

Secretary
Review of the Law of Negligence
C/- Department of the Treasury
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**Submission
to the
Review of the Law of Negligence
from**

The logo for Volunteering Australia is displayed within a blue rectangular banner. The word "Volunteering" is written in a large, white, serif font. Below it, the word "AUSTRALIA" is written in a smaller, white, sans-serif font, with each letter separated by a small gap. A thin white horizontal line runs across the banner, positioned between the two words.

Volunteering
A U S T R A L I A

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About Volunteering Australia

Volunteering Australia is the national peak body for volunteering in Australia. Its mission is to represent the diverse views and needs of the volunteer movement while promoting the activity of volunteering as one of enduring social, cultural and economic value.

Volunteering Australia receives funding from the Commonwealth Department of Family and Community Services (FaCS) under the National Secretariat Program (NSP) to represent the interests of volunteers and volunteer involving organisations.

Volunteering Australia's member organisations consist of the state and territory volunteering peak bodies, who in turn represent volunteer-involving organisations and interested individuals. Volunteering Australia also works closely with a large network of regional volunteer resource centres (VRCs).

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1. Executive Summary

As the national peak body for volunteering, Volunteering Australia is providing comments on one of the Terms of Reference for the Review of the Law of Negligence: *3(f) – develop and evaluate options for exempting or limiting the liability for eligible not-for-profit organisations from damages claims for death or personal injury (other than intentional torts).*

Although not expert in the area of negligence law, Volunteering Australia has a strong understanding of the issues confronting the not-for-profit sector, specifically the issues facing volunteer-involving organisations and their volunteers.

Volunteering Australia does not support exempting or limiting the liability of eligible not-for-profit organisations from damages claims for death or personal injury.

Volunteering Australia's interest in this review of the law of negligence is due to the current public liability insurance crisis which has seen not-for-profit organisations experience large increases in premiums.

It is now well recognised that many not-for-profit organisations have suffered considerably from enormous and unanticipated premium rises, many of which are well above anything they have previously experienced. There have been reported cases of organisations closing their operations or ceasing well-known community events or activities. These are obviously the more extreme cases, however many other organisations report increases in excess of 100% on previous years that will inevitably strain their operating budgets and potentially cause them to cut back on the services they provide.

Reform of the law of negligence has been proposed as one method of resolving the current insurance problem. While the exemption of not-for-profit organisations (or limitations on their liability) from damages claims for death or personal injury would be expected to reduce the need for, and therefore the cost of, public liability insurance, Volunteering Australia does not believe this to be an appropriate solution to the problem.

There is no avoiding that the issue of rising insurance premiums and possible solutions is a complex one. Volunteering Australia's position with respect to this proposal is ultimately determined by the impact on the activity of volunteering. In identifying this impact it is necessary to first consider the impacts on both volunteer-involving organisations and volunteers. The impact of this proposal on injured parties is also severe and cannot be overlooked.

The impacts on not-for-profit organisations include: reduced accountability by not-for-profit organisations; reduction in competitiveness; damage to public perception of not-for-profit organisations; and increased complexity for not-for-profit organisations.

The impacts on volunteers include: transfer of liability to individual volunteers; reduced accountability of volunteers; damage to public perception of volunteers; and a reduction in the willingness of volunteer.

The resulting impacts on the activity of volunteering is the damage to the image of volunteering and a decline in volunteer numbers, both of which would be regressive for the volunteer movement in Australia.

The impact on injured parties can be summarised as an inability to obtain adequate compensation for injuries incurred as a result of another's negligent acts.

More detail on these identified impacts is contained in the body of the submission that follows.

2. Impact on Volunteer-Involving Organisations

It would be tempting to regard exemptions from damages claims for not-for-profit organisations as the solution to spiraling insurance premiums currently being experienced. In reality however there are a number of serious, negative consequences of any proposal that would treat not-for-profit organisations differently to others within the community and exempt them from having to apply commonly accepted standards of reasonable care in their activities.

The consequences of exempting not-for-profit organisations from damages claims for death and personal injury include:

- reduced accountability of not-for-profit organisations;
- reduced competitiveness of not-for-profit organisations;
- damage to public perception of not-for-profit organisations; and
- increased complexity of a new legislative regime for not-for-profit organisations.

2.1 Reduced Accountability of Not-for-Profit Organisations

The users of services provided by not-for-profit organisations, the staff and volunteers who work within them and the community at large all have a reasonable expectation that organisations will operate so as to minimise the risk of harm to their clients, their staff (paid and volunteer) and the general public.

It must be recognised that the broader community, either through taxes, direct public fundraising appeals or trusts and foundations, funds many not-for-profit organisations. In an environment in which the community is increasingly demanding more of the private sector in terms of meeting community and social responsibilities, it seems unlikely that the broader public would accept what would effectively be a lowering of the standard of care required of not-for-profit organisations.

The current system of common law encourages not-for-profit organisations and those who work within them to take reasonable care in their actions. If the threat of damages awards were removed, there is a risk that some not-for-profit organisations would become less accountable in terms of maintaining safe workplaces, practices and procedures for staff, volunteers and clients.

This is not to say that large sectors of the not-for-profit sector would not continue to strive for good health and safety practices. Indeed many organisations, especially those dealing with vulnerable client groups, take their responsibilities in the area of health, safety and risk management very seriously. But without the added ‘stick’ of litigation it would be easier for risk management practices and duty of care to receive less emphasis and have fewer resources devoted to them. This is particularly the case when not-for-profit organisations are constrained by limited resources and or uncertain funding environments.

Volunteering Australia has developed a set of *National Standards for Involving Volunteers in Not-for-Profit Organisations* that are aimed at assisting organisations to operate sound volunteer programs. We know from our own experience that the voluntary nature of these standards is often an obstacle to organisations adopting them. Even for those organisations who have a desire to operate within best practice the lack of any form of compulsion can mean that the achievement and maintenance of standards is allocated a lower order priority.

It may be that it is the fear of litigation and a costly damages award that will motivate boards of management (usually comprised of volunteers) to develop and implement effective risk management strategies for the protection of themselves, their employees, their volunteers, their clients and the public. By removing or reducing this fear for them, organisations may gradually allow and accept a decline in their standards of safety and risk management.

2.2 Reduced Competitiveness of Not-for-Profit Organisations

The introduction of competitive tendering has meant not-for-profit organisations now compete with one another and the private sector for government funding for service provision. While there are a number of downsides to this development in one sense it has made not-for-profit organisations more ‘competitive’, requiring them to meet the same standards of accountability as expected of for-profit organisations.

Within this accountability has been the development of sound risk management strategies, including taking out adequate and appropriate insurance coverage to protect organisations from liability.

If the threat of being sued for damages for death or personal injury is removed for not-for-profit organisations, the requirement for them to take out the same level of insurance is also removed. However the community is more likely to support only those events or organisations where compensation would be available if injury occurred. This would erode the not-for-profit sector’s place in the market. The ultimate consequence of this is that numerous community services, events and activities would go unprovided or would be picked up by the for-profit sector with potential impacts on affordability for the community.

2.3 Damage to Public Perception of Not-for-Profit Organisations

Most Australians acknowledge that not-for-profit organisations of all sizes across all sectors provide valuable services to the Australian community that could not, or would not, otherwise be provided by government or business. However the community has an expectation that these organisations will operate professionally within certain standards that ensure the health and safety of all parties involved.

The not-for-profit sector in Australia has worked hard to gain a reputation of professionalism and to establish itself as a credible provider of services. To distinguish

not-for-profit organisations by not requiring of them the same standards required of others in the community would cause significant damage to the credibility of the not-for-profit sector and the important role it plays in providing services to the Australian community.

The community, including government and business, may become skeptical about the professionalism of the sector and view it as second-rate. The consequences of this are that the community would either turn to the services offered by the private sector or, in the case of the many services not provided by the private sector because of lack of commercial viability, forgo the services altogether. In addition, the public fundraising potential of the not-for-profit sector is likely to be reduced. In research conducted in the UK on charitable giving by the wealthy some respondents viewed the voluntary sector as inefficient and unprofessional and was therefore one of the reasons that they did not donate more to charity.¹

Even self-assessment standards such as those developed by Volunteering Australia (1.2 above) would be viewed cynically by the community as without penalties or potential legal consequences for failure to adhere to them they would be perceived as without substance.

2.4 Increased Complexity for Not-for-Profit Organisations

Although simple on the face of it, a decision to exempt not-for-profit organisations for damages claims for death or personal injury would most likely lead to legislative complexity that would grow over time.

As it is extremely difficult to identify in advance all of the possible situations that could arise it seems unlikely that any legislation could be developed which would exempt all not-for-profit organisations in all circumstances from damages claims for death or personal injury (other than intentional torts). This would result in uncertainty for some organisations about whether they are exempt or not (or to what degree) and which may ultimately need to be determined by a court regardless. This uncertainty may have the ironic effect of actually increasing an organisation's administrative costs if they need to seek legal advice about whether the legislation fully exempts them from liability.

Not-for-profit organisations obviously have various responsibilities that they would be required to continue to meet under other legislation, for example, Occupational Health and Safety Acts. For many organisations it would be unclear how the two pieces of legislation would interact and in which circumstances they could be held liable for breaches of an Act and in which circumstances they would be exempted from damages claims.

¹ P.27 A bit rich? What the wealthy think about giving – Laura Edwards, IPPR, 2002

This would also have the potential to create greater disparities between paid and volunteer staff in terms of the protections that they are afforded. For instance an organisation is likely to have a range of legislative obligations in relation to their paid workforce which may not clearly extend to their volunteer workforce.

If the threat of damages claims for negligent acts is removed an organisation may be less willing to ensure that their volunteers are working in healthy and safety environments and perform only tasks for which they are adequately trained. In such a scenario paid staff may refuse to work with volunteers because of lack of clarity about their own legal position as a result of any injury arising from their 'co-work' with volunteers.

To exempt not-for-profit organisations from damages claims for death or personal injury, yet continue to impose legislative requirements that are aimed at protecting clients of services, for example compulsory police checks on volunteers working with children (eg. NSW), sends mixed messages about the obligations that an organisation has in respect of risk management.

The also applies when organisations are expected to abide by certain standards under the terms of government funding contracts. The interface between the standards specified within the contracts and the exemption from damages claims for death and personal injury is unlikely to be clear.

Another problem is that an exemption from damages claims for death or personal injury may also falsely convey to organisations that they are broadly exempt from other similar or related liabilities, for example, professional indemnity insurance.

3. Impact on Volunteers

Regard must also be given to the impact on volunteers when considering the proposal to exempt not-for-profit organisations from damages claims.

In Australia 4.4 million people volunteer for a not-for-profit organisation or group. 47% of people identified 'help others/community' as a reason for being a volunteer and 42% identified 'personal satisfaction' as a reason for being involved.² This overwhelmingly shows that Australians volunteer because they want to assist others, but at the same time recognise that volunteering is an important way for them to personally contribute to society.

The potential impacts on volunteers of exempting not-for-profit organisations from damages claims for death and personal injury include:

- Transfer of liability to volunteers;
- Reduced accountability of volunteers; and
- Damage to public perception of volunteers.

² p. 20 Voluntary Work Survey, Australian Bureau of Statistics 2000 Cat. 4441.0.

3.1 Transfer of Liability to Volunteers

The level of volunteering increased in Australia to 32% of the civilian population aged 18 years and over in 2000 from an estimated 24% of the population of the same age in 1995. This increase is despite the many issues that affect volunteers and the barriers to volunteering that were identified during the consultations to develop *A National Agenda on Volunteering: Beyond the International Year of Volunteers* conducted by Volunteering Australia and Australian Volunteers International in 2001.

Among the issues raised during consultations was the increased (whether real or perceived) legal exposure of volunteers and the not-for-profit organisations that they work for.

Although exemption of liability of not-for-profit organisations from damages claims may go some way (but unlikely, all of the way) to clarifying the situation for not-for-profit organisations, the situation would remain unclear for volunteers.

It is likely that an injured party who is unable to seek damages from a not-for-profit organisation would then seek to obtain damages from the individual/s that are claimed to have caused the injury. This would put volunteers in the extremely vulnerable position of having potential liability for negligent acts or omissions that may have resulted from inadequate training, support or information from their organisation.

While the various Volunteer Protection Acts (or Bills) and Good Samaritan Acts (or Bills) that have been introduced or proposed in some states would provide some protection for volunteers, again it is unlikely that protection will be afforded in all circumstances. Unless all Volunteer Protection Acts / Good Samaritan Acts of the various states are developed in conjunction with one another and in tandem with any legislation that would exempt not-for-profit organisations from damages claims it is likely that 'gaps' would emerge with some volunteers unintentionally falling outside the intended protections. This would create unnecessary differences between groups of volunteers, depending on their geography and/or activity.

If insufficient protection is afforded to individual volunteers, including the voluntary boards of management of most not-for-profit organisations, then volunteers would be forced to consider taking out their own insurance in order to protect themselves if sued. For many volunteers this would not be a viable option, so they would be forced to choose between continuing to volunteer at perhaps significant financial risk to themselves and their families or withdrawing their voluntary labour. Some organisations may be willing and able to meet the costs of insurance to protect their volunteers from damages arising were any of their volunteers to be successfully sued. However in many instances the cost is likely to be high and would leave the organisation no better off. In some cases this cost may even be higher as there may be reduced opportunities for the organisation to bulk buy appropriate insurance.

3.2 Reduced Accountability of Volunteers

If exemptions for not-for-profit organisations from damages claims operated in tandem with appropriate volunteer protection legislation and volunteers had a reduced fear of being successfully sued (except for intentional torts) then the risk of volunteers acting inappropriately or taking unacceptable risks may increase.

Even if we ignore the potential for ‘misguided’ volunteers to become involved in an organisation, the reduction in fear of negative consequences could mean that the most well-meaning of volunteers could find themselves undertaking activities on behalf of the organisation for which they have not been adequately trained. This will be particularly so if an organisation has reduced its emphasis on risk management strategies and appropriate training and management of their volunteers.

3.3 Damage to Public Perception of Volunteers

The Sydney Olympics, the International Year of Volunteers 2001 and the New South Wales Bushfires (Christmas 2001) have all heightened the recognition of the important role that volunteers play. Integral to this recognition is the idea that volunteers are fellow citizens who undertake their roles with commitment, enthusiasm and professionalism. If, as a result of exempting not-for-profit organisations from damages claims, the public view of these organisations were to become one of mistrust about the adequacy of organisations’ risk management strategies, the community would also become skeptical of the role of volunteers.

A reduction in the positive image of volunteering is very likely to result in individuals being less inclined to offer their services and be identified with organisations viewed negatively by the public.

3.4 Reduced Willingness to Volunteer

A consequence of both a transfer of liability to volunteers and damage to the public perception of volunteers would most likely result in a decline in volunteer numbers for the various reasons identified previously.

In addition, volunteers may simply become unwilling to volunteer their time with organisations who do not demonstrate a clear commitment to minimising the risk of injury to volunteers and the public they serve.

At a personal level volunteers may feel exploited by organisations who have a reduced legal imperative to minimise harm and who do not actively demonstrate the ways in which they are avoiding risk to their volunteers.

At a professional level volunteers will feel disinclined to support organisations who do not display the highest professional standards when providing services. As previously stated, “helping others/community” is the most frequently identified motivator for

volunteering. Volunteers will consider not only *the help or services being offered*, but also the *way in which the services are provided* when determining their willingness to commit to a particular organisation.

4. Impact on the Activity of Volunteering

Volunteering Australia works to advance volunteering in Australia. While representing the diverse views and needs of the volunteer movement its mission is to “...promote the activity of volunteering as one of enduring social, cultural and economic value.”

It is only after we have considered the impacts on volunteer-involving organisations and volunteers that we can identify the impacts on *volunteering* of a proposal to exempt or limit the liability of not-for-profit organisations from damages claims for death or personal injury.

4.1 Damage to the Image of Volunteering

In addition to key events such as the Sydney Olympics, the International Year of Volunteers and the New South Wales Bushfires there are a number of ‘trends’ that have been identified in recent years that have given volunteering a ‘boost’ both in terms of numbers and image.

In Australia the stereotype of the volunteer as a ‘middle-class, middle-age woman’ has largely been dismissed. Volunteering is now well recognised as an activity that attracts a diverse range of people, to a diverse range of organisations, for a diverse range of reasons.

Volunteering is increasingly regarded by the corporate and government sectors as an important way in which their staff and organisation can engage in their local community. For the corporates there is recognition that this level of community engagement can contribute to meeting their triple bottom line social responsibilities, as well as providing opportunities for their staff to develop and use skills. For individual staff, volunteering that is supported by their employer provides an opportunity to use skills they may not otherwise have the opportunity to, to connect with their community and to satisfy a range of other motivations they may have.

Young people (18-24) are identifying volunteering as an opportunity to gain work experience³ and as a pathway to paid employment, while people across all age ranges are identifying one of their motivations for volunteering as using their skills or experience.

There is increasing recognition by government that volunteering provides unemployed people and others receiving income support payments with a pathway to greater social

³ p. 20 Voluntary Work Survey, Australian Bureau of Statistics 2000 Cat. 4441.0 – 17% of young people in the 18-24 age group identified “gain work experience” as one of their motivations for volunteering.

and economic participation. This is evidenced by the Commonwealth's commitment to two key programs. The *Voluntary Work Initiative* was developed in 1997 in response to unemployed people identifying for themselves that volunteering was a way in which they could engage more fully in the community whilst meeting their activity test requirements. The newer *Australians Working Together* package has increased the emphasis on voluntary and community work.

Damage to the public image of volunteer-involving organisations and their volunteers due to a perceived weakening of their accountabilities to their clients, their staff and volunteers and the broader community would ultimately damage the volunteering movement.

The very positive images that large segments of the community now have of volunteers and volunteering would soon be eroded. Not only would the numbers of actual and potential volunteers reduce, those that remained involved would no longer view with as much pride the importance of work that they do. Community recognition of the work of volunteers would no longer be as prevalent and volunteers themselves may begin to devalue the contribution that they make.

5. Impact on Injured Parties

It should not be ignored that those most affected by any reforms that exempt or limit the liability of not for profit organisations from damages for death or personal injury will be the injured parties. If not-for-profit organisations are exempted from damages claims, injured parties and their families are likely to be insufficiently compensated for personal injury caused by the negligent acts or omissions of a not-for-profit organisation.

This would result in an unfair legal system in which the right to sue would be determined by *who* caused the injury. An injury caused by the negligence of a small business may entitle the injured party to an award of damages, whereas the same injury caused by a not-for-profit organisation would not.

An inability to obtain adequate compensation may leave injured parties without the resources needed to undertake all required medical care to recover as completely as possible and return to full economic and social participation. In the more extreme cases of personal injury, additional care and support may need to be provided by the family members of the injured person. This has the potential to lead to further loss of family income and adverse economic conditions for more than just the injured party.

In the absence of an alternative system of compensation, a lack of adequate compensation for genuine cases of negligence available through the courts would only increase the reliance of the injured party on support on the wider community, through tax-payer funded support and assistance.

Many injured parties, as a result of injuries sustained and due to an inability to afford required care, may require one or more of the services provided by not-for-profit organisations. This increases the demands on already resource-strained services.

6. Conclusion

Exempting or limiting the liability of eligible not-for-profit organisations from damages claims for death or personal injury might initially seem a viable solution to the current crisis in public liability insurance. In reality, for the reasons outlined in this submission, it is not.

The credible reputation of the not-for-profit in the eyes of the bulk of the community has been hard won. Proposals such as 3(f) in the current review would permit the lowering of standards of care required of not-for-profit organisations and nullify all previous efforts to ‘raise the bar’ and emphasise the high standards and professionalism exhibited within the sector.

Even if no actual reduction in standards occurred a negative public perception is sufficient to damage the reputation of the sector and its place in the community.

Volunteering Australia acknowledges that the Review Panel is obliged to adhere to the Terms of Reference for the review, however our view is that any options developed under 3(f) would be unsatisfactory. Governments across the jurisdictions must seek alternative solutions to the problem of spiraling public liability insurance premiums and the negative impacts of this on not-for-profit organisations.