

PART G PEOPLE

Chapter 37: Volunteers

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37. VOLUNTEERS

37.1. Introduction

A volunteer is a person that delivers a community service and is not paid.¹ Collecting organisations, large and small, are dependant on volunteers. Small museums often have no paid staff and are entirely dependent on the generosity of volunteers. Large galleries, libraries and museums, although they do have employed staff, have quite sophisticated volunteer programs: not only do they permit resources to go further; such programs are one of the valuable tools by which a collection is hooked to its public.²

Given the importance of volunteers to the functioning of most collecting institutions good governance requires that the collection management scheme includes a volunteer policy.³ The common purpose of all volunteer policies is to articulate:

1. the rationale for using volunteers;
2. the way in which volunteers will be selected, inducted, trained;
3. the tasks for which volunteers may appropriately be used;
4. the rewards that will be given to the volunteer;
5. the responsibilities that the volunteer has to the organisation and its public; and
6. the responsibilities owed by the organisation to the volunteer.

It is the last two of these (the responsibilities) with which this discussion is most concerned.

When analysing volunteers within a legal framework we ask:

- What is the legal basis of the relationship between an organisation and its volunteers?
- Can the organisation contract with a volunteer?

¹ A person is still a volunteer if reimbursed for out-of-pocket expenses or other costs.

² For example, see D. Wilksch (Public Records Office, Victoria), 'Community Museums and Volunteer Stories', (Paper presented at the Museums Australia Conference, Brisbane, 2006.

³ See the excellent risk management advice provided by Volunteering Queensland Inc, 'Insurance for Organisations Involving Volunteers', <<http://www.volqld.org.au>>. Also see the risk management reviews undertaken in 2004 and 2005 by the Local Government Association Mutual Liability Scheme (LGAMLS), the South Australian organisation formed to protect and assist councils to manage their civil liability risks and claims.

- What is the duty of care owed to volunteers?
- Who owes a duty of care to the volunteer?
- What are the duties of the volunteer to the organisation?
- Can volunteers incur legal liabilities?
- Can the organisation insure its volunteers?

What is the legal basis of the relationship between an organisation and its volunteers?

There is no question that the institution has a legal relationship with its volunteers – but what is it? Actually defining the legal nature of the relationship is not simple.

Volunteers are unpaid, so they are not employees.⁴ Arguably they may be independent contractors.⁵ Essentially, they are 'invitees' who, in return for their services, are provided privileges and benefits beyond those granted to the institution's normal invitees (the public). The term 'volunteer' does not mean that they are not owed duties, for the institution owes duties to all of its invitees – but they are not the same duties that are owed to employees.

37.2. Can the organisation contract with a volunteer?

There has been a common misconception that because volunteers are not paid, they cannot enter a valid contract with the institution. This mistake arises from an erroneous interpretation of the legal requirement that for a valid contract there must be mutual 'consideration': that is, that each party must give something of value to the other.⁶ This is where the term 'volunteer' causes confusion. There is no question that the individual is providing something of benefit to the institution but the term 'volunteer' is misleading in that it implies that the institution is not giving something

⁴ What are common indicators of employees? They are paid regularly (for example, weekly/fortnightly/monthly); are entitled to superannuation; have income tax deducted; are entitled to receive paid leave; and perform work under the direction of their employer.

⁵ What are common indicators of independent contractors? They have control as to how to carry out the work and the expertise to do so; pay their own superannuation and GST; often use their own tools; are contracted to work for a set period of time or to do a set task and decide what hours to work to complete the specific work.

See <<http://www.wo.gov.au/data/portal/00007407/content/08155001183342241733.pdf>>.

⁶ A relationship where the consideration is not mutual is a gift and you cannot form a contract to make a gift. A gift is only enforceable when it is in the form of a deed. A 'deed' has particular formal requirements.

of value to the individual in return. It may not be paying them but it is giving them training, access to exhibitions, access to the backrooms of the collection, social occasions and so on. These are all benefits to the volunteer notwithstanding that they do not have a cash value. The law on this is quite clear: Consideration does not have to have a cash value; nor do the respective benefits need to be of equivalent value. The only requirement is that the consideration given by one party must be something of value to the other.⁷

Accordingly there is no legal reason why institutions cannot enter valid agreements with their 'volunteers'. Indeed there is no reason why they would not. Every organisation that uses volunteers should have a written contract for volunteers, setting out the function of the volunteer and the rights and obligations of both parties. It does not have to be in legalese – and indeed should not be. It should be a simple, unambiguous statement of what the organisation expects from, and will do for, the volunteer.⁸ The contract must be signed, dated and a copy given to the volunteer. No volunteer should be allowed to work on behalf of the organisation without signing a volunteer agreement. To do so is not being friendly and relaxed; it is bad practice that puts both parties at risk.

37.3. The duty of care owed to volunteers

37.3.1. Negligence

Since Mr Stevenson allegedly caused Mrs Donohue terrible shock by selling her a soft drink replete with a dead snail, the dreams of lawyers have echoed with the words of Lord Atkin:

The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa' [fault], is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. But acts or omissions, which any moral code would censure, cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law arise which limit the range of complainants and the extent of their remedy.

The rule that you are to love your neighbour becomes in law, you must

⁷ Provision of an Annual Mayoral Buffet Tea for the Council's volunteers and the provision of various awards and certificates may be a benefit – but it is not remuneration.

⁸ Refer to the checklist at the end of this chapter for guidance as to the issues that you might choose to cover.

not injure your neighbour; and the lawyer's question 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.⁹

Besides being a lovely piece of judicial logic, it makes it clear that under the Common Law, volunteers are owed a duty of care because the organisation 'ought reasonably have them in contemplation'. Liability is not based on contract; it is based on the duty of care.¹⁰

Establishing the existence of the duty of care may be straight forward enough in the case of volunteers¹¹ but that does not assume that the organisation that owes the duty of care has actually breached that duty.¹² That really is a question that will be determined on the facts of each case. To do this, you ask whether the risk was foreseeable and significant, and whether a reasonable person would have taken precautions.

In determining whether a reasonable person would have taken the precautions against risk or harm, the court takes into account the following:

⁹ *Donohue v Stevenson* [1932] AC 562.

¹⁰ *Hrybynyuk v Mazur* [2004] NSWCA 374. In *Lobb v Central West County Council*, Supreme Court, NSW, Lusher J., 15 Sept 1978, CL Nos 9031-2175 it was held that a volunteer may recover damages for injury suffered from the peril or risk negligently created, but if the injury is caused by some other, extraneous activity related to the danger, the position is different. The plaintiff was assisting in fighting a bush fire that allegedly had been caused by the negligence of the defendant. In the course of fighting the fire, the plaintiff fell off a truck and was injured. He was not entitled to recover damages in respect of injuries resulting from the fall.

¹¹ *Hehir v Harvie & Duffield* [1949] SASR 77.

¹² *Hrybynyuk v Mazur* [2004] NSWCA 374, in which the existence of the duty of care was established but the plaintiff could not prove that the duty of care had been breached. In that case there was no evidence the defect would have been ascertained upon an inspection by a qualified builder. Nor was there evidence that a person with appropriate supervisory skills would have directed Mr Hrybynyuk not to climb onto the roof.

- the probability that the harm would occur if care were not taken;
- the likely seriousness of the harm;
- the burden of taking precautions to avoid the risk of harm; and
- the social utility of the activity that creates the risk of harm.¹³

37.3.2. Applicability of workplace legislation to volunteers

Volunteers, like employees, risk suffering physical injury in the workplace. The absence of pay doesn't change the risk – indeed because volunteers are often inexperienced, the risk of suffering (and indeed causing) injury may be greater than that applicable to employees.

Volunteers injured in the workplace, unlike employees, do not have the benefit of WorkCover. That is not to say that they are not owed a duty of care. Far from it. Although most statutes controlling safety in the workplace do not specifically mention volunteers, they apply to everyone in the workplace.¹⁴ Occupational health and safety obligations, construction regulations and hazardous materials requirements, all apply to volunteers as well as employees.¹⁵ This means that it is the organisation that is primarily liable for injuries suffered by volunteers in the workplace. As Volunteering Australia observes:

In most instances, volunteers fall under the category of 'other persons' to whom a volunteer-involving organisation owes a duty of care. While an employer's duty of care to 'other persons' is not usually defined as specifically as it is for employees, breaches of this duty of care are just

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<<http://www.volunteeringaustralia.org/files/4M470AJYX9/OHS%20NSW.pdf>>.

¹⁴ For example, in NSW although occupational health and safety is governed principally by the *Occupational Health and Safety Act 2000* (NSW), other relevant legislation includes the *Dangerous Goods Act 1975* (NSW); *Workplace (Occupants Protection) Act 2001* (NSW); and *Civil Liability Act 2002* (NSW); and the *Workers' Compensation Act 1987* (NSW). With the exception of volunteer fire-fighters and volunteer emergency service personnel, volunteers can not make a claim for compensation under NSW workers' compensation laws. Volunteers can make a civil claim for damages for a breach of occupational health and safety laws.

¹⁵ See *Lenz v Trustees of the Catholic Church* [2005] NSWCA 446, BC200511170, in which a volunteer assisting with construction fell from the roof sustaining injury. The Full Court of the Supreme Court (NSW) held that it was the duty of the organisation, not the volunteer, to comply with the *Construction Safety Regulations 1950* (NSW). In that case the organisation won because it was found that it had adequately warned the injured volunteer.

as important and treated as seriously as if the person were an paid employee.¹⁶

Accordingly, either the organisation should maintain cover for its volunteers or the volunteers should be encouraged to take out personal accident insurance for the period of their volunteer work.

That said, because of the spiralling cost of personal injury claims and the related mountainous increases in insurance premiums, the Commonwealth and the states have all implemented legislation in place which, to some extent, limits the duty of care in general, and to volunteers in particular. For ease of reference we can refer to these statutes as the Civil Liability legislation.

37.3.3. Statutory limitation of volunteer liability

The Civil Liability legislation is similar in all jurisdictions. First, it codifies the test for negligence. For example:

5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

5C Other principles

¹⁶ <<http://www.volunteeringaustralia.org/files/4M470AJYX9/OHS%20NSW.pdf>>.

In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.¹⁷

This kind of provision limits the Common Law and limits exposure to civil liability actions generally. But there is more.

Each jurisdiction has taken the opportunity to give particular protection to volunteers. This legislation has two aspects:

- it limits the personal liability for negligence of a volunteer who works for a community organisation and transfers the volunteer's liability to the community organisation; and
- it limits the right to bring proceedings against the volunteer personally and hence reducing the risk to a volunteer of incurring legal costs as a result of the voluntary work.¹⁸

Of course, not everyone who does work without payment is protected by the legislation. For example, the Commonwealth limits its legislative protection to volunteers working for the Commonwealth or one of its agencies.¹⁹ It provides that a person will not incur personal liability where it arises from work done in good faith, on a voluntary basis, and which is or was organised by the Commonwealth or agency. The States and Territories limit their protection to volunteers for their actions either in performing 'community work' organised by the organisation or as an office holder of it. There are some key definitions.

¹⁷ *Civil Liability Act 2002* (NSW).

¹⁸ See preamble to the *Volunteers Protection Act 2001* (SA). Most other jurisdictions are similar.

¹⁹ *Commonwealth Volunteers Protection Act 2003* (Cth) s 6.

'Community organisation' means 'any of the following that organises the doing of community work by volunteers and that is capable of being sued for damages in civil proceedings:

- (a) a body corporate,
- (b) a church or other religious organisation,
- (c) an authority of the State.²⁰

You will notice that the definition includes voluntary work performed on behalf of the state, the Church and for an incorporated organisation. The later is very important in the context of community groups: unless they are incorporated (either as an incorporated association, a company or a statutory trust), their volunteers will not have the benefit of this legislative protection. If there were not already sufficient good reasons for every community group to incorporate, this would provide it.

'Community work' means 'work that is not for private financial gain and that is done for a charitable, benevolent, philanthropic, sporting, educational or cultural purpose'. Collecting organisations clearly have a cultural purpose.

'Volunteer' means 'a person who does community work on a voluntary basis' The term 'voluntary' excludes people providing their services under a court order (because that is clearly not voluntary) but does not exclude people who get their expenses paid or who are paid 'within limits prescribed by the regulations'.²¹

37.3.4. Exclusions

Unsurprisingly, the protection given to volunteers is not absolute. The work must be organised by the organisation (or arise from the volunteers' role as an officer of the organisation): It does not apply when the volunteer is doing the work off their own bat. So what does 'organised' mean? The statutes give guidance – but their definitions are only 'inclusive'. For example, the legislation says that 'organised' includes 'directed or supervised'. The definition does not exclude situations in which the work was neither directed nor supervised but still should reasonably come within the term. For example, Mrs Robinson who had run the tuck shop at the local school

²⁰ *Civil Liability Act 2002* (NSW) s 60.

²¹ What does that last phrase apply to? If the directors of the Australian Museum were paid a sitting fee that was set by a mechanism established by a government Regulation, they would still be considered 'volunteers' notwithstanding that they had received some remuneration. Accordingly, they would be protected as volunteers. (By the way, they do not receive remuneration.)

for many years had done so largely unsupervised and undirected. Nevertheless the Court held that she was a volunteer.²²

37.4. Who owes a duty of care to the volunteer?

This is answered by the question: 'Who had the duty to take precautions against the risk or harm that caused the injury?' Where that person is an employee of a statutory or incorporated organisation, through the principles of vicarious liability, it is the organisation that eventually bears the financial liability. However the issue is more difficult when dealing with small community groups for they are reliant on volunteers and are often unincorporated. When an accident happens to one of their volunteers, the injured person has no corporate body to sue and will often look to the committee members for recourse.

In the case of *Hrybnyuk v Mazur*²³ the plaintiff was a member of the Russian Club, an unincorporated association. He was asked to attend a working bee by the club president. While doing so he suffered extensive injuries when he fell through the roof of the shed that he was helping to demolish. The plaintiff sued Mr Mazur on the basis that, as president of the club, he owed Mr Hrybnyuk a duty of care in relation to the demolition work. The trial judge held that although there was a duty of care, there had been no breach of this duty and thus entered a verdict for Mr Mazur. This case ended well for the club president but principles set out by Justice Beazley are instructive for those responsible for administering unincorporated community collections:

Generally, a member of an unincorporated association does not owe a duty of care to other members of the association if that is the only relationship between them.²⁴

Membership of an association's committee is not sufficient to displace that principle. For a duty of care to arise between the members of an unincorporated association, it needs to be established on ordinary principles of negligence that a duty of care is owed in the particular circumstances.

²² *Robinson v Tyndale Christian School* [2000] SAIRC37, a decision of the South Australian Industrial Relations Court.

²³ [2004] NSWCA 374.

²⁴ *Owen v Northampton Borough Council* [1992] 156 LGR 23; *Prole v Allen* [1950] 1 All ER 476; *Robertson v Ridley & Anor* [1989] 1 WLR 872.

A person who seeks the services of a volunteer may be liable in negligence.²⁵

In accepting the task of arranging for the demolition of two sheds on Club premises given to him by the committee, Mr Mazur owed Mr Hrybynyuk a duty of care.

The duty of care in this case arose on the ordinary principles of negligence. The factors relevant to liability were common and coextensive regardless of whether the case is considered under the construct of a duty owed by Mr Mazur as a committee member or a duty owed to Mr Hrybynyuk as a volunteer. On either basis, a duty of care was owed.

There was no evidence to establish breach of duty. In particular, there was no evidence the defect would have been ascertained upon an inspection by a qualified builder. Nor was there evidence that a person with appropriate supervisory skills would have directed Mr Hrybynyuk not to climb onto the roof.

It is also sanguine to note that when considering the obligation to fulfil the duty of care, the courts will not be impressed by the argument that the defendant didn't have the resources to meet their duty of care. In *PQ v Australian Red Cross Society*²⁶ the judge held that the duty of care to the plaintiff is to be tested by reference to 'a reasonable person with adequate resources available for the activity in which it was engaging'. In that case the jury was instructed that it must not test the defendant's compliance with its duty of care by reference to the standard which might be expected of a partly voluntary charitable or benevolent organisation with limited resources of finance or staff.

37.4.1. Sexual harassment

It is unlawful for a 'workplace participant' to sexually harass another workplace participant at their place of work.²⁷ This applies to volunteers as well as employees.

²⁵ *Hehir v Harvie & Duffield* [1949] SASR 77.

²⁶ [1992] 1 VR 19.

²⁷ For example, *Anti-Discrimination Act 1977* (NSW), s 22B(9) – A 'workplace participant' includes an employer, employee, commission agent, contract worker, partner in a partnership, a self-employed person and a volunteer or unpaid trainee.

The definition of 'workplace participant' includes volunteers and unpaid trainees.²⁸

37.5. Duties of the volunteer to the organisation

All volunteers should be made aware that the collecting institution has very real expectations of them. They have to understand that, at the very least, they must:

- understand the objectives and functions of the organisation and the specific services that it provides;
- understand and comply with the organisations policies and procedures;
- participate in all relevant induction and training programs;
- operate under the direction and supervision of nominated staff;
- notify the appropriate program supervisor of any hazardous situations that pose a risk to themselves or others;
- report any accidents or incidents relating to staff, volunteers or plant and equipment;²⁹
- behave appropriately and courteously to both the staff and the public with whom they interact in the course of their services.

These and other matters should be set out in the volunteer management policy, the volunteers' information sheets or manuals, or incorporated in some other way in the agreement between the volunteer and the organisation.

37.6. Can volunteers incur legal liabilities?

37.6.1. Personal liability

There are many instances where volunteers have incurred legal liability for their actions. Most of these relate to volunteers working within emergency services rather than collecting institutions but the principles are the same, even if the degree of risk is different. For example, volunteer guides responsible for a school tour, owe a heavy duty of care to the children in their care. It would tire the imagination to list the many ways in which members of tour groups can cause damage to themselves,

²⁸ Ibid at s 22B(6); *Hollingsworth v Commissioner of Police, New South Wales Police* [2004] NSWADT 17 (applicant was found not to be a 'workplace participant'). See, for example, *Borg v Commissioner, Dept of Corrective Services* [2002] NSWADT 42; *Ferreira v Wollongong Spanish Club Pty Ltd* [2005] NSWADT 57.

²⁹ City of Tea Tree Gully, Volunteer Management Policy, <<http://www.teatreegully.sa.gov.au/page?pg=1513&stypen=html>>.

to others and to exhibition objects. Each such incident averted, is a legal liability that will not need to be litigated.

Because governments recognised that volunteering to be an essential public benefit and that insurance cover was becoming prohibitively expensive, all Australian jurisdictions have introduced legislation to reduce the legal liability of volunteers.³⁰ For example:

61 Protection of volunteers

A volunteer does not incur any personal civil liability in respect of any act or omission done or made by the volunteer in good faith when doing community work³¹:

- (a) organised by a community organisation, or
- (b) as an office holder of a community organisation.³²

It is very important to note that the statutory definition of a 'community organisation' includes a body corporate (such as an Incorporated Association or a company); a religious organisation or an authority of the state. This definition means that unless the collection is within a religious or government³³ environment, the organisation must be incorporated if it is to give this protection to its volunteers.

37.6.2. Occupational health and safety

It has already been made clear that volunteers are protected by occupational health and safety (OH&S) legislation. However, when the volunteer is a director or person involved in the management of the organisation, that same legislation together with the person's directorial or managerial role in the organisation creates potential

³⁰ *Commonwealth Volunteers Protection Act 2003* (Cth); *Civil Law (Wrongs) Act 2002* (ACT); *Civil Liability Act 2002* (NSW); *Personal Injuries (Civil Claims) Act 2003* (NT); *Civil Liability Act 2003* (Qld); *Civil Liability Act 1936* (SA), *Volunteers Protection Act 2001* (SA); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA).

³¹ *Ibid.* 'Community work' means work that is not for private financial gain and that is done for a charitable, benevolent, philanthropic, sporting, educational or cultural purpose (s 60).

³² *Ibid.* s 60.

³³ Note that the Commonwealth legislation does not relate to community work but rather, work done for the Commonwealth or one of its agencies: A volunteer will not incur civil liability for anything he or she does in good faith while doing work for the Commonwealth or a Commonwealth agency (provided that the work is done on a voluntary basis and is organised by the Commonwealth or agency).

liability for the volunteer. After all, in certain circumstances, board members and senior management may be held liable for the faults of the organisation and this is a major disincentive to people volunteering their expertise to community purposes.

For example in South Australia, the *Volunteers Protection Act 2001* provides the (now) normal protection for volunteers,³⁴ stating that the liability that would have been owed by the volunteer is, thanks to the legislation, owed by the community organisation for which the volunteer works.³⁵ However, it goes on to provide that the a person

who suffers injury, loss or damage as a result of the act or omission of a volunteer may not sue the volunteer personally unless (i) it is clear from the circumstances of the case that the immunity conferred by this Act does not extend to the case; or (ii) the injured person brings an action in the first instance against the community organisation but the community organisation then disputes, in a defence filed to the action, that it is liable for the act or omission of the volunteer.³⁶

This means that the plaintiff must first sue the organisation rather than bring personal proceedings against the volunteer director or manager. But it leaves a sting in the volunteer's tail. If the organisation decides to set the volunteer adrift, it can. If the organisation dispute that it is liable for the acts or omissions of the volunteer, the volunteer is exposed to personal legal proceedings. This is no small matter. The family home and all personal possessions are exposed.

To overcome this hurdle for volunteers, some jurisdictions have introduced legislation that absolves volunteers from such liability. For example, in 2008, NSW amended its occupational health and safety legislation so that is absolutely clear that a director or person concerned in the management of a corporation who is a volunteer, would not be liable for the OH&S responsibilities of the organisation.³⁷

37.6.3. Exclusions

Volunteers are not protected if performing a criminal act, if they are intoxicated, or if they are acting outside the scope of their activities or contrary to instructions. Nor

³⁴ Section 4: 'Subject to the following exceptions, a volunteer incurs no personal civil liability for an act or omission done or made in good faith and without recklessness in the course of carrying out community work for a community organization'.

³⁵ Section 5.

³⁶ Section 5.

³⁷ *Occupational Health and Safety Amendment (Liability of Volunteers) Act 2008* (NSW).

does it apply to defamation, nor where the liability is covered by third party road accident cover.³⁸

37.6.4. Vicarious liability

One of the great risk management issues for any organisation using volunteers is this: Can the organisation be liable for the acts of its volunteers? The answer varies from jurisdiction to jurisdiction.

As a general principle, the common law doctrine of vicarious liability applies only to employment relationships and as a volunteer is not an employee, no vicarious liability is possible. However, in all of the States except Queensland, the common law position has been varied by legislation so that for these purposes, a volunteer is treated as an employee and the organisation assumes the liability of the volunteer.³⁹ In the federal jurisdiction, where a volunteer works in good faith for the Commonwealth or a Commonwealth authority, the Commonwealth will be vicariously liable for the acts of that volunteer.⁴⁰ In Queensland, the legislation is not clear as to whether the organisation will be vicariously liable for its volunteers. That will need clarification by case law or legislation.

37.6.5. Can the organisation get an indemnity from the volunteer?

As the above shows, the legislation basically saves the volunteer from personal liability but does not protect the organisation for which the volunteer is working. The organisation is still potentially liable for the acts of its volunteers. Lest some clever-Harry administration seek to limit its risk by having its volunteers indemnify the organisation, this is prohibited. Any such indemnity is ineffective.

37.7. Insurance and Volunteers

37.7.1. Can the organisation insure its volunteers?

There is no reason why the institution cannot insure its volunteers in the event that they are injured in the course of their services. The better question is 'Why would you not take out volunteer insurance?' The Centre for Volunteering goes as far as

³⁸ See statutes cited at n 27.

³⁹ For example, see *Volunteers Protection Act 2001* (SA) s 5.

⁴⁰ *Commonwealth Volunteers Protection Act 2003* (Cth) s 7, but see defence in sub-s (2). In Queensland, the legislation does not make it clear whether the organisation can be vicariously liable even though the volunteer is not.

saying, 'Not-for-profit organisations engaging volunteers must carry public liability insurance and volunteer personal accident insurance.'⁴¹ Must. No maybes.

Having such protection is basic good governance: By doing so, the institution provides protection to those in its care and, at the same time, protects itself against the financial cost of litigation should the volunteer suffer injury in the course of their services.

Volunteer insurance is commonplace and, in the collections sector, reasonably affordable. (It is certainly affordable when one considers the cost of a successful claim by an injured volunteer.) The costs, however, are increasing.

Part of the problem is the unrealistic view that volunteer historical organisations have of themselves as insurance risks. In general, volunteer groups tend to see themselves as low risk because they are run by well-meaning, dedicated people who only put on two or three small events each year.

Insurers see volunteers as inexperienced amateurs staging events with the kind of liability that may not emerge for five years – and keeping poor records (or none at all) of incidents that may result in later claims. Moreover, the insurer's administrative costs are the same for a \$300 premium or a \$50 000 one. From the insurer's perspective a typical historical organisation presents a long-term risk for no cash value.⁴²

Insurers are also unconvinced by the argument that a volunteer organisation has operated for years without a claim and is therefore low risk.

Some small organisations rely on their public liability policy in the hope that it will cover their volunteers. Whether this is appropriate depends completely on the small print of the individual policy. In most cases, volunteers will not be covered by a public liability policy because their relationship to the institution goes beyond the policy's definition of 'public'. Before relying on a public liability policy it is essential that you ask the insurance company in writing for assurance that the volunteers will be covered. If the answer is 'yes', all is well. If it is 'no', you can ask that the insurer

⁴¹ <http://www.volunteering.com.au/working_with_volunteers/insurance.asp>.

⁴² June Edwards & Beth M. Robertson, 'Insurance Issues at the opening of the 21st Century.' Originally published in *History Matters*, the History Trust of South Australia magazine Vol 14, Number 3, November 2004.

extends the public liability policy to include the volunteers and pay the extra premium, or enter a separate volunteers policy.

37.7.2. Types of insurances relevant to volunteers

It is important to consider the breadth of the protection offered to volunteers by legislation and then consider what other risks should be insured. A broker experienced in the volunteer sector is essential.

The range of insurances relevant to volunteers is little different to the range that is relevant to not-for-profit organisations generally: After all, it is the activities that are being insured and it is irrelevant that paid staff or volunteers are performing them.

Any list of insurances relevant to volunteers will include the following:

Volunteer workers personal accident insurance: This is similar to the compulsory cover that employers have to take out for their paid employees. It covers volunteers for out-of-pocket expenses following accidental injury, disability, or death while working for the organisation. Depending on the type of policy, this type of insurance should normally cover loss of income.⁴³

Public liability insurance: This covers personal injury or property damage caused to third parties by those working on behalf of the organisation. The policy should include protection for volunteers that cause such liability. After all, if a member of the public is injured, he or she will sue both the organisation and the volunteer worker who is alleged to have caused the loss. It is important to make one loud warning: Many organisations choose not to take out personal accident cover because they believe that their volunteers are covered by their public liability cover. Such policies are about as rare as the unicorn. You need both kinds of cover – one is designed to make sure that the public has a remedy in the event of loss; the other makes sure that the volunteer has a remedy in the event of injury, disability or death. The organisation has a duty to protect its public and its workers.

Directors' and officers' liability insurance: This cover is designed to protect those who serve on the governing body of the organisation. Given the liabilities that are imposed on the directors of companies and trustees, it is essential cover. No-one should serve on a board without insisting that the organisation take out such cover.

⁴³ See Volunteering Queensland Inc, 'Insurance for Organisations Involving Volunteers', <<http://www.volqld.org.au>>. VQ warns that students and work placements are often not covered by the wording of such policies. This illustrates how important it is to read the wording of the policy on offer and negotiate its terms so that it fits the particular needs of your organisation.

Professional indemnity insurance: This is only occasionally necessary for collecting organisations. It protects the organisation, paid staff and volunteers in the event that a claim is made for breach of professional duty or advice resulting from negligence, error, omission, loss of records, dishonesty and so on. If the organisation provides valuations or estimates of value for the public or provides opinions as to authenticity or provenance, then such cover would be prudent. However, it is really only relevant to situations in which the organisation owes a professional duty of care or is giving advice. If volunteers are performing such functions, it is important to check that they are covered.

Motor vehicle comprehensive insurance: This insurance covers the organisation's vehicles whether they are driven by volunteers or paid staff. It covers loss or damage to the vehicle or third party property. If volunteers are using their own vehicle in the course of their volunteering the organisation would be prudent to advise the volunteers to inform their motor vehicle insurer.

Property and contents insurance: This is little different from the usual householder's insurance. It has no particular relevance to volunteers.

When considering insurance, the Centre for Volunteering provides four pieces of very practical advice:

- Check that your policy specifically covers your volunteer staff for their normal work practices and has an up-to-date age range.
- Presume anything not stated in your policy is NOT covered.
- Disclose all relevant facts to the insurer, even planned activities or events requiring insurance in the future.
- Presume risk management practices are a basis for insurance.⁴⁴

37.8. The volunteer contract checklist

Given that volunteers are owed a duty of care it is important that every institution that uses volunteers has a contract that defines the rights and responsibilities of each party towards the other. Although volunteer agreements will vary from institution to institution according to the uses that it makes of its volunteers and the benefits that it offers in return, the basic contents of such agreements should be reasonably similar. The following is a checklist that describes these characteristics.

⁴⁴ <http://www.volunteering.com.au/working_with_volunteers/insurance.asp>.

VOLUNTEER CONTRACT CHECKLIST

1. Name of the institution
2. Name and contact details of the volunteer
3. Name of the person within the institution who is responsible for the volunteer program (and thus the volunteer) so that the communication channels and chain of command is clear
4. The functions of the volunteer and the workload obligations to which they are committing
5. The level of training or qualifications required of a volunteer before they will be permitted to perform various functions
6. The benefits that the institution will give the volunteer in return for their services
7. The obligation of care that the volunteer must fulfil towards the objects and the administrative system of the institution
8. The volunteers' obligation of care and courtesy towards the members of the public with whom they interact in the course of their services
9. Any dress and appearance standards that are required
10. The obligation of care that the institution has to the volunteer while the volunteer is providing services to and on behalf of the institution
11. The insurance protection that the institution offers to the volunteer
12. The assessment protocols that the institution has in place to ensure the on-going quality of the work provided by the volunteer
13. The ongoing education requirements so that the knowledge of the volunteers is always reasonably current and of suitable standard to their functions

14. The disciplinary procedures that determine the consequences of the volunteer breaching his or her obligations under the agreement
15. The grounds upon which the either party can terminate the agreement and the process by which this will be done
16. A provision that permits the institution to change the terms of the agreement; that sets out how those changes may be communicated to the volunteer and provides the mechanism by which the volunteer confirms their acceptance of such changes. This provision should make it clear that if the volunteer does not accept the change in the terms, their only recourse is termination of the agreement.

In many institutions, the rules and duties that govern the volunteer will be set out in a volunteers' handbook. Where the institution has such a document it may considerably simplify the agreement by including a term that requires the volunteer to act in accordance with all of the obligations provided in that document. In this way, provided that the volunteers' handbook is well articulated and comprehensive, the contract between the volunteer and the institution can be quite brief.

At the end of the day, it is only respectful towards one's volunteers to have a considered and fair document that fully describes each of the parties' expectations and obligations. Volunteers are not martyrs; they are part of and essential contributors to the collections community.