

VOLUNTEERS LEGAL RESPONSIBILITY

A person wearing a yellow tank top is sitting in a wheelchair in a vast green field under a clear blue sky. Their arms are raised in the air, and they are facing away from the camera towards the horizon.

Services that provide for people with disabilities have a clear responsibility to work in ways that genuinely empower, enable and support participants to experience all the rights that belong to all citizens.

Although we have the responsibility to support people with disabilities to take control over their own lives, we also have the responsibility to ensure that people are not unreasonably exposed to risks of physical injury or other harm.

There are two key areas in which a person with a disability may be at risk of harm:

- The first relates to physical injury;
- The second relates to limiting maximum personal development, self-determination and decision making.

For people with disabilities, harm in these areas may be difficult to assess, therefore it is important that we are well aware of how harm can occur. Volunteers carry a higher burden of responsibility compared with working with people without disabilities.

The *Disability Act 2006* and the *Disability Regulations 2007* (the Act) commenced on 1 July 2007. The Act replaced the *Intellectually Disabled Persons' Services Act 1986* and *Disability Services Act 1991*. The following website will give information regarding the Act: <http://www.dhs.vic.gov.au/for-individuals/disability/your-rights/disability-act-2006>

Additionally the *Disability Discrimination Act (1992)* in Australia and the *Human Rights Act of Victoria* are also important to understand. You can find more details on both of these acts here: <http://www.humanrightscommission.vic.gov.au/index.php/-types-of-discrimination/disability/federal-disability-discrimination-law>

Both the principles of the *Disability Act 2006* and the *Disability Regulations 2007*, require an approach which not only takes into account an organisation's responsibility to ensure physical well-being, but also to assist a person with a disability to maximise their personal development, self-determination, independence and quality of life. This has implications for what is considered reasonable practice in providing services and what could be considered as damage. When we consider the rights of people with disabilities to grow and develop we also need to consider the range of risks that they can be exposed to in achieving this.

This has implications for:

- Volunteers in encouraging participants to confront dangers and risks and to support them to do so safely; and
- Imposing restrictions because of what we perceive will cause injury that restricts the individual's independence and freedom.

As volunteers we will come to realise that there is a fine line between being helpful and constructive and being overprotective and custodial. Though we encourage independence, challenge and some risk taking, we are aware that we have a legal responsibility to protect the participants entrusted to us from harm physical, emotion, and psychological.

It is extremely important that we understand the legal responsibilities that we have to the participants entrusted to us and to ensure that these are observed. Initially, this may sound daunting and difficult to comprehend, but if we look at it in simple terms we can understand the basics and come to understand how we should respond, what precautions we should take and what pitfalls to avoid.

The principles we need to be aware of are:

- Negligence;
- Breach of duty of care; and
- Duty of care;
- Harm and loss.
- Standard of care;

In a sport and active recreation environment, the relationship that the volunteer has with a participant is one of 'in locoparentis'. This is a legal term meaning 'in place of parent or parents/caregivers'. The leader is expected to take on all the responsibilities of the parents/caregivers and possibly even more. This is a general responsibility but a volunteer does not have all the responsibilities of a parent or guardian. It is a responsibility of care but not one that includes the power to make the same decisions that parents/caregivers can make.

Negligence

Negligence is doing or failing to do something that a reasonable person would, or would not, do in a certain situation and which causes another person damage, injury or loss as a result.

Duty of Care

Duty of care basically means that you must be careful to protect others around you from any foreseeable danger – you have a legal obligation to avoid causing harm to this participant. There must be sufficient relationship of closeness between two people for duty of care to exist. For example, the volunteer to participant relationship.

Standard of Care

In providing our duty of care we need to be aware of the standard of care, i.e. what a reasonable person would have done, or not done, in the same circumstance.

Duty of care involves the responsibility to be careful; standard of care involves the consideration of how far one is expected to go in being careful. This standard of care may be determined by an organisation's guidelines, a volunteer's resource manual, volunteer training program or by what can be reasonably expected of a person in a given role. Standard of care can be breached through a failure to adhere to the documented requirements, through ignoring a reasonably foreseeable danger or not taking steps to safeguard those in your care. Not speaking up when you know that you are participating in an activity where, in your opinion, someone else does not apply a duty of care can also be interpreted as a breach of standard of care.

Breach of Duty of Care

Failure to meet a reasonable *standard of care* constitutes a breach of *duty of care*. Where harm or injury occurs as result of this failure, legal action for compensation can be made. In sport and active recreation activities for people with disabilities, the expected standard of care tends to be higher than in other situations.

Harm or Loss

A claim for compensation can be made if harm or loss to a participant has occurred, as result of the other person's negligence; this is usually known as a claim for damages. Harm or loss has traditionally included terms such bodily injury, economic loss or nervous shock, but more recently a broader concept of injury has emerged. For example, it may be considered possible to damage a person with a disability by unnecessarily restricting their freedom and autonomy. Though this is not recognised by courts as grounds for a negligence action, it is part of legal responsibility and is therefore relevant in determining if negligence has occurred.

Avoiding Injury

It is very obvious to all concerned, organisations and the volunteers who work with them, that it is imperative to avoid situations that may lead to the injury of a participant as a result of *negligence* in the *duty of care*. Initially a volunteer is inclined to be very cautious in their work with a participant with a disability, not being quite sure of what constitutes a *breach of duty of care*. As their confidence in working in this area develops, they will also become more aware of potentially risky situations and therefore develop strategies for assessing potential risks and working in such a way that their impact can be minimised.

When in doubt about a situation it can be useful to talk to other leaders about it and seek some feedback. This action in itself can be seen as taking steps to avoid a breach of *duty of care*. The following preparation will help to avoid situations where harm or injury may occur.

Come to know:

- a participant's capacity to carry out activities, and how to carry out similar activities safely;
- a participant's awareness of the risks that might be involved and how they can be avoided;
- the dangers involved in an activity and how well the participant is equipped to deal with them;
- what you can learn from relevant assessments or reports regarding the participant, their vulnerability and their skills; and
- Be careful to avoid rumour or hearsay.

Rely on your common sense in making assessments about the degree to which injury to a particular participant in a particular situation is foreseeable.

Considering what is reasonable in avoiding injury:

A volunteer is not expected to provide absolute protection against all possible injuries of the participant who are owed the duty of care, but rather to do whatever would be considered reasonable in the circumstances.

Therefore, with most activities it is matter of working out what is reasonable. The following will assist in doing this:

- Look for the course of action that involves the least possible restriction of the participant's rights. It is never reasonable in protecting participants from injury or harm to restrict participants or violate their rights or freedoms any more than are necessary.
- Do not shelter participants from all risks. We have a responsibility to empower people with disabilities to take a greater control over, and responsibility for, the situations in which they are confronted. This includes risks. Risks are part of life and provide the means by which participants grow and develop. Help them to confront risks safely by providing support in ways that are likely to assist the person to deal with risky situations in ways that do not result in injury. This is called 'dignity of risk' and is a feature of sport and active recreation programs.

Ask the following questions when deciding about a potentially harmful situation:

- What are the reasons for thinking that someone might experience some harm or injury?
- What am I basing my assessment on? Can I check this with someone else?
- How great are the risks involved?
- Are the risks indisputable or are they just risks from my own personal perspective in an attempt to be protective?
- Are the things that I plan to do to avoid risk of injury reasonable? and
- Can I find ways to support the person to learn from the risks and confront them safely?

Avoiding the Risk of Breach of Duty of Care

Be familiar with the guidelines and regulations of the organisation with regard to sport and active recreation programs. Carry out responsibilities and tasks as recommended by the organisation, program manager or coordinator and understand the principles of individual rights and freedoms and recognise the importance of applying them when working with people with disabilities. Talk to others about areas in which you are uncertain.

Come to know the abilities of the participants. Talk to the coordinator and parents/ caregivers of the participant, prior to the program, and find out as much as you can about the abilities and confidence level of the participant. Develop a process of carefully considering all alternatives and their consequences.

Find out about the insurance coverage provided by the organisation, be clear in which ways the insurance covers you. Take out personal liability insurance if you feel the organisation's insurance is inadequate.

The following may assist in meeting duty of care requirements as volunteers:

- Plan all activities thoroughly;
- Consult experts for advice on activities when not sure;
- Conduct activities in safe areas having regard to the capabilities and experience of the participants;
- Use appropriately qualified and/or experienced staff;
- Use appropriate and approved equipment;
- Know the health status of the participants;
- Inspect all equipment before use;

- Arrange medical and first aid treatment in anticipation of injury;
- Make arrangements for emergency situations; and
- Keep accurate records on all aspects of an activity, where accidents have occurred.

Negligence

The participant has a right to privacy and volunteers must respect the participant's right to privacy.

Volunteers are entrusted with a significant amount of information about the participant with a disability they assist on a sport or active recreation program. This information may be passed to them by:

- The program manager;
- Other volunteers ; and
- The coordinator;
- The person with the disability.
- Parents/caregivers;

This information is made available to the volunteer specifically for the purposes of assisting in the provision of the highest standard of care possible. We have access to information to use it for the participant's benefit. There must be a good reason to give out any of this information to anyone else.

This information is confidential and must not be shared with others without the prior consent of the participant/caregiver concerned.

The person who has permission to give out confidential information is charged with the responsibility to carefully choose which information it is necessary to share.

An example of this -

You may be involved in a group activity where it is advisable for other volunteers to be aware that your one-to-one participant has a tendency to wander off and pick wild-flowers and hence heads for the bush at every opportunity.

It is not necessary for the volunteers to be informed, for example, of the participant's deprived childhood, or that he/she was abused and put in an institution and now has happy memories of Sunday walks in the bush.

The participant has a right to privacy and a right to expect that confidential information will not be discussed in casual conversation. We must ensure that our actions do not threaten a participant's right to privacy or their control over information about themselves.

The law of torts that relates to the wrongs done in 'trespass, nuisance or defamation' can protect a participant's privacy.

Confidential information is information entrusted to another as a matter to be kept secret. Situations can occur where the volunteer's duty of confidentiality conflicts with the responsibilities to others whose wellbeing or welfare can be at risk if they remain ignorant, but in the sport and active recreation this is rare.

Breaches of confidentiality most often occur when the volunteer discusses their experiences with peers, family and others, and in so doing refers to a participant and provides information about the participant that is confidential. Often this is done without intention, but this information can be potentially harmful to the participant. It can also occur when the volunteer's discussions with another volunteer or coordinator is overheard by another who should not have access to the information.

Harm to a participant as a result of breach of confidentiality can be in the areas of:

- Embarrassment to the participant;
- Adversely influencing a volunteer's assessment of the participant with disability to make use of a service; and
- Influencing the attitudes of another who may respond differently to the participant, for example - be overprotective and not interact with, or ridicule the participant.

We are often tempted to tell a colleague or volunteer more about a participant so they will 'understand the client' or be 'nicer to' or 'try harder to help'. Resist this temptation, not only is it a breach of privacy, it is unfair to the participant, it is unethical and it can embarrass the participant.

The following will assist us to maintain confidentiality.

- Respect the dignity of the participant.
- Respect the participant's right to control the spread of information about self.
- Remember that you are in position of trust.

We can do this by:

- Never gossiping about a participant.
- Never discussing a participant where a passer-by can overhear.
- Questioning someone who asks for specific information, Why do they need to know?
- Keeping papers about a participant in a safe place.
- Being clear and strong in our desire to maintain confidentiality - relate it to your own life.
- Being convinced that it is important to maintain confidentiality.
- Remembering that service providers and staff of an agency do not have the automatic right to access all kinds of personal information.

Volunteer Rights

The volunteer who freely and willingly provides their service to an organisation without receiving compensation has a number of rights and the organisation has a number of responsibilities to the volunteer.

The first and most basic right is for the volunteer to be respected and to be treated as a professional colleague by the organisation, program directors, coordinators and fellow volunteers at all times.

The volunteer has the right to confidentiality of information about themselves such as phone numbers and personal details.

The volunteer also has the right to be fully informed by the organisation and to attend a training program conducted by the organisation. Training is for the purposes of briefing the volunteer on the specific organisation details of a program, the role and responsibilities of the volunteer in the program and strategies for facilitation of an effective program.

The volunteer has the right to be insured for accidental injury and death and personal liability, while on the program. This insurance is to be taken out by the organisation. In the interests of personal awareness, the volunteer should know the conditions and benefits of this insurance and in some cases may be encouraged to also take personal liability insurance.

The volunteer has the right to be supported by the organisation at all times against all actions that may be taken against him or her. This may not be the case if the volunteer is found to be negligent in their duty of care.

The volunteer has the right of access to the coordinator, program director, or organisation manager should a major concern arise.

The volunteer has the right to time on their own (time-out), when negotiated with the program director and taken at a time mutually agreed upon if on an overnight program.