data and Protection Act 2014 \(Vic\)*](#), [*Health Records Act 2001 \(Vic\)*](#)
- Western Australia: [*Freedom of Information Act 2001 \(WA\)*](#)

Intellectual Property legislation

- [*Copyright Act 1968*](#) (Cth)
- [*Patents Act 1990*](#) (Cth)
- [*Designs Act 2003*](#) (Cth)
- [*Trade Marks Act 1995*](#) (Cth)

Volunteering Australia resources

- ✔ Volunteering Australia 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:

- ✔ Volunteering and Contact ACT – www.vc-act.org.au
- ✔ The Centre for Volunteering (NSW) – www.volunteering.com.au
- ✔ Volunteering Queensland – www.volunteeringqld.org.au
- ✔ Volunteering SA&NT – www.volunteering-sa-nt.org.au
- ✔ Volunteering Tasmania – www.volunteeringtas.org.au
- ✔ Volunteering Victoria – www.volunteeringvictoria.org.au
- ✔ Volunteering WA – www.volunteeringwa.org.au

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A NFP Law Information Hub resource. Access more resources at www.nfplaw.org.au.

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