Civil Liability Act 2003 (Qld)

1.1 What is it about?

The Civil Liability Act 2003 (Qld) (‘the Act’) contains statutory protection for persons performing voluntary work for community organisations from incurring personal civil liability.\(^1\) It also contains fundamental changes to the common law of negligence.\(^2\)

The Act was passed as part of the Queensland Parliament’s response to the civil liability and insurance ‘crisis’. Many of its initiatives are based on the recommendations of the Review of the Law of Negligence Report (Ipp Report).\(^3\)

Legislation dealing with the issue of volunteer protection has been passed in every State and Territory in Australia. Legislation has also been passed in the United States that deals with similar issues.

1.2 When does it start?

The Act, as it relates to volunteer protection, took effect from 9 April 2003.\(^4\) It does not have retrospective effect. It will apply to a volunteer while performing community work organised by a community organisation after this date.

1.3 Who is a volunteer?

A “volunteer” is defined as a person who performs community work on a “voluntary basis”. A person is considered to work on a “voluntary basis” where he or she:

- provides services without payment, or
- only receives reimbursement of his or her reasonable expenses in doing the work.

A person will not be considered to be working on a voluntary basis where he or she is performing community work under a court order.

Refer: ss 38 (1), (2).

1.4 What protection is given to a volunteer?

The protection is afforded for any act and omission done or made by the volunteer in good faith when performing community work either:

\(^1\) Civil Liability Act 2003 (Qld), Chapter 2, Part 3, Division 2.

\(^2\) Explanatory Notes, Civil Liability Bill 2003 (Qld) 1.

\(^3\) Queensland, Parliamentary Debates, Legislative Assembly, 11 March 2003, 367 (RJ Welford).


\(^4\) Civil Liability Act 2003 (Qld), s 2 (2); Queensland Legislation Annotations (2004), Issue 25, p 124.
organised by the community organisation; or
as an office holder of the organisation.

The protection applies to any civil claim\(^5\) for damages\(^6\) for personal injury, property
damage or economic loss,\(^7\) except for claims relating to certain defined areas of liability
(refer 1.10).

The liability may be based in:

tort (for example, negligence);
contract (for example, breach of contract); or
another form of action, including breach of statutory duty (for example,
discrimination).

If protected, a volunteer will not be personally liable to pay any compensation to third
parties to whom he or she may have caused injury, damage or loss as a result of their
own negligence.

The Act is silent on whether the volunteer’s protected liability will be borne by the
community organisation (refer 1.9).

In most other Australian jurisdictions\(^8\) and the United States,\(^9\) a statutorily protected
volunteer’s liability is automatically transferred to the community organisation. In
contrast, the New South Wales legislation provides that the protection offered to
volunteers extends to the community organisation’s liability.\(^10\)

Refer: ss 4, 39, Sch 2.

1.5 What criteria must the volunteer meet to gain protection?

To gain protection the volunteer must meet the following criteria:

be a “volunteer” as defined (refer 1.3);
be carrying out “community work” (refer 1.7) either “organised” by the “community
organisation”, or as an office holder of a “community organisation” (refer 1.8);
come within an area of liability protected by the Act (refer 1.4, 1.10); and
not fall within one of the recognised exceptions (refer 1.6).

Refer: ss 4, 5, 38, 39, 40, 41, 42, 43, 44.

1.6 What are the exceptions to protection?

A volunteer is unable to claim the benefit of protection in a number of circumstances. These are where:

the volunteer did not act in good faith;

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\(^5\) For fatal injuries this includes a claim for the deceased’s dependants or estate: Civil Liability Act 2003
(Qld), Sch 2.
\(^6\) ‘Damages’ includes any form of monetary compensation: Civil Liability Act 2003 (Qld), Sch 2.
\(^7\) Civil Liability Act 2003 (Qld), s 4, Sch 2.
\(^8\) See Volunteers Protection Act 2001 (SA), s 5 (1); Volunteers (Protection from Liability) Act 2002 (WA),
s 7 (1); Wrongs Act 1958 (Vic), s 37 (2); Civil Liability Act 2002 (Tas), s 48 (1); Civil Law (Wrongs) Act
2002 (ACT), s 9 (1); Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 7 (6);
Commonwealth Volunteers Protection Act 2003 (Cth), s 7 (1).
\(^9\) The Volunteer Protection Act 1997 42 U.S.C., §§ 14503 (c).
\(^10\) Civil Liability Act 2002 (NSW), s 3C.
• the volunteer was, at the time the act or omission occurred, engaged in conduct that constitutes an offence;
• the volunteer was intoxicated while doing the work and failed to exercise due skill and care;
• the volunteer was acting outside the scope of activities authorised by the community organisation concerned;
• the volunteer was acting contrary to instructions given by the community organisation;
• the liability incurred by the volunteer is a liability required to be insured against by State law; and
• the liability incurred by the volunteer is covered by a compulsory third party insurance policy under the Motor Accident Insurance Act 1994 (Qld) or recoverable by the Nominal Defendant under that Act.

Refer: ss 39, 40, 41, 42, 43, 44, Sch 2.

1.7  Activity test: What is community work?

To qualify for protection, the volunteer must be performing “community work”. This is referred to as the activity test. “Community work” is defined in the Act to mean work that is:

• not for direct private financial gain; and
• performed for one of the following purposes:
  o charitable;
  o benevolent;
  o philanthropic;
  o sporting;
  o recreational;
  o political;
  o educational; or
  o cultural.

Refer: ss 38, 39.

1.8  Organisational test: What is a community organisation?

The protection is only afforded for community work that is:

• organised, directed or supervised by a community organisation; or
• performed by an office holder of a community organisation.

This is referred to as the ‘organisational test’. “Community organisation” is defined to mean “any of the following that organises the doing of community work by volunteers”:

• a corporation (for example, a company limited by guarantee or an incorporated association);
• a trustee acting in the capacity of trustee;
• a church or other religious group;
• a registered political party under Queensland or Commonwealth electoral legislation; or
• a public or other authority (for example, a government department or a local authority)

Refer: ss 34, 38, 39.
1.9 Will the community organisation be liable for the volunteer’s negligence?

The Act is silent on whether the community organisation is, or can be made, vicariously liable for the acts or omissions of a volunteer or volunteer office holder. In all other States and Territories except New South Wales, the legislation is clear that a community organisation will be liable even though the volunteer may be excused of liability.

Vicarious liability is a means by which legal liability is transferred from the person who committed a tortious act to another person. A person may incur a *vicarious* liability, where a *principal* liability is incurred by a person in a special relationship with them. Under the common law a community organisation is vicariously liable to persons injured as a result of the negligence of its employees where the employees’ conduct was performed “in the course of employment”.\(^1\) This will be so even if the community organisation was not at fault. The liability arises because of the legal relationship between the employer and employee. In some circumstances, a person or organisation may also incur vicarious liability where the negligent person was an ‘agent’ of the person or organisation.

It is unclear at common law whether the principle of vicarious liability extends to the relationship of community organisation and volunteer. As the common law still applies except as excluded or modified by the Act,\(^2\) there is a possibility that a community organisation can be made vicariously liable for the acts and omissions of its volunteers.

However, whether this is possible will be unclear until the Act is amended, or a court makes a ruling on the issue, that sheets liability home to a community organisation for the acts of its volunteers.

1.10 In what areas of liability is the protection not available?

The protection afforded by the Act does not apply in relation to a civil claim for damages for *personal injury* if the harm resulting from the breach of duty owed to the injured person is or includes:

- an “injury” as defined under the *Workers Compensation and Rehabilitation Act 2003* (Qld) where employment is a significant contributing factor to the injury;\(^3\) or
- an injury that is a “dust related condition”; or
- an injury resulting from smoking or the use of tobacco products or exposure to tobacco smoke.

If any part of the personal injury suffered by the claimant relates to any of the above factors, the Act will have no effect.\(^4\)

Refer: s 5.

1.11 Can the protection be waived by contract?

The Act does not prevent the parties to a contract from making an express provision for their rights, obligations and liabilities under contract for *any matter* to which the Act applies (except the provisions relating to the assessment of damages for personal

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\(^1\) *Rose v Plenty* [1976] 1 WLR 529.
\(^2\) *Civil Liability Act 2003* (Qld), s 7 (5); Queensland, *Parliamentary Debates*, Legislative Assembly, 11 March 2003, 367 (R Welford).
\(^3\) See *Workers Compensation and Rehabilitation Act 2003* (Qld), s 32.
\(^4\) Explanatory Notes, *Civil Liability Bill 2003* (Qld) 5.
injury). If such a contract is entered into, the Act does not in any way limit or otherwise affect the operation of the express provision in the contract.

This means it is possible for a community organisation and a volunteer to enter into a contract of indemnity in relation to any liability placed on the community organisation resulting from acts or omissions made by the volunteer while performing community work. Such a contract would exclude the operation of the volunteer’s statutory right to be protected from incurring personal civil liability.

The provision would also allow a volunteer to enter a contract of indemnity with a client of the community organisation. This would provide the volunteer with an indemnity against any civil liability incurred by him or her in relation to activity he or she undertook with that client.

Any such contract made between a community organisation and a volunteer, or a client of a community organisation and a volunteer, may be subject to strict interpretation by the courts.

Refer: s 7 (3).

1.12 Does the Act apply to the government?

The Act expressly binds “the State”. This includes the State of Queensland, and, to the extent that the Queensland Parliament can bind, the Commonwealth and other States. Any action commenced by, or against, the Crown must therefore respect the volunteer protection provisions.

A “public or other authority” is included in the Act as a community organisation. A “public or other authority” is defined to mean:

- the Crown;
- a local government; or
- any public authority constituted under an Act.

As a community organisation, volunteers performing community work organised by a public or other authority may seek protection under the Act (refer 1.8).

Refer: ss 6, 34, 38, 39.

1.13 How does the Act affect other law?

The Act does not create any new cause of action for the recovery of damages and is not a complete codification of the common law relating to civil claims for damages. A code seeks to state the whole of the law governing a certain issues, the Act only operates to modify particular aspects of the common law. Duties and entitlements under the common law remain intact unless specifically excluded or modified under the Act.

The provisions in the Act giving protection to volunteers from incurring personal civil liability do not limit protection given to a volunteer by other provisions of the Act, or by other Acts or law.

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15 See Civil Liability Act 2003 (Qld), Chapter 3 (assessment of damages for personal injury).
16 Civil Liability Act 2003 (Qld), s 6.
17 Civil Liability Act 2003 (Qld), s 7 (5); Queensland, Parliamentary Debates, Legislative Assembly, 11 March 2003, 367 (R Welford).
1.14 Will liability be imposed on a volunteer or a community organisation where the injured person is engaging in criminal conduct?

Under the Act, a civil liability will not generally be incurred by a person (the defendant) if the court is satisfied that:

• the breach of duty from which civil liability would arise, occurred when the person who suffered the harm (the plaintiff) was engaged in conduct that constitutes an indictable offence; and
• the person’s conduct (the plaintiff’s conduct) materially contributed to the risk of the harm.

The court may only award damages if, in the circumstances of the case, to not do so would be harsh or unjust.

For the provision to operate, it does not matter whether the person whose conduct is alleged to constitute an indictable offence has been proceeded against, or convicted of, an indictable offence.

Refer: s 45.

1.15 Will an expression of regret to an individual about an incident be construed as an admission of liability in a proceeding based on a claim arising out of the incident?

A volunteer or community organisation may make an expression of regret about an incident without fearing it will be construed as an admission of liability in a claim or proceeding arising out of the incident.

The Act provides that any oral or written statement made by an individual expressing regret (as opposed to admitting fault or negligence) in relation to an incident alleged to give rise to an action for damages for personal injury is inadmissible in court.

This inadmissibility only applies to:

• statements made by the person before the civil proceeding is started; and
• claims for personal injury damages.

Refer: ss 69-72.

18 An indictable offence is an offence classified as a crime or misdemeanour: Criminal Code Act 1899 (Qld), s 3 (3).
19 Civil Liability Act 2003 (Qld), s 45.
20 Civil Liability Act 2003 (Qld), s 72.