

# **Environmental Defenders Office ( SA ) Inc.**

## **INFORMATION GUIDE**

### **Volunteers Protection Act 2001**

( current as at June 2011 )

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#### **What is the purpose of this Act?**

The purpose of the Act is "to protect volunteers in the community from personal liability

The primary method of achieving this purpose is to provide that liability in most circumstances for the acts or omissions of volunteers that result in loss or damage to third parties, will rest with the organisation for whom the volunteer works and not the volunteers themselves. The most likely scenarios that would trigger the Act are situations involving "negligence" that result in personal injury or property damage.

The Act recognises that volunteers make a major contribution to the South Australian community but that the prospect of incurring serious personal liability for damages or legal costs in proceedings for negligence is a major disincentive to volunteering

The Act states that it seeks to achieve "a reasonable and expedient balance between the need to protect volunteers against personal liability and the interests of the members of the community that may suffer personal injury, loss or damage". The balance is sought to be achieved in two ways;

1. limiting the personal liability of a volunteer who works for a community organisation by transferring liability to the organisation; and
2. limiting the right to bring proceedings against the volunteer personally for work undertaken while volunteering, (which in turn, reduces the risk of incurring legal costs resulting from those proceedings).

#### **Insurance**

It is important to note that the Act does not remove the need for appropriate public liability and volunteer insurance.

Sadly for many organisations, the cost of this insurance has increased significantly in recent years. This trend is likely to continue.

## **Risks for community groups & volunteers**

The risks associated with volunteer activities vary widely across the community. Low risk activities such as stuffing envelopes or licking stamps can be contrasted with physical labour involving power tools and heavy machinery. However, even fairly routine activities pose a risk of injury if those involved are negligent.

For example,

1. injuries on fund-raising carnival rides or other amusements;
2. food poisoning from improper food storage or preparation at a cake stall or sausage-sizzle
3. negligent advice by volunteer community counsellors
4. damage to property resulting from community events. Etc. etc.
5. Whilst the risk may be quite low and the likely cost or compensation might also be low, it is possible to imagine extreme cases. In any of these cases the question is -who should pay - the community group or the individual volunteer that acted negligently?

Prior to the Volunteers Protection Act, there was a greater risk that the volunteers who were in control of the cake stall or the ride or gave the advice or caused the damage (to use the above examples), may face legal proceedings to determine if their actions were negligent and if they should personally pay compensation. Now it is more likely that the community organisation would be held responsible for the actions of the volunteers who were carrying out work on its behalf.

In Court actions, it is not uncommon for a person who has suffered loss to sue everyone that may possibly be liable. This is because the individuals involved may be wealthier than the organisation and therefore more able to pay compensation. The purpose of the new Act is to prevent individuals from being held personally liable. However this will not always be the case due to a number of exemptions that are explained further below

### **Who is a Volunteer?**

Under the Act, a volunteer is a person who carries out community work and receives no or limited remuneration (pay) for that work. Re-imbursment of out-of-pocket expenses (eg. petrol money) would not affect a person's status as a volunteer.

If any remuneration is to be provided for volunteer work the limit placed upon that remuneration is as prescribed by the Volunteers Protection Regulations 2004. This determines that a person works on a voluntary basis so long as reimbursement is merely for expenses incurred during the course of carrying out work or the person is only given a monetary gift 'true honorarium' in recognition of their work as a volunteer. Note: A person who carries out community work under the order of a court

or as a condition of a bond is not regarded as a volunteer. This would include those who do community work instead of paying fines for small criminal offences.

### **Protection from personal liability for a volunteer**

Under the Act, a volunteer has general protection from personal liability for an act or omission, subject to certain qualifications and exceptions.

1. The protection is only in relation to civil liability, (eg negligence).
2. The act or omission must be done or made in 'good faith' and 'without recklessness'
3. The act or omission must be in the course of carrying out 'community work'
4. The work must be for a 'community organisation'.

These terms are explained below:

"Civil Liability" refers to situations where a person "sues" another for compensation. This is distinguished from "Criminal Liability" where the State (usually through the police) takes action for a breach of the criminal law.

Acting in 'good faith' refers to being honest and not having intent to deceive or defraud. In relation to personal injury matters, it would also mean that the person responsible did not deliberately intend to cause the injury therefore the act or omission was truly negligent.

'Recklessness' is a test indicating whether the volunteer either knew or should have known of the risk involved in doing the act or making the omission. If a person does something without considering the consequences, it is likely to be regarded as "reckless" and therefore outside the scope of the protection offered by the legislation.

'Community work' is defined by the Act as:

" (a) work for any one or more of the following purposes:

- i. for a religious, educational, charitable or benevolent purpose;
- ii. for promoting or encouraging literature, science or the arts;
- iii. for looking after, or providing medical treatment or attention for, people who need care because of a physical or mental disability or condition;
- iv. for sport, recreation or amusement;
- v. for conserving resources or protecting the natural environment from harm;
- vi. for preserving historical or cultural heritage;
- vii. for a political purpose;
- viii. for protecting or promoting the common interests of the

community generally or a particular section of the community; or

(b) work classified by regulation as community work."

'Community organisation' is limited to an incorporated group that directs or coordinates the carrying out of community work by volunteers. This includes any organisation founded by the Government.

### **Exceptions from protection**

The general immunity for volunteers does not extend to:

- a liability that is covered by the scheme of compulsory third-party motor vehicle insurance; or
- a liability for defamation.

The liability will not operate if the volunteer's ability to carry out the work properly was significantly impaired by a recreational drug in effect at the relevant time. A recreational drug is a drug taken voluntarily for non-medicinal purposes and includes alcohol.

The liability will not operate if the volunteer was acting, and 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.

### **Transfer of liability from the volunteer to the organisation**

Under the Act, a liability that would normally attach to a volunteer is instead attached to the community organisation that the volunteer works for. This means that a person who suffers injury, loss or damage by the acts or omissions of a volunteer working for an incorporated organisation has no right to sue the volunteer personally unless it can be shown that the exceptions apply. The prospect of volunteers continuing to be sued is discussed at point 9. below.

### **What legal actions are not covered?**

#### **Volunteers injured**

The Act deals with situations where a volunteer causes harm or injury to a third party. That person could be a stranger or another volunteer.

Where a volunteer is injured at "work" by their own actions or through the negligence

of another volunteer or a third party, then normal rules of liability would apply. The injured volunteer could seek compensation from the negligent party (if any) or through Worker's Compensation provisions.

Where a person is injured whilst undertaking volunteer work for the government, then special insurance provisions apply. All government volunteers are covered by insurance, however the policy is a last resort option when other avenues of compensation fail. It is unclear whether volunteers for "government-funded" community organisations are covered by the Government's insurance policy. [See Public Sector Management Act Determination no. 27 - Volunteers in Government Agencies].

To safeguard the interests of their volunteers, many community organisations have separate volunteers insurance to cover injuries to volunteers at work. Whether or not such a policy is necessary will depend on the nature of community organisation and its activities. The cost of such a policy will also be a relevant consideration.

### **Unincorporated Associations**

Volunteers who do work for unincorporated associations are not able to take advantage of the Volunteers Protection Act. This means that volunteers can still be personally sued for damages. This provides a further incentive for community groups to become incorporated if they wish to attract and keep volunteers.

### **Defamation is not covered**

It is important to note that the immunity given to volunteers by this Act is not applicable to all types of civil wrongs that may be committed by the volunteer. The Act expressly provides that the immunity will not operate if the liability is for defamation.

It is doubtful that acts such as tortious assault, fraud or misrepresentation under the Trade Practices Act would be covered by the immunity, as they require an element of intent of the part of the person committing the actor omission. The immunity only applies if there is absence of an intention to do harm.

There are a number of issues where it is unclear whether or not the Act applies. This would include torts arising from non-violent direct action where purely economic loss is claimed (such as harm to business interests). It would be interesting to see whether a Court would construe participation in a non-violent protest or picket line as "Work for the purpose of conserving resources or protecting the natural environment from harm".

It is probably safe to assume that the Act will be narrowly and conservatively interpreted. In particular a Court is likely to find that such conduct is "reckless" even if it is done "in good faith".

No criminal acts are protected by the immunity provisions. Individuals will still be personally liable to prosecution as well as the civil consequences of criminal acts. This would be the case even if the acts were under the direction of the community

organisation.

### **Does this mean that you will not be sued?**

Although the Act attempts to stop the individual volunteer being sued and transfers all liability to the community organisation, it seems there may still be circumstances where the volunteer will face being sued or at least being part of the proceedings.

A person who has suffered injury, loss or damage may still bring legal action against the volunteer as well as the community organisation in order to test important facts relevant to the case. In particular,

- whether the volunteer's actions or omissions were in "good faith" or are "reckless";
- whether the volunteer was under the influence of recreational drugs;
- whether the volunteer's work can be classified as "community work";  
and
- whether the volunteer was acting outside his or her authority or instructions.

The likelihood of the individual volunteer being sued will be greater when the community organisation is poor or uninsured and the volunteer has assets or insurance. In some cases, the main dispute might really be between the community organisation and the volunteer over who is liable. Even if the volunteer is not sued directly, they may be joined as a defendant by the community organisation seeking to spread or shift liability.

### **Legal Costs**

In most civil cases, the normal rule is that "costs follow the event". This means that the loser must pay the winner's legal costs. The Volunteers Protection Act does not alter this situation. However, if by virtue of the Act, volunteers are less likely to be sued, then they are also less likely to be lumbered with their own or other parties' legal costs.