

INFORMATION SHEET

Application of the *Occupational Health, Safety and Welfare Act 1986* to Volunteer Operated Organisations and Recreational and Sporting Events

Community groups and sporting organisations perform an enormous duty to us all, every week, all around the state. They do this by organising and conducting events and activities that provide recreation and enjoyment to an enormous number and range of South Australians.

Given that the heart of any such group is it's volunteers, it is vital that we ensure the safety and welfare of these people whilst they are contributing to the club and community at large by their volunteer efforts. The following information has been produced to assist your organisation to ensure the safety of its employees and/or volunteers, and to better understand it's legal obligations under health and safety legislation.

This document specifically provides information about the obligations under the *Occupational Health, Safety and Welfare Act 1986* (**the OHSW Act**) and the *Occupational Health, Safety and Welfare Regulations 1995* (**the OHSW Regulations**). This legislation establishes the health and safety obligations for workplaces, workers and employers across South Australia.

The OHSW Act states the duty of care, and other legal obligations applicable to employers and employees in South Australia, whilst the OHSW Regulations provide specific and practical legal guidance in relation to what is required to address particular health and safety issues.

The question that many organisations who utilise volunteer services ask is:

Does the OHS&W Act apply to our volunteers?

The OHSW Act places a duty on **employers** who utilise the services of volunteers, and requires them to provide protections to volunteers, as if they were employees. This can be found in section 4(3) of the Act which reads:

4(3) For the purposes of this Act, where a person, in connection with a trade or business carried on by the employer, performs work for an employer gratuitously, the person will be taken to be employed by the employer.

This means where a person performs work for an employer free of charge, if the work is in connection with that employer's trade or business, then the employer owes that volunteer the same duty of care as their employees. In other words, the OHSW Act deems the volunteers to be employees of the employer, for the purposes of the Act, and affords the equivalent status to employees.

For volunteers to be deemed as employees, the **organisation needs to employ** a person (in any capacity, not necessarily doing duties associated with the particular event) and require volunteers involved in the event to perform duties directly associated with the trade or business carried on by the employing organisation.

Whether volunteers are 'deemed' as employees is thus a practical matter to be determined after a case-by-case assessment. If an organisation, being an employer, conducts commercial activities on a regular basis (buying or selling goods or services, conducting events which charge a fee) and its volunteers participate in that activity it may wish to seek legal advice about whether its volunteers are 'deemed' employees.

If we assume that the volunteers working for your organisation perform work for free in the normal course of business for the organisation, the next key question to ask when determining whether the OHSW Act and Regulations apply to the organisation is:

Is the organisation an employer?

To answer this, you will need to understand how the OHSW Act defines an **employer**. In section 4(3) the Act defines employers as follows:

***employer** means a person by whom an employee is employed under a contract of service.*

A **contract of service** (not to be confused with a contract for service) is also defined in the OHSW Act. It reads,

*A **contract of service** means –*

- (a) a contract under which one person is employed by another;*
- (b) a contract of apprenticeship;*
- (c) a contract, arrangement or understanding under which a person receives on-the-job training in a trade or vocation from another*

This means, **if your organisation employs anyone under a contract of service**, then they are considered to be an **employer** under the OHSW Act, and all of the legislative duties under **the OHSW Act and Regulations apply** toward all staff, employees or volunteers.

Sometimes however, things may not be so clear. There are many clubs that provide some compensation or reimbursement to particular members who perform time consuming or costly duties.

In this type of situation, the following question often arises:

Does payment of expenses or an honorarium to volunteers count as employment or a contract of service?

Such payments will **not usually** define volunteers as employees.

A contract of service is not formed when there is no intention on the part of the organisation or the volunteer to form a contract of service (employment relationship) and wage-like bargaining for payment does not occur.

Merely providing an honorarium or expense allowance will not generally be seen as establishing an employment relationship.

If a voluntary role is not intended to be a job, and not treated like a job by either party, then it is unlikely to be treated as such legally. Some indicators of an employment relationship can include timesheets, rosters, dress code/uniform requirements, performance expectations and most importantly an intention by the parties to have an employment relationship.

If an organisation is concerned that its particular expense reimbursement arrangements and performance expectations for volunteers might be establishing an employment-like relationship it should seek independent legal advice.

Does training of volunteers establish a 'contract of service'?

The training of volunteers would not generally constitute a contract of service.

The appropriate training of volunteers is an important part of managing events safely and doing so does not imply an employment relationship.

Training is included in the definition 'contract of service' only as it relates to an apprenticeship or on the 'job' training in a 'trade or vocation'.

An apprenticeship is clearly an employment relationship rather than a voluntary arrangement and training in a 'trade or vocation' implies training for a particular form of paid employment.

Do not reduce or refuse any training of volunteers on the basis that it might signify an unwanted employment relationship. This could be a costly mistake.

Summary of application of the OHSW Act to Volunteers

In determining this, ask **does my organisation employ anyone under a contract of service?**

If the answer is yes, the OHSW Act **will apply** to volunteers performing work in connection with your organisation's trade or business. If your organisation is an employer, then you should continue reading this document to help your organisation understand the obligations placed by the Act.

If the answer is no, then the OHSW Act **will not apply**.

It is not intended that the OHSW Act should apply to all-volunteer organisations that conduct all-volunteer events. However this does not mean that the safety measures and standards described in the legislation should be ignored, only that the organisation and the volunteers who perform work for the organisation cannot be held liable for breaches of the Act or Regulations. There are still other duties that must be obeyed, and some of these are discussed in the final pages of this document.

Please Note - The Act applies equally to all employers, whether your motives are for personal profit or for the good of others. Your duty is not reduced if your organisation is performing a community service, or some other public good. Regardless of how commendable your organisations activities are, this does diminish the importance of protecting the safety and welfare of the organisations volunteers or employees.

Does the OHSW Act apply to organisations that contract out work, rather than employ people directly?

Some organisations may contract with employers (such as labour hire firms) to provide certain labour requirements, particularly for special events. In this case, employees of the labour hire firm can also be deemed to be employees of the 'host' employer, for the purposes of the OHSW Act.

Therefore you **may** be required to provide the same safety protection to the labour hire staff, as your own employees. That is, they may be deemed to be employees under the Act.

Section 4 (2) of the OHSW Act addresses this question:

(2) For the purposes of this Act, where a person (the contractor) is engaged to perform work for another person (the principal) in the course of a trade or business carried on by the principal, the contractor, and any person employed or engaged by the contractor to carry out or to assist in carrying out the work, will be taken to be employed by the principal but the principal's duties under this Act in relation to them extend only to matters over which the principal has control or would have control but for some agreement to the contrary between the principal and the contractor.

For a worker **to be deemed to be an employee** under this section of the OHSW Act, certain conditions must be in place.

The worker must be **engaged to perform work** for the organisation which is **in the course of the trade or business of that organisation**. This can include a wide range of workers, for example (but not limited to) those who provide specific services to the organisation, assist with the conduct of an event, or the maintenance of a club facility.

The duties extend **only to matters under the control of the organisation**, or matters that they would normally control, but for an **agreement to the contrary**.

The organisation would not be responsible for matters outside of their control.

This might mean safety matters relevant to a technical field outside of the expertise of the organisation, or matters where the responsibility has been arranged prior to the work commencing. For example, the organisation cannot be held to account under the OHSW Act if a licensed electrician contracted by the organisation, is performing a complex job and does not follow the appropriate electrical precautions (with a resulting shock), because this is outside the control of the organisation.

The organisation could not be expected to be aware if proper procedures were not being followed by a qualified tradesperson with specialist knowledge. But if the organisation supplied the electrician with a broken ladder to access an electrical box (with a resulting fall), they may be liable, because this was not a technical issue, and may have been under their control.

A further example in relation to a hypothetical motorcycle event is illustrated below. The event is being conducted by a well established organisation, who is a not for profit registered association who specialise in conducting such events for the benefit of the motorcycling community.

The organisation responsible for the conduct of this professional motorcycle race has employees, volunteers and may contract riders or teams to attend. If this is the case, the organisation would have a duty under the Act to all of these contributors to the event, and of course the public who attend.

Generally speaking, their duty is to ensure as far as reasonably practicable that the employees, contractors, volunteers and the public are safe from injury and risk to health whilst attending or working / participating in the event.

The organisation is likely to be responsible for ensuring things such as crash barriers are installed and effective (a matter of which they have control, which will protect the safety of the public, paid contract riders and volunteers). They may also be responsible for things such as ensuring that no riders can race without wearing the proper helmet and protective equipment.

The organisation may supply helmets to volunteers performing roles which require it (such as trackside marshals) but this does not necessarily mean they also have a duty to supply helmets to all riders as well, even though the duty owed under the OHSW Act is the same (all treated as employees of the organisation).

The organiser may have an agreement with the rider to the contrary of the organisations normal duty to provide personal protective equipment (PPE) to employees. It may not be practical for the organisation or the riders to have PPE provided by the organisation. The riders preferred choice may be to wear their own customised expensive PPE. In this situation the organisation would not necessarily be responsible for **providing** the personal protective equipment to the riders, just that they wear it during the event. In a situation like this, the organisation might ensure this by placing a clear condition in the contract that that riders provided their own PPE, or that riders wearing and supplying their own PPE formed part of the race entry conditions. **But the organisation would still have to ensure** that no one raced without the required PPE.

To elaborate further, given the organisation has only limited control over the conduct of riders on the track, it is unlikely to be held responsible for a rider crashing whilst taking a corner, assuming that the track's design, construction and maintenance complied with the relevant safety standard.

It is important to remember, if you organise or run events via employees or 'deemed' employees then the OHSW Act does apply to your organisation and your event.

It is important to note that duties under the Act are 'non-delegable duties'. This means that **you cannot delegate your duty onto someone else**. It is often the case that two employers may be responsible for the one employee, albeit the practical responsibilities for each will be different.

Complying with the OHSW Act and Regulations

One way to ensure your organisation is fulfilling its duty is to ensure the management committee of the organisation is aware of the OHS duties and how they apply to the organisation and its activities.

It is important for your organisation's committee to understand the obligation to provide a safe, healthy workplace/event and to prevent injury and illness arising by identifying hazards, then assessing and controlling the risks.

The SafeWork SA website (www.safework.sa.gov.au) has a series of practical information sheets on **Event Safety** for small to medium sized community events. Help is also available from the SafeWork SA's Help Centre on telephone 1300 365 255 or (08) 8303 0400 for mobile and interstate callers.

When utilising the services of volunteers, consideration of the following should occur:

- considered selection of the right person for volunteer work;
- provision of an appropriate induction to volunteers;
- identification and management of all potential OHS hazards;
- provision of training to volunteers;
- provision of adequate supervision; and
- encouragement of safety and operational feedback by volunteers.

The OHSW Act and Regulations are available from the SafeWork SA Bookshop on the Ground Floor, 100 Waymouth Street, Adelaide (telephone (08) 8204 8887) or via download from the SafeWork SA website.

An employing organisation may also need to appoint and train a Responsible Officer pursuant to section 61 of the OHSW Act if it is also:

- incorporated under the section 20 of the *Associations Incorporation Act 1985*; or
- a company incorporated under the *Commonwealth Corporations Act 2001*.

Some of the most **common questions** from organisations that must comply with the OHSW Act are as follows:

What does an organisation need to do if there is an incident or a dangerous occurrence at an event organised by them?

Each organisation with obligations under the OHSW Act should have a procedure in place for injury management. This should incorporate:

- procedures to ensure emergency first aid can be delivered (Division 2.11.1 of the OHSW Regulations and the Approved Code of Practice for Occupational Health and First Aid in the Workplace);
- Procedures to ensure that the site is secured and not altered following the incident, without the permission of an Inspector (OHSW Regulation 6.6.2(3) and 6.6.3(3))
- recording of the injury or occurrence (OHSW Regulation 1.3.7);
- investigation of the causes of the injury or occurrence so that the causes and environmental factors can be identified and addressed;
- liaison with any Health and Safety Representatives or OHS Committee members if these are established within the organisation;
- reporting to SafeWork SA (Division 6.6 of the OHSW Regulations); and
- facilitating WorkCover claims when necessary.

What are the work related injuries that must be reported?

Work related injuries as defined by the OHSW Regulations should be notified immediately by telephone or facsimile to SafeWork SA. Regardless of whether the injured party is a volunteer or not, an incident involving a 'deemed employee' is considered a work related incident.

When the injury is reported to SafeWork SA, an Inspector will decide whether an immediate investigation is needed. If necessary, an Inspector will visit the workplace as soon as possible to gather information and examine the place where the injury occurred. It is very important that the scene of the incident is not altered, so as to enable a proper investigation of the scene to be conducted. This is also a requirement of the OHSW Regulations (6.6.2(3)).

The following work related injuries must be reported to SafeWork SA immediately by telephone or facsimile:

- any death;
- any injury, which has immediate symptoms associated with exposure to a substance at work (e.g. the employee is burnt by acid or a solvent, they develop a serious rash after coming into contact with a chemical, they fall unconscious after breathing in a substance);
- any injury that requires treatment as an in-patient in a hospital immediately after the injury.

In addition, claims received from employees for compensable injury, that is, an injury sustained in the course of employment, must be forwarded by the employer to the **WorkCover Claims Agent** within 5 days of receipt.

The WorkCover's Claims Agent is:

Employers Mutual
Level 15, Flinders Street, Adelaide SA
GPO Box 2575, Adelaide SA 5001
Phone (08) 8127 1100 Fax (08) 8127 1200

It is important to understand that notification to the WorkCover Claims Agent for purposes of compensation is a separate legal requirement and **does not fulfil the requirements for notification under the OHSW Act** in relation to work related injuries or dangerous occurrences.

What is a dangerous occurrence? Must these be reported?

Dangerous Occurrences, as defined by the OHSW Regulations should be reported as soon as practicable. A written report must also be provided within 24 hours.

A dangerous occurrence is any incident or event that arises from operations carried on at a workplace/event and which causes an immediate and significant risk to a person (OHSW Regulation 6.6.1).

A person does not have to be injured – it is the risk that is important. The risk may arise if a person is or could have been in or near the incident or event.

What dangerous occurrences should be reported?

The OHSW Regulations require organisations that are employers to report all dangerous occurrences. Regulation 6.6.1 also lists some events that must be reported if they cause an immediate and significant risk. Specific dangerous occurrences that must be reported are:

- the collapse, overturning or failure of the load bearing of any scaffolding, lift, crane, hoist or mine-winding equipment; or
- damage to or malfunction of any other major plant; or
- the unintended collapse or failure of an excavation more than 1.5 metres deep (including any shoring); or
- the unintended collapse of the floor, wall or ceiling of a building being used as a workplace; or
- an uncontrolled explosion, fire or escape of gas hazardous substance or steam; or
- an electrical short circuit, malfunction or explosion; or
- an unintended event involving a flood of water, rock-burst, rock fall or collapse of ground; or
- breathing apparatus malfunctioning to the extent that the user's health is endangered.

How should work related injuries and dangerous occurrences be reported?

In the case of an injury at a workplace/event SafeWork SA should be notified immediately by telephone or facsimile.

Preliminary notification of dangerous occurrences should occur as soon as possible and a dangerous occurrences form should be submitted within 24 hours to SafeWork SA.

For emergency telephone notifications, telephone 1800 777 209 (24 hours).

A Notification of Dangerous Occurrences form is available from www.safework.sa.gov.au.

Responsibilities beyond the OHSW Act

Regardless of whether the OHSW Act is legally applicable to an event or organisation, there are always other duties which apply to the activities of volunteer organisations. At a particular site, event or activity, organisers have legal obligations based in the common law of negligence, and public liability responsibilities, to ensure that the events they run are safe for both participants and members of the public.

In light of this, any organisation must be strongly advised to have regard to the principles of duty of care, risk assessment and risk reduction stated by the OHSW Act and Regulations.

If an organisation follows the requirements of the OHSW legislation, they are much more likely to discharge their common law duties and conduct safe activities and events. Clear and effective procedures should be in place to avoid and respond to injury and dangerous occurrences should they occur.

The information sheets on Event Safety available at the SafeWork SA website (www.safework.sa.gov.au) provide useful guidance for any organisation regardless of the application or otherwise of the OHSW Act.