

## Fact sheet: Volunteer civil liability protection in Victoria

### Overview

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In Victoria, there are laws which provide that some volunteers are not personally liable for anything done (or not done) in good faith while doing community work that is organised by a community organisation. These laws provide that any liability (legal responsibility) resulting from the actions of these volunteers may transfer to the community organisation, so that the organisation will be held liable to injured parties, instead of the volunteer.

These laws were introduced in Victoria in 2002 and are set out in the *Wrongs Act 1958 (Vic)*.

The *Wrongs Act* contains particular definitions of 'volunteer', 'community organisation' and 'community work'. There are also a number of exceptions in the Act. In short, the Act does not apply to all volunteers, or to all community organisations, or to all actions undertaken by a volunteer or for all types of legal proceedings.

There are a few threshold requirements to be met before a volunteer may gain the benefit of the protection afforded by the legislation (that is, before a community organisation will be held liable for the actions of its volunteers). These requirements are listed below. Your organisation will need to understand the definitions used in the *Wrongs Act* to work out whether it is, or has the potential to be, liable for the actions of its volunteers.

This fact sheet provides an overview of the major issues to consider. After reading this you may also wish to work through our 'Checklist: Community organisation liability under the *Wrongs Act 1958 (Vic)*', in order to work out how your organisation may be liable for its volunteers under the Act.

PilchConnect gratefully acknowledge the work of Professor Myles McGregor-Lowndes from the Australian Centre for Philanthropy and Nonprofit Studies at the Queensland University of Technology, on which much of this fact sheet is based.

**Note:** The information contained in this fact sheet is intended as a guide only, and is not legal advice. If you or your organisation has a legal problem you should talk to a lawyer before making a decision about what to do. The information in this fact sheet is written for people and organisations resident in, or affected by, the laws that apply in Victoria, Australia and is current at 1 October 2008.

## Could our Victorian community organisation be liable for the actions of our volunteers?

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To work out the answer to this question, your organisation will need to understand and work through the terminology used in the *Wrongs Act 1958* (Vic). The *Wrongs Act* protects certain ‘volunteers’ who are performing ‘community work’ that has been ‘organised’ by a ‘community organisation’. Many of these terms are specifically defined in the *Wrongs Act*.

### What is a ‘community organisation’ for the purpose of this law?

Civil liability protection is afforded to volunteers who undertake community work that is organised by a ‘community organisation’. The *Wrongs Act* defines a community organisation as:

- ▶ an incorporated association under the *Associations Incorporation Act 1981* (Vic);
- ▶ a municipal council or other incorporated local government body;
- ▶ a body corporate such as a company limited by guarantee; or
- ▶ 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.

that organises the doing of ‘community work’ by volunteers.

All Victorian incorporated associations, companies and co-operatives are covered by the *Wrongs Act*.

**Beware:** The volunteer protection provisions of Victoria’s *Wrongs Act* do not apply to unincorporated community groups. This means volunteers who are involved in unincorporated community group will be liable for their own actions. If you are an unincorporated group, this may make it more difficult for you to attract volunteers.

### What is ‘community work’?

To gain protection the volunteer must be performing ‘community work’ organised by a community organisation. Community work is broadly defined as work for any 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;
- ▶ promoting the common interests of the community or a section of the community; or
- ▶ other purposes specified in the regulations to the *Wrongs Act*.

The definition of 'community work' focuses on the purpose of the activity the volunteer is performing, not the overall purpose of the organisation. Therefore, whether a volunteer is performing 'community work' will depend on what work the volunteer is actually doing, rather than the object of the organisation they are doing the work for.

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 your organisation falls in to one of these categories.

### 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 protection does not extend to spontaneous acts of volunteers or activities that the organisation has not authorised.

**Example:** A person attends an organised event such as a community sports day and starts to help with marshalling participants. An injury occurs as a result of the person's marshalling activities. It is unlikely the volunteer will be protected under the *Wrongs Act* as his/her actions were not formally authorised by the community organisation.

However, although the definition of 'organise' includes 'to direct and supervise', it 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.

### 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 1 July 2008.

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.

**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

There are a number of people who are specifically excluded from the definition of 'volunteer' (such as members of the Country Fire Authority or some Emergency Services personnel) because they are already given immunity by other Victorian laws. Also a person doing community work under a court order is not included in the definition of a 'volunteer' for the purposes of the civil liability protections of the *Wrongs Act*.

## What protection is given to volunteers under the *Wrongs Act*?

Section 37 of the *Wrongs Act* sets out the actual legal protection that is given to a volunteer who is performing community work organised by a community organisation. Again, the protection itself has limits to it. The section reads: *A volunteer is not liable in any civil proceeding for anything done, or not done, in good faith by him or her in providing a service in relation to community work organised by a community organisation.*

There are a few issues to consider here, which are outlined below.

### Civil liability

The volunteer protection provisions only apply to 'civil proceedings'. Civil proceedings essentially mean a legal action between two citizens – for example, a negligence claim or a breach of contract claim. This means that, if protected by the provisions in the *Wrongs Act*, 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 negligence.

The *Wrongs Act* does not protect volunteers from criminal proceedings (which are proceedings between a person and the State). 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 liability in this situation.

Also the *Wrongs Act* specifically does not provide protection for volunteers for two types of civil proceedings - defamation and liability under the *Transport Accident Act 1986* (Vic), that is, a liability for compensation in respect of people who are injured or die as a result of transport accidents.

### 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 wrongdoing, the volunteer is taken to be acting in good faith.

### Providing a service

The volunteer civil liability protection only applies in relation to a service provided by the volunteer, not the provision of goods.

### Are there any other exceptions to the volunteer protection in the Act?

Yes. Even if a person is a volunteer and they have been undertaking community work and that community work has been organised by a community organisation and the volunteer has been providing services in good faith - there are still some further exceptions set out in the *Wrongs Act* before the community organisation will be held liable for the volunteer's actions.

In general, a community organisation will not be liable where:

- ▶ the volunteer knew, or who ought reasonably to have known, that at the relevant time he or she was:
  - ▶ acting outside the scope of the community work organised by the community organisation; or
  - ▶ 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 time, significantly impaired by alcohol or drugs.

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

**Tip:** It is a good idea for community organisations to clearly define the role and tasks of their volunteers in a written document (a kind of 'volunteer job description'). The job description may also specify actions that are prohibited (for example, giving clients medical advice). Providing your volunteers with written policies, instruction manuals and training is also recommended.

These documents may help to define what kind of work or actions are authorised or instructed by the community organisation and what volunteer actions might be considered to be outside the scope of their authority or contrary to instructions. It might be a good idea to set out general policies for all workers (paid employees and volunteers) on issues such as alcohol and drug use.

As mentioned previously, the Act also precludes volunteer protection for two specific types of civil proceedings. If the volunteer is sued for defamation, they will not be able to claim volunteer protection under the *Wrongs Act*. If the volunteer has a car accident while volunteering, 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 part insurance that is included in the registration costs of a vehicle).

For more information on community groups and insurance, see the Related Resources section at the end of this document.

## So, if our volunteers are protected by Victoria's *Wrongs Act*, what will our community organisation be liable for?

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Victoria's *Wrongs Act* provides 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 negligence.

Instead, the liability of a protected volunteer will be borne by the community organisation that organised the community work the volunteer was performing.

In short, any civil liability the volunteer incurs is transferred to the community organisation. This means that an injured party would sue the community organisation (rather than the volunteer) for any injury or injuries caused by the volunteer.

**Tip:** Community organisations that may potentially be liable for the actions of their volunteers under the volunteer protection provisions of Victoria's *Wrongs Act* should consider implementing volunteer risk management procedures and should ensure that their insurance coverage is adequate.

## Are there exceptions to a community organisation's liability?

Possibly - the Victorian *Wrongs Act* sets out a few exceptions. In very general terms, even if a volunteer is protected and liability for civil proceedings transfers to a community organisation:

- ▶ the community organisation will be able to rely on any existing protection from liability that a community organisation may have arising from contractual arrangements with the injured person (eg. possibly via an appropriate warning sign or disclaimer);
- ▶ if more than one community organisation is involved in organising the community work performed by the volunteer, the community organisation that principally organises the work incurs the liability of the protected volunteer; and
- ▶ if the community organisation is also a public body or public entity or local authority (a technical definition applies), then the State Government will be held liable for the costs of any civil actions.

## Can we get our volunteers to sign a waiver, to indemnify our organisation from any liability resulting from their actions?

No! Or more accurately, your organisation could, but the waiver would have no effect. The *Wrongs Act* specifically prohibits these kinds of agreements. An organisation cannot try to 'contract out of' the volunteer protection provisions in the *Wrongs Act* 1958 (Vic).

## What does the *Wrongs Act* say about making an apology?

Under the provisions of the *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 *Wrongs Act* specifies that an apology is an expression of sorrow, regret or sympathy by a person that does not contain a clear acknowledgement of guilt. In a civil proceeding where death or injury is at issue or relevant to a 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.

## Do we still need volunteer (accident) protection insurance?

Yes. The *Wrongs Act* does not cover personal injuries suffered by a volunteer. It is a good idea to consider insurance for injury (personal accident) to volunteers.

As discussed above, the Victorian provisions shift a volunteer's liability to the community organisation. As such, community organisations should consider obtaining insurance to cover losses caused by their volunteers. Public liability, professional indemnity and directors' and officers' insurance may need to be considered.

For more information on community groups and insurance, see the Related Resources section at the end of this document.

## What if our Victorian community organisation has volunteers that operate across in other States?

The provisions in Victoria, while having some similarity to other jurisdictions, are different in many respects. Determining which law a volunteer will be subject to can be a complicated matter, depending upon the circumstances which gave rise to the liability. Generally, volunteers in other States will be subject to that State's laws. It does not matter that the volunteer is resident in Victoria or that the community organisation is registered in Victoria.

Community organisations with a national volunteer force will have to examine how the laws of each State and Territory apply to their volunteers.

## How does this legislation impact upon our organisation?

A community organisation's volunteers have some added measure of protection from civil liability via the Victorian *Wrongs Act*. There are conditions and exceptions that apply to this protection. It may create a 'certain peace of mind' for many volunteers. Volunteers may feel 'protected', if they operate within the limits set by the community organisation.

The volunteer's liability is shifted to the community organisation. This means that community organisations will potentially be liable for civil liability that their volunteers cause. As such, it is recommended that community organisations continue to maintain insurance cover as part of a risk management strategy.

Other risk management steps that could be taken by community organisations include examining their systems for engaging, authorising and instructing volunteers. Volunteers are only protected from civil liability if they act as instructed by the community organisation within the scope of authorised activities. As such, closer monitoring and instruction of volunteers could reduce the liability of community organisations.

## Related resources

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### Related PilchConnect fact sheets

PilchConnect Checklist: Is our organisation liable for its volunteers under the *Wrongs Act 1958* (Vic)?

### Related legislation

*Wrongs Act 1958* (Vic)

*Associations Incorporation Act 1981* (Vic)

*Public Administration Act 2004* (Vic)

*Transport Accident Act 1986* (Vic)

### Related links

For other online legal information resources for Victorian community organisations about :

- ▶ volunteers see: [www.pilch.org.au/volunteers](http://www.pilch.org.au/volunteers)
- ▶ insurance and risk management, see [www.pilch.org.au/insurance](http://www.pilch.org.au/insurance)