

Volunteer

PROTECTION LEGISLATION



Discussion Paper for Public Consultation



Government
of South Australia



1. Purpose

The purpose of this Discussion Paper is to seek the views of community members and stakeholders in relation to proposed legislation. The intent of the legislation is to protect volunteers against civil liability arising out of their activities as volunteers.

2. Background

During 1999 the South Australian Government sponsored a Volunteers Summit and Forum process aimed at identifying the needs of the volunteer sector in this State. These initiatives reflected the Government's policy direction to better support and promote the vital contribution that volunteers make to the community.

The process identified the following key themes:

- changes in society that affect volunteers and which need to be reflected in policy making
- appropriate recognition for volunteers
- publicity for the work of volunteers and to raise their profile
- ways of encouraging more people to become volunteers, especially young people
- ways of maximising the use of available funds
- training, occupational health and safety, industrial, legal and insurance issues which affect the work of volunteers.

The Premier, the Hon John Olsen, MP, subsequently released a statement titled "*Supporting Volunteers in South Australia*". The statement committed all sections of Government to on-going support for volunteering in the South Australian community and announced that the Hon Iain Evans, MP had been appointed as Minister responsible for Volunteers.

In response to the matter of legal and insurance issues affecting volunteers, Minister Evans has initiated a process to develop legislation that will protect volunteers against civil liability whilst they are volunteering for a duly constituted not-for-profit organisation.

3. Establishment of Working Party Group

Following the Volunteers Summit, the Minister responsible for Volunteers established a working party of Government officers to consider whether and how legislation to protect volunteers should be enacted. This discussion paper has been prepared in conjunction with the working party.

4. Comparable Legislation

There is no other legislation of the type proposed in Australia. However, in the International Year of Volunteers, many jurisdictions are initiating proposals to better recognise, protect and promote volunteers and their valuable contribution to communities. For example, Parliamentarians from the Council of Europe's 41 member states recently adopted a recommendation urging governments to remove legal obstacles hindering people from engaging in volunteering roles.

In the United States, the Federal Congress has enacted legislation to protect volunteers against liability. A copy of this legislation can be found at <http://ahec.msu.montana.edu/volclin/pl105-19.html> That legislation has been used as a basis for the proposed South Australian legislation.

5. Scope

This paper is not intended to address the issue of personal injury to volunteers themselves. Any scheme of compensation to volunteers for personal injury would be likely to require provisions as complex as the workers rehabilitation and compensation scheme that exists for employees. Costs of such a scheme would also be significant.

The scope of the proposed legislation is the protection of volunteers against civil liability arising from authorised activities. It is intended to provide a mechanism by which volunteers can be confident that, when acting in an authorised manner, they will not be personally liable to pay

compensation to third parties to whom they may have unintentionally caused personal injury, property damage and financial loss.

“Civil liability” refers to the responsibility of one citizen to pay compensation to another citizen for monetary loss or physical damage arising out of:

- Negligence (causing personal injury, property damage or financial loss)
- Defamation
- Trespass

6. Current Law

Some existing legislative measures, discussed below, protect volunteers in the course of the exercise of their volunteering work. However, there is no specific legislation aimed at reducing the exposure of volunteers to legal liability. For the most part, the volunteer’s position is that of an ordinary citizen.

The protections against liability that already exist are also dispersed across various administrative and legislative arrangements in a manner that is not easy to identify. Current measures include:

Protection for volunteers assisting Government agencies (Public Sector Management Act: Commissioner for Public Employment Determination No.27).

Determination 27 is currently under review. Copies of Determination 27 are available through the Office for Volunteers. Essentially, it provides protection for volunteers who operate within the Government sector (i.e. working specifically with Government agencies under an acknowledged arrangement) against financial loss associated with injury to themselves in the course of their volunteering work and civil suit brought by members of the public against them. It is this second form of protection that this paper proposes for all volunteers, be they operating within the Government sector or in the private sector.

Protection afforded to volunteers in specific classes such as fire-fighters, eg Section 64, Country Fires Act 1989.

Section 64 of the Country Fires Act 1989 provides that:

“A person incurs no civil or criminal liability for an honest act or omission in the exercise or performance, or purported exercise or performance, of a power or function under this Act”.

However, although this protection extends to volunteer fire-fighters, it is limited to those operating within the structure of the Country Fire Services organisation.

Protection afforded by incorporation under the Associations Incorporation Act 1985.

By forming an incorporated association under the Associations Incorporation Act 1985, a group of individuals with a common community purpose can incorporate that association to form a separate legal entity. One of the consequences of the act of incorporation is that, generally speaking, liability arising out of the acts or decisions of the association that would ordinarily attach to the individuals who undertook those acts or made those decisions, transfers to the association itself.

Protection provided by the insurance carried by the parent volunteer organisation.

Many of the larger volunteer organisations carry insurance against public liability. Whilst the terms of these contracts will vary, an example of the terms of insurance carried by a major volunteer organisation is detailed below from Apex Australia:

The Apex Australia Directory has an insurance summary section titled “Guide to Apex Insurance”. This section aims to acquaint Apex members with a general outline of the various Associations’ Insurance policies. It is presented in plain language and strongly encourages



members to consult with insurance brokers prior to any activity, should they have any concerns.

Apex members are covered under various policies designed to protect members whilst engaged in Apex activities only, and include personal accident cover, workers compensation, public liability and club property.

The Public Liability insurance will indemnify the Association of Apex Clubs, the separate Clubs, and all members including Life Members and voluntary helpers, for the liability at law for bodily injury or damage to property caused by an accident happening as a consequence of an Apex activity. The Policy will also indemnify an accident caused as a result of a defect in any buildings, plant, or equipment used by the Clubs or their members in the course of those activities.

Specific legislative provisions relating to citizens (whether or not volunteers) in particular circumstances.

Some specific legislative protections have developed over time against common law liability for civil wrongs. The most significant example of this is that a person who causes injury to another arising out of the use of a motor vehicle will, unless some disentitling factor applies, be covered by the third party personal injury scheme that attaches to motor vehicle registration in this State. This limitation on liability applies to all registered drivers and covers volunteers when they are performing their volunteering functions.

However the protections described above are inconsistent across the various arrangements and do not cover all volunteers or all relevant situations. This can be contrasted with the protection from personal liability afforded to employees by virtue of the common law principle of vicarious liability, whereby the authorised acts of an employee are deemed to be the acts of the employer. Although self-employed persons and contractors do not have the protection of vicarious liability (because they are not employees), they do have the capacity (through their income) to protect themselves by insuring against civil liability.

7. Who is a Volunteer?

In order for any protective measure to be workable, a clear definition of a volunteer needs to be established. Exactly who will enjoy the protection afforded by the legislation needs to be clear to volunteers, their parent organisations and the public.

It is suggested that a volunteer could be defined as *a person who provides services in the furtherance of a community benefit, of their own free will and for no financial benefit to themselves.*

The elements of the above definition of a volunteer require some elaboration:

"in the furtherance of a community benefit"

A number of Acts have already attempted to define the elements of activity that is directed towards public or social good. It is proposed that, for the purposes of the proposed legislation, *in the furtherance of a community benefit* should be defined along the same principles as used in the Associations Incorporation Act 1985 for eligibility for incorporation, namely:

18. (1) An association formed -

- (a) for a religious, educational, charitable or benevolent purpose; or
- (b) for the purpose of promoting or encouraging literature, science or the arts; or
- (c) for the purpose of providing medical treatment or attention, or promoting the interests of persons who suffer from a particular physical, mental or intellectual disability; or
- (d) for the purpose of sport, recreation or amusement; or
- (e) for the purpose of establishing, carrying on, or improving a community centre, or promoting the interests of a local community or a particular section of a local community; or

- (f) for conserving resources or preserving any part of the environmental, historical or cultural heritage of the State; or
- (g) for the purpose of promoting the interests of students or staff of an educational institution; or
- (h) for political purposes; or
- (i) for the purpose of administering any scheme or fund for the payment of superannuation or retiring benefits to the members of any organisation or the employees of any body corporate, firm or person; or
- (j) for the purpose of promoting the common interests of persons who are engaged in, or interested in, a particular business, trade or industry; or
- (k) for any purpose approved by the Minister. (1)

It is proposed that these purposes may also be used to define bodies that satisfy the criteria “in the furtherance of a community benefit”. A volunteer working for such an organisation, as long as they also satisfy the other criteria, will qualify for the protection of the proposed legislation.

“of their own free will”

The proposed legislation is not intended to confer additional benefits to those participating in work-for-the-dole schemes or performing community service as required by a court of law.

However, it is proposed that the legislation will enable the making of regulations which allow the definition of a volunteer to be expanded to identified classes not falling within the definition in the legislation.

“for no financial benefit to themselves”

Some volunteers receive a small honorarium for their contribution. It would be unreasonable to preclude such persons from the protection of the proposed legislation. On this basis, the issue becomes the threshold over which the honorarium payment should preclude access to the protection. It is proposed that the sum be prescribed by regulation and that the sum be prescribed at \$500 per annum in the first instance. Reimbursement of expenses necessarily incurred (as opposed to an honorarium) should not preclude the volunteer from the protection.

7.1. Should the phrase “in the furtherance of a community benefit” be defined by reference to the eligibility criteria for incorporation under the Associations Incorporation Act 1985?

7.2 How much should a volunteer be able to receive as a result of their volunteer work, or recover in lost expenses, before they are no longer classed as a “volunteer” for the purposes of the legislation?

(1) However, it also proposed that the following criteria that disentitle a body from incorporating should also disentitle a body from being classified as one which is directed at the “furtherance of community benefit”, namely:

- (a) a principal or subsidiary object is to secure a pecuniary profit for the members of the association or any of those members; or
- (b) a principal or subsidiary object is to engage in trade or commerce,
An association is not to be regarded as having as a principal or subsidiary object the securing of a pecuniary profit for its members or any of its members or engaging in trade or commerce by reason only of any one or more of the following circumstances:
 - (a) that the association itself makes a pecuniary profit, unless that profit or any part of it is or is to be divided among or received by the members or any of them otherwise than in accordance with section 55; or
 - (b) that the association buys or sells or deals in or provides goods or services where those transactions are ancillary to the principal objects of the association and, in the case of transactions with non-members (other than spouses, children or parents of members), the transactions -
 - (i) are not substantial in number or value in relation to the other activities of the association; or
 - (ii) are intended to provide financial support to the association in a manner that is directly related to the objects of the association; or
 - (iii) consist in the charging of admission fees to functions organised for the promotion of the objects of the association; or
- (c) that the association is established for the protection of a trade, business, industry or calling in which the members are engaged or interested, if the association itself does not engage or take part in any such activity; or
- (d) that the members of the association compete for trophies or prizes in contests directly related to the objects of the association.



For reasons set out below, the definition of a volunteer to be used in the legislation would stipulate that the person must be providing services on behalf of an incorporated not-for-profit organisation or a local or State Government agency. (An incorporated not-for-profit organisation would include incorporated associations, not-for-profit companies and the like).

7.3 Under the proposed legislation, does any other organisational structure need to be covered?

8. Transfer of Liability of the Volunteer to the Parent Organisation

The legislation model under discussion would prohibit legal proceedings being brought against volunteers personally, and transfer liability to a volunteer's parent organisation.

As indicated earlier in this paper, an employee usually avoids personal liability for actions arising out of their work because that liability transfers to the employer by virtue of the common law principle of vicarious liability. Under this principle, the employee is an agent of the employer, and the employee's lawful authorised acts are the responsibility of the employer. The principle of vicarious liability is also entrenched in section 27C of the Wrongs Act 1936; a copy can be accessed on the Internet at http://www.austlii.edu.au/au/legis/sa/consol_act/wa1936111/s27c.html.

It is proposed that the same principle be applied to volunteers, to the extent that civil liability would otherwise apply to the volunteer.

For example, if a volunteer accidentally damages the property of a member of the public whilst volunteering, the legal responsibility for compensating the member of the public would transfer from the individual volunteer to the parent organisation, or local or State Government agency, if the volunteer is working with Government.

In fact, the proposal for volunteers affords greater protection than that provided for by section 27 of the Wrongs Act 1936 because section 27 only affords an indemnity, and the legislation proposed by this discussion paper provides immunity from civil suit. In other words, the principle of vicarious liability in section 27 only allows an employee who is sued to join his or her employer as a co-defendant, whereas the proposal of the volunteer protection legislation is to require a claimant to sue the volunteer organisation instead of the volunteer personally. In the latter situation, the volunteer avoids legal proceedings altogether.

One difficulty with applying the vicarious liability principle to volunteers and their parent organisations is that the parent organisation cannot exert the same level of direction and control over its volunteers as an employer can in respect of an employee. Therefore, it might be argued that it is unfair for the parent organisation to take legal responsibility for its volunteers. To minimise the impact of this, it is proposed that volunteer organisations should identify, in the clearest terms possible, the range of functions and activities that it authorises a volunteer to undertake, and that the organisation be entitled to withdraw that authorisation at any time. Once the authorisation is withdrawn, the volunteer no longer has the protection of the proposed legislation. This is discussed further in section 9 below.

It should be noted that the transfer of liability would only apply where the parent organisation is an incorporated not-for-profit body or a local or State Government agency. If the volunteer is working with an unincorporated body (for example, a sporting club run by an unincorporated committee), there is no scope to move the liability away from individuals. A committee is not a legally separate body, and as such legal liability could only transfer from one individual (the volunteer) to several individuals (the committee). One of the primary aims of the legislation is to ensure that individuals are protected. Accordingly, the transfer of liability will be limited to situations in which the parent body is incorporated, or is a local or State Government agency.

This means that volunteers working for committees or other to unincorporated groups will not benefit from the legislation. The same will apply in respect to volunteers operating solo. In such areas liability would still lie with the individual volunteer as it does now.

Where the incorporated not-for-profit body does not carry relevant or appropriate insurance its funds and assets would be used to pay for any damages awarded against them. However, the funds and assets of the individuals (the volunteer or the members of the incorporated body's governing body) would not be exposed. By preventing a member of the public from suing a volunteer personally and requiring that person to sue the volunteer's parent association, it is possible that the claimant may miss out altogether on compensation. That is, if the volunteer organisation has insufficient funds to meet the judgment, the claimant will miss out altogether.

8.1. What are your views on the proposed model of protection?

9. What Volunteering Activities Should be Covered?

It would be unreasonable to provide a volunteer with unlimited protection against liability for his or her acts.

The legislation will only provide protection to those acting in a manner authorised by the parent organisation. That is, the activity being performed must be an activity that falls within the tasks that the volunteer has been requested to undertake. Organisations will retain the right to withdraw authorisation at their discretion at any time.

The introduction of this legislation will be accompanied by an appropriate awareness-raising campaign with volunteer organisations to encourage those organisations to identify the roles and activities of their volunteers. This is a matter of risk management in any event.

Volunteers would not be protected if:

- the activity in which the volunteer is engaged at the time at which the incident occurred is outside the activities authorised by the parent organisation
- the activity is associated with an unlawful act, or
- the activity involves dishonesty, serious and wilful misconduct, wilful default, or wilful neglect or gross negligence
- their mental or physical ability to perform the task being undertaken is appreciably affected by the influence of a drug
- they have a blood alcohol level in excess of 0.05 per cent.

The legislation would also not apply to incidents arising out of the use of motor vehicles. This is because the compulsory third party insurance scheme which motorists contribute to via vehicle registration will apply to such incidents (in respect of personal injury).

Under the proposed legislation, protection would not cover defamation, libel or slander.

9.1 Are there difficulties with the proposed grounds of exclusion listed above?

9.2 Are there other grounds of exclusion that ought to be included?

10. Cost Implications

Under this proposal, a volunteer organisation assumes the risk of litigation currently facing its volunteer workers. However, this additional risk can be managed through the adoption of appropriate insurance arrangements. The cost of insurance policies for volunteer workers is likely to be determined by the level of risk presented by the type of volunteering undertaken by the organisation.

10.1 What do you consider to be the cost implications arising out of the proposed legislation?

11. Comments Sought

The Minister responsible for Volunteers seeks written submissions commenting upon the proposals set out in this discussion paper. Volunteers and not-for-profit organisations that work with volunteers are encouraged to respond. Submissions should be sent to:

Manager, Office for Volunteers
GPO Box 1047
ADELAIDE SA 5001

Submissions in electronic format may be made to: OFV@saugov.sa.gov.au.

The closing date for submissions is 5pm Friday 25 May, 2001.

