

This fact sheet covers:

- ▶ your organisation's responsibility for the safety of its volunteers
 - ▶ your organisation's responsibility for the actions of its volunteers, and
 - ▶ ways to minimise the risk to volunteers and others.
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Your organisation is legally responsible for the safety of its volunteers and may also be legally responsible for the actions of volunteers that cause injury to others.

Your organisation has a legal obligation to provide and maintain a safe working environment for its volunteers. There are also laws which provide that, in certain situations, your organisation could be held legally responsible for the actions of its volunteers.

Therefore, it is crucial for your organisation to have good volunteer management practices, policies and insurance in place.

1. Safety of your volunteers

Your organisation has a legal obligation to provide and maintain a safe working environment that is without risk to the health and safety of its workers, including its volunteers, so far as is reasonably practicable to do so.

This obligation is prescribed by New South Wales work health and safety legislation, namely, the *Work Health and Safety Act 2011* (NSW) and the *Work Health and Safety Regulation 2011* (NSW) (together, **NSW WHS Laws**).

The NSW WHS Laws set out various duties that organisations and individuals must comply with in the workplace that are regulated and enforced by a New South Wales government authority known as SafeWork NSW. SafeWork NSW may prosecute organisations and individuals who do not comply with WHS duties under the NSW WHS Laws.

The NSW WHS Laws will apply to your organisation if the organisation conducts a business or undertaking. This includes for-profit organisations and unincorporated associations, but not to organisations that only engage volunteers and have no employees or contractors (**volunteer associations**).

However, in addition to NSW WHS Laws, 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. So, even if your organisation is a volunteer association so is not covered by NSW WHS Laws, it has an obligation under common law to provide a safe working environment.

Organisations and officers of those organisations can satisfy this duty by:

- identifying any risks that their volunteers face
- assessing the level of risk they may face, that is, how likely it is that something will happen and the seriousness of that risk, and
- implementing a process that will eliminate the risk or, if the risk can't be eliminated, implementing a process that will minimise the risk as far as possible.

For more information about risk management, see Section 3 below.

EXAMPLES

Driving 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.

Collecting 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.

RELATED RESOURCES

For more information about whether or not the NSW WHS Laws apply to your organisation, key duties under these laws and what is required of your organisation, go to Not-for-profit Law's Work Health and Safety fact sheet on the Information Hub at www.nfplaw.org.au/OHS.

For more information on the common law of negligence and the standard of care your organisation needs to meet, see Not-for-profit Law's Negligence fact sheet on the Information Hub at www.nfplaw.org.au/negligence.

2. Legal responsibility for actions of volunteers

When could our organisation be liable for a volunteer's actions?

In some circumstances, your organisation could be held liable (legally responsible) for the actions of its volunteers.

The *Civil Liability Act 2002* (NSW) (**the 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. 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 their own negligence.

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 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.

NOTE

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



Protection from liability under the Civil Liability Act

There are 6 steps your organisation can follow to assess whether or not a volunteer might gain the benefit of protection under the Civil Liability Act – which, as above, will mean that your organisation could also be protected from liability (unless it has breached its own duty of care). In summary, a volunteer will gain protection if:

- the work is being done by a 'volunteer';
- your organisation is a 'community organisation';
- the work being done by the volunteer is 'community work';
- the community work being done has been 'organised' by the community organisation, or the volunteer is an office holder;
- the volunteer's action (or failure to act) was done in 'good faith'; and
- no exception applies.

If the above steps do not all apply, the volunteer may be personally liable for their actions. Each of the steps is outlined in more detail below.

STEP 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 October 2017.

A person doing work under court ordered volunteering is *not* a volunteer under the Civil Liability Act definition.

CAUTION

Organisations working with individuals under court orders will need to carefully manage their own risks and should advise the individuals to consider whether there is insurance covering their participation.



STEP 2 - Is your organisation a 'community organisation'?

The Civil Liability Act defines a community organisation as:

- a body corporate (such as a company limited by guarantee or an incorporated association);
- a church or other religious organisation; or
- an authority of the State;

that organises the doing of 'community work' (discussed below) by volunteers and that is capable of being sued for damages in civil proceedings.

CAUTION

The volunteer protection provisions of the 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. If you are an unincorporated group, this may make it more difficult for you to attract volunteers.



STEP 3 - Is the work being done by the volunteer 'community work'?

Community work is broadly defined as work that is not for private financial gain that is done for any of the following purposes:

- charitable;
- benevolent;
- philanthropic;
- educational; or
- cultural.

The Regulations to the 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 October 2017.

The protection under the 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.

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 Information Hub page on Registering as a charity at www.nfplaw.org.au/charity.

STEP 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 also the exceptions at Step 6 below: a volunteer will not be protected if he or she acted contrary to instructions or outside the scope of the work authorised by the organisation.)

STEP 5 - 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.

STEP 6 - Does an exception apply to your organisation?

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

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

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

EXAMPLE

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



WHERE CIVIL LIABILITY ACT PROTECTIONS FOR VOLUNTEERS DO NOT APPLY

A volunteer will not be protected by the *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.

A volunteer will not be protected from liability for criminal actions (actions between a person and 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 Civil Liability Act won't protect the volunteer from criminal liability in this situation.

What could our organisation be liable for based on Civil Liability Act provisions?

To summarise, the Civil Liability Act provides that, if a volunteer is protected (that is, all of the tests set out above have been met and no exceptions apply) 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 the volunteer's own actions or omissions. The Civil Liability Act also provides that if a volunteer is protected from liability, the liability will not transfer to the community organisation. However, importantly, the organisation owes a 'duty of care' to those using its services (and to others, for example employees), so may become liable for a volunteer's actions if it failed to fulfil this duty.

What does the Civil Liability Act say about making an apology?

Under the Civil Liability 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 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.

3. Managing the risk

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. Therefore, volunteer risk management procedures and insurance are very important risk management strategies.

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
- 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 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

SafeWork 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](#).

SafeWork NSW has published numerous resources relating to workplace safety and minimising risk.

These can be located at <http://www.safework.nsw.gov.au/>.



RELATED RESOURCES

For a checklist covering what to do when an incident or accident happens in your organisation, go to our Not-for-profit Law checklist Incident and Accidents on the Information Hub at www.nfplaw.org.au/negligence



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

The Civil Liability Act is silent on the effect of these kinds 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.

Insurance considerations

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.

Common types of insurance include:

Protects:	Type of insurance:
Volunteers	Volunteer personal accident insurance
Employees	WorkCover insurance
Committee members	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
Selling goods or products	Product liability insurance
Vehicles	Motor vehicle 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. It is important to remember that:

- workers' compensation insurance does not cover volunteers (there are rare exceptions), and
- public liability insurance will usually cover injuries a volunteer causes to others but may not cover injuries caused to volunteers.

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.

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.

RELATED RESOURCES



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

For more information on child safety issues, which are not covered in this resource, go to our NFP Law fact sheet on "Engaging and working with youth volunteers" at www.nfplaw.org.au/volunteers.

Resources

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.

Legislation

- Work Health and Safety Act 2011* (NSW)
- Work Health and Safety Regulation 2011* (NSW)
- Civil Liability Act 2002* (NSW)

Other Related Resources

- SafeWork NSW <http://www.safework.nsw.gov.au/>

- 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](#)

- Volunteering Australia www.volunteeringaustralia.org

Volunteering Australia has published a suite of resources for volunteer managers including [Running the Risk? A Risk Management Tool for Volunteer Involving Organisations](#).

For information about the question to ask in relation to your insurance policies, go to the [Conversation Guide](#).

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

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