



# APPOINTING AND REMOVING A PUBLIC OFFICER

**Part 2 – Guide for Public Officers and Secretaries**

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# APPOINTING AND REMOVING A PUBLIC OFFICER

This Part of the Guide for Public Officers and Secretaries covers the legal requirements for appointing and removing a public officer of an incorporated association in Victoria.

## Key Points

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### 1. Who can be the public officer?

The *Associations Incorporation Act 1981* (Vic) regulates who can be the public officer of an incorporated association. In addition, an organisation's own rules and policies may have particular requirements.

### 2. How is the public officer appointed?

Whenever there is a vacancy in the position of public officer, the management committee must appoint a new public officer within 14 days.

### 3. What happens after the public officer is appointed?

Every new public officer must notify Consumer Affairs Victoria of particular matters after they have been appointed or if their details change. Most organisations also need to notify the Australian Taxation Office of a change of public officer.

### 4. When will the public officer's position become vacant?

The *Associations Incorporation Act 1981* (Vic) sets out the circumstances in which the position of public officer will be automatically terminated (vacated).

### 5. Removing an public officer

It is also possible for an organisation to remove the public officer from their position.

**Note:**

This Part of the Guide deals with the position of *public officer* only. The public officer may (or may not) also be the secretary of the organisation. Check [Important Background Information](#) in this Guide for more information and to find out which parts of this Guide apply to your situation.

For information about appointing and removing a secretary, see [Appointing and Removing a Secretary](#) in this Guide.

## 1. Who can be the public officer?

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The public officer is the principal contact point between Consumer Affairs Victoria (**CAV**) and your organisation. As such, the public officer is legally responsible for a number of specific tasks — see [Reporting to Consumer Affairs Victoria](#) in this Guide, and CAV's website: [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au) > [Incorporated Associations](#)

It is important that you choose the public officer carefully. You need to consider:

- any restrictions or qualifications imposed by law, particularly:
  - the *Associations Incorporation Act 1981* (Vic) (the **AI Act**)
  - your organisation's rules (sometimes called “the constitution”), and
- any policies your organisation has about this issue.

### **Important:**

The AI Act is being changed to merge the roles of public officer and secretary. The new laws are expected to start 1 July 2012, and when they do the public officer will automatically be called the secretary under the AI Act. This Guide will be updated when these new laws start.

To make the transition to these new laws easier, if your organisation is changing its secretary and/or public officer, consider appointing the same person to both roles (that is, appoint one person as the public officer and secretary).

### **AI Act requirements**

A public officer of an association incorporated in Victoria must:

- be at least 18 years old (section 25(2)(a) of the AI Act)
- be a resident of Victoria (section 25(2)(b) and see further below)
- not be bankrupt nor take advantage of the laws relating to bankruptcy (section 27(2)(d) and see further below), and
- not be of unsound mind nor liable to be dealt with under the law relating to mental health (section 27(2)(e) and see further below).

Unless the rules of your organisation say otherwise:

- the public officer may also hold another position in your organisation (section 26), and
- there is no limit to the public officer's maximum age.

**Tip:**

Some organisations have found themselves in the embarrassing position of appointing a public officer who is not allowed to hold the position. To avoid this, before someone is appointed as public officer, get them to sign a letter in which they:

- agree to act as the organisation's public officer
- confirm that they satisfy the AI Act requirements for being a public officer, and
- agree to notify the organisation if any of these matters or their contact details change.

The AI Act requirements about being a public officer are now explained in more detail.

**Who is a “resident” of Victoria?**

The AI Act does not define who is a resident of Victoria. However, generally, the public officer's primary residence (that is, the place where they usually live) must be located in Victoria.

So even if the public officer is not an Australian citizen or if they frequently travel outside Victoria, they can usually still be the public officer. But check the rules of your organisation for any special requirements.

**Note:**

The AI Act is being changed to merge the roles of the public officer and the secretary. When these new laws start (expected 1 July 2012), the public officer will automatically be called the 'secretary' under the AI Act. This Guide will be updated when these new laws start.

These new laws will also remove the requirement for the public officer/secretary to be a resident of *Victoria*, and replace it with the broader requirement that they be a resident of *Australia*. This means that a person appointed as secretary after 1 July 2012 can be a resident of any State or Territory in Australia.

To make the transition to these new laws easier, your organisation may wish to consider appointing the same person to the roles of public officer and secretary before 1 July 2012.

**What is “bankruptcy”?**

Bankruptcy is a legal status that offers a person protection from further action against them by creditors (that is, people to whom the person owes money). A person is a “declared bankrupt” when an actual declaration of bankruptcy has officially been made about them. A person is not a declared bankrupt if bankruptcy proceedings are only *in the process* of being brought against them. The usual period of bankruptcy is three years. For further information about bankruptcy, see [www.itsa.gov.au](http://www.itsa.gov.au) > [Bankruptcy](#).

The term “take advantage of the laws relating to bankruptcy” includes if a person enters a personal insolvency agreement (which is an agreement to repay creditors that a person who is in debt can sometimes make to avoid being declared bankrupt).

Bankruptcy records are publicly accessible on the National Personal Insolvency Index (**NPII**), so it is possible to check if a person has been declared bankrupt — see [www.itsa.gov.au](http://www.itsa.gov.au) > [Creditors](#) > [NPII](#). Fees apply for searching the NPII.

### What is “unsound mind”?

The term “unsound mind” is not defined in the AI Act, but generally refers to someone who is mentally incompetent.

The AI Act also refers to a person who “is liable to be dealt with in any way under the law relating to mental health.” This would include, for example, a person who is an involuntary patient under the *Mental Health Act 1986* (Vic).

#### **Remember!**

A public officer who goes to live outside Victoria, or who becomes bankrupt or of unsound mind, is no longer able to be the public officer. Under the AI Act, the position of public officer becomes (automatically) vacant when any of these things occur.

### Your organisation’s rules and policies

You must check the rules of your organisation for any additional requirements about who can be appointed as the public officer and the term (or length) of their appointment. Your organisation may also have policies about who should be the public officer. The rules and any policies of your organisation cannot override the AI Act requirements.

Particularly if your organisation is large, your rules may state that the public officer can be a paid manager. In some large organisations the rules may allow for the work of the public officer to be carried out by a specialist firm for a fee. However, even if the public officer delegates their duties to another person, the public officer remains legally responsible for those duties being properly carried out (for further information on the public officer’s duties, see [Reporting to Consumer Affairs Victoria](#) in this Guide).

### Does the public officer have to be the secretary or on the management committee?

No, but the rules of many organisations require the public officer of the incorporated association to be the secretary, and often also a member of the management committee (that is, the organisation’s governing body, sometimes called the “board”). However this is optional – it is not required by the AI Act or by the *Associations Incorporation Regulations 2009* (Vic) (the **Regulations**). The model rules (set out in Schedule 4 of the Regulations) do not require this either.

If your organisation’s rules do not require the public officer to be a member of the management committee, it will be implied (unless they expressly state otherwise) that the public officer cannot vote at management committee meetings.

**Important:**

The AI Act is being changed to merge the roles of the public officer and secretary (these changes are expected to commence 1 July 2012). When these changes start, the public officer will automatically be called the 'secretary' under the AI Act. This Guide will be updated when these new laws start.

To make the transition to these new laws easier, if your organisation is changing its secretary and/or public officer before this date, consider appointing the same person to both roles.

## 2. How is the public officer appointed?

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The first public officer of your association is the person who applied for incorporation (unless the application specified another person) and must consent to being the first public officer (section 24 of the AI Act).

The rules of some associations state that the secretary *automatically* becomes the public officer when they are elected as secretary. However this is not the case for every organisation, so you need to check what your rules say.

The management committee must appoint a person to fill the position within 14 days of the position of public officer becoming vacant (section 25(1) of the AI Act). The circumstances in which the position may become vacant are discussed below,

**Tip:**

A sample resolution to appoint a new public officer is set out below:

*The management committee appoints Ms Katherine Smith to be the public officer of XYZ Inc, effective from 1 January 2009 until the end of the next annual general meeting of XYZ Inc (or earlier resignation or termination in accordance with the rules).*

The organisation may also wish to state in the minutes something like this:

*The management committee has received (and will keep for its records) a written statement by Ms Katherine Smith confirming that she:*

- *agrees to act as the public officer of XYZ Inc*
- *satisfies the AI Act requirements for being a public officer, and*
- *agrees to notify the management committee of XYZ Inc if any of these matters or her contact details change.*

Your organisation may have special requirements for exactly how the management committee goes about appointing a new public officer when there is a vacancy. Check your own organisation's rules and any policies carefully.

**Remember!**

If your organisation does not appoint a public officer within 14 days after the position becomes vacant, your organisation can be fined.

### What if the public officer is also the secretary of the organisation?

As mentioned above, in many organisations the public officer is also the secretary of the association and (because of that role) also a member of the management committee.

Depending on your organisation's rules, the requirements for appointing a person as *secretary* may differ from the requirements for appointing them as the *public officer*.

The way in which your organisation appoints members of the management committee (which usually includes a secretary) must be set out in your organisation's rules (item 4(a) and (b) of the Schedule to the AI Act). See [Appointing and Removing a Secretary](#) in this Guide for more information.

## 3. What happens after the public officer is appointed?

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### Report to CAV

Within 14 days after a new public officer is appointed, the public officer must notify CAV of certain details (section 28(1) of the AI Act and reg 10 of the Regulations).

If the existing public officer's details change (for example, their address), this information also should be updated with CAV.

**Important:**

If you have just been appointed as the public officer (or you are the existing public officer and your details have changed), you need to notify CAV – even if your organisation or the previous office bearers have not done this in the past!

The public officer can advise CAV of these changes by:

- lodging the "Change of Association Details" form with CAV in person, post or fax (the form is available on CAV's website: [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au) > [Incorporated Associations](#) > [Fees Forms](#))

[and Online Transactions](#). CAV also accepts completed and signed forms scanned (PDF format) and sent by email, or

- updating the details online via CAV's website: [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au).

As at 1 October 2011, there is no lodging fee to pay.

**Tip:**

To notify CAV or lodge forms online, the public officer must first obtain a "User ID" and "Passcode". The public officer (and only the public officer) can apply to obtain these via CAV's website: [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au) > Incorporated Associations > Fees Forms and Online Transactions > **Online transaction** - for public officers with a [User ID and Passcode](#).

**Remember!**

If the public officer does not notify CAV within 14 days of their appointment, your group can be fined.

### Ongoing reporting responsibilities

The public officer also has responsibilities for reporting to CAV about:

- the organisation's financial information in its annual statement, and
- decisions made by the organisation's members which must be approved by CAV before they can become official (such as changes to the rules or statement of purposes).

See [Reporting to Consumer Affairs Victoria](#) in this Guide for more information about the reporting responsibilities of the public officer of an incorporated association.

### Who else should be notified of the appointment of a new public officer?

If your organisation is registered for tax purposes (for example, if it has an ABN), the organisation must also notify the Australian Tax Office (ATO) of certain changes to the organisation, including the appointment of a new public officer. The ATO must be notified of a change in public officer within 28 days after becoming aware of the change.

**Tip:**

It will be easier for your organisation to appoint the same person as the public officer for both the ATO and CAV. However you should check who your own organisation has appointed in each case – they can be different.

The outgoing public officer should notify the ATO and other authorities of the new public officer's before they leave their role. This will ensure a smooth transition from one public officer to the next.

In addition to the public officer, an organisation may authorise another office bearer to make enquiries to the ATO about the organisation's tax affairs. A tax officer will only discuss your organisation's

account with your authorised contact person (who may be your public officer). You will also need to notify the ATO if your authorised contact person changes.

As at 1 October 2011, the ATO can be notified of a change of public officer or other authorised contact person by:

- telephone – phone 1300 130 248 between 8am and 6pm Monday to Friday
- sending the form “Change of Registration Details” (NAT 2943) which can be requested by phone or via the ATO website, or
- online, if your organisation is registered for ATO online services.

The ATO has a useful fact sheet [“How do I ensure the Tax Office can speak to my organisation’s representative?”](#) which can be downloaded from the ATO website [www.ato.gov.au](http://www.ato.gov.au) > Non-Profit > Your situation > Record keeping and managing your tax affairs > Changes to your organisation, including key staff.

You may need to consider whether there are other people, organisations or agencies that should be notified of a change of public officer. Check your organisation’s policies and important documents such as funding agreements and leases.

#### 4. When will the position of public officer become vacant?

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Under the AI Act (section 27(2)) the position of public officer becomes vacant if the public officer:

- dies
- resigns in writing
- is removed from office (see below,
- [5. Removing a public officer](#)), or
- becomes bankrupt, of unsound mind, or no longer lives in Victoria (see above).

If any of these circumstances apply, the organisation does not have to pass a resolution removing the person as public officer. Their position is automatically terminated (vacated) under the AI Act.

##### **Remember!**

If the position of public officer becomes vacant, the organisation’s management committee must appoint a new public officer within 14 days, and CAV must be notified within 14 days after the appointment.

#### **Return of documents of the organisation**

The public officer will have access to documents and information about the organisation because of their role. After they have left their position, these documents must be returned to the management committee within 28 days (section 29D of the AI Act). If the documents are not returned the organisation can, after a further request to do so, apply to the Magistrates Court for an order directing the person to return them.

**Tip:**

To assist the transfer of information from one public officer to the next, it is a good practice to:

- arrange for the new public officer to seek information from the outgoing public officer (for example, logins/passwords, financial records, copies of documents lodged with CAV) as soon as they are appointed
- store all information securely in a central place (such as the organisation's office and/or computer), including back-ups of electronic data, and
- provide a copy and/or explain the organisation's policies and procedures to the next public officer.

It is good practice for the outgoing public officer to sign a statement confirming they have returned all relevant documents after they have finished in the position.

## 5. Removing a public officer

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Sometimes an organisation may have to remove a public officer from office (for example, because the person is not carrying out their duties properly).

The AI Act says that an incorporated association may remove a public officer (section 27(1)). This is commonly done by the management committee, but check your own organisation's rules for any special procedures.

After they have left their position, the public officer must return documents belonging to the organisation (see above).

### What if the public officer is also the secretary and/or a member of the management committee?

For more information about removing the secretary of your organisation, see [Appointing and Removing a Secretary](#) in this Guide.

If the removed public officer is also a member of the management committee, depending on your organisation's rules, the person may be automatically removed as a management committee member. However, check your rules carefully about this.

### What if the public officer is an employee of your organisation?

If the public officer is also an employee of your organisation, their employment arrangements should be carefully considered before they are removed. This is very important if the person's main role is as the public officer and the organisation no longer wants to employ them.

If your organisation wants to remove a public officer who is also an employee, *and* this would mean the person no longer has a paid position within the organisation, seek legal advice before taking any action. The organisation needs to ensure that the organisation complies with relevant contractual and statutory requirements about terminating (ending) a person's employment. Under the national *Fair Work Act* it is illegal to dismiss an employee on a range of grounds (except where related to an inherent requirement of the position concerned). More information on fair and lawful termination can be found on the website of the [Fair Work Ombudsman](http://www.fairwork.gov.au) at [www.fairwork.gov.au](http://www.fairwork.gov.au).

#### **Important:**

Under the *Fair Work Act*, small businesses (employing fewer than 15 full time employees) are no longer exempt from unfair dismissal laws. If your organisation is a small business, it should familiarise itself with the Small Business Fair Dismissal Code. The Code contains a checklist to help small business employers assess and record their reasons for dismissing an employee.

For more information on termination of employment or to view the Small Business Fair Dismissal Code, visit the website of the Fair Work Ombudsman at [www.fairwork.gov.au](http://www.fairwork.gov.au) > Termination > Small Business Dismissal Code.

## Further information

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### PilchConnect resources

The PilchConnect web portal contains a variety of resources and fact sheets for community organisations – go to [www.pilch.org.au/legal\\_info/](http://www.pilch.org.au/legal_info/):

- for information about taking a role in an incorporated association in Victoria see The people involved > Holding a position in a community organisation > positions in an incorporated association at [www.pilch.org.au/positionia/](http://www.pilch.org.au/positionia/).

### Legislation

The [Associations Incorporation Act 1981](#) (Vic) is the legislation that regulates incorporated associations in Victoria.

The [Associations Incorporation Regulations 2009](#) (Vic) contain additional requirements for incorporated associations in Victoria.

#### Government

Consumer Affairs Victoria website contains a variety of online resources, including online access for incorporated associations. See: [www.consumer.vic.gov.au](http://www.consumer.vic.gov.au) > Incorporated Associations.

The Fair Work Ombudsman website contains information about employers' obligations and the Small Business Fair Dismissal Code. See [www.fairwork.gov.au](http://www.fairwork.gov.au)

#### Other links

See [Important Background Information](#) in this Guide for links to other organisations and online resources to assist you and your organisation.

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