

National Volunteering Guide

Part 6

**Other legal issues relevant to volunteers
– intellectual property, privacy and record
keeping**

Feb 2024



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Part 6

**Other legal issues relevant to
volunteers – intellectual property,
privacy and record keeping**

Other legal issues relevant to volunteers



This part covers:

- ▶ intellectual property rights
- ▶ privacy law, and
- ▶ record keeping

This part of the guide covers some additional legal issues relevant to volunteer involving organisations.

For example:

Who **owns photographs** taken by a volunteer for use on our social media sites?

What are our **privacy obligations** towards our volunteers?

Are obligations regarding **use of confidential information** the same for volunteers as they are for employees?

What records need to be kept in relation to volunteers? What about **records involving personal information** (for example, a copy of the volunteer's Working with Children Check)? For how long should we keep these records?





Intellectual property

Intellectual property (or IP) is a legal term used to describe kinds of intangible property which protect outputs of the 'mind'. As part of its activities, your organisation will develop, hold and use intellectual property.

Intellectual property may include:

- your organisation's name, logo and branding (including for services or programs you provide)
- publications and training materials
- photos and other artistic materials (including those used on social media)



Why does intellectual property matter?

It's important to understand how intellectual property is created, who owns it and how ownership can be changed so that:

- your organisation's intellectual property rights are protected, and
- your organisation doesn't infringe another person's intellectual property

Infringement of intellectual property rights, even unintentionally, may lead to undesirable consequences (such as, legal action against your organisation).

There are 'types' of IP, including:

- copyright – protects certain types of works including literary, artistic and musical works
- trade marks – used to signify an association between certain goods or services and a particular trader
- trade secrets and other confidential information
- designs – protect the appearance or 'visual features' of a product
- patents – protect inventions
- plant breeder rights – protect new plant varieties

These forms of intellectual property are all different in what they protect, how they are protected, how they are enforced and exploited, and the duration of the protection provided.

The owner of intellectual property will have certain rights to 'exclude' others from using their asset. For example, the owner of the copyright in a literary work (such as a newsletter or report), has the right to prevent others from publishing that work.

While ownership of intellectual property typically originates with its author or creator, most forms of intellectual property can be assigned to another party. For example, employers will typically own intellectual property created by their employees as a matter of law, while other individuals such as contractors or volunteers can agree to assign intellectual property arising from their work to their organisation.



How is intellectual property protected in Australia?

In Australia, intellectual property rights are protected under Commonwealth legislation (laws passed by the Federal Parliament), as well as by the common law (laws developed by Australian courts).

In some instances, intellectual property protection is automatic and doesn't require any formal registration (for example, copyright), while in other cases, you must formally apply for registration to protect the intellectual property (for example, patents).



Copyright

Copyright is the expression of an original idea in a material form. The expression of the idea is known as a 'work'. Depending on the type of work, different copyright protections may apply. Key categories of works include:

- literary – works reduced to writing (articles, letters, flyers)
- dramatic – works intended to be performed dramatically (dance, choreography)
- artistic – works which have an artistic quality or craftsmanship (painting, prints, photographs, sculptures)
- musical – works involving an auditory element, such as a melody (songs, jingles, musical scores)

In addition, copyright also protects sound recordings, films, broadcasts and published editions of works.

Protecting copyright

In Australia, copyright is protected under the *Copyright Act 1968 (Cth)* (**Copyright Act**). Works created in Australia are protected by copyright automatically on creation. The copyright in a work does not need to be 'registered'.

Copyright protection only lasts for a certain amount of time, depending on the type of copyright.

For example:

Work	Duration of protection
Literary, artistic or musical works	<ul style="list-style-type: none"> • 70 years after the death of the author, if the work was made public before death • 70 years from the date the work was made public, if the work was made public after the death of the author
Sound recordings, films	<ul style="list-style-type: none"> • 70 years from the year the material was created or first made public
Broadcasts	<ul style="list-style-type: none"> • 50 years after the broadcast was made
Published editions	<ul style="list-style-type: none"> • 25 years after first publication

Once the copyright protection period ends, the work is no longer protected and can be used by anyone provided it is not also the subject of another intellectual property right (for example, a trade mark registration).

The owner of the copyright has the exclusive right to do certain things with the material. Depending on the kind of work involved, this will typically include the exclusive right to:

- copy or reproduce the copyright material in any format (for example, scan, print or photocopy)
- publish the material (for example, in hardcopy or electronic form)
- perform the material in public (for example, present it at a conference or training session)
- make an adaptation of the material (for example, translate it into a different language, or update it over the years), and
- communicate the material to the public (for example, publish or broadcast on the internet)

Copyright ownership

Under the Copyright Act, unless another agreement is made, copyright in a work will be owned by the author of the work. However, the Copyright Act also provides that employers will own copyright in certain works produced by employees in the course of their employment. This exception is unlikely to apply to volunteers or contractors.

The agreements organisations have with its employees, contractors and volunteers should include terms setting out what works the organisation will own. The agreement will also need to ensure that these works



are transferred to the organisation. Generally, the transfer (or assignment) will occur on **creation** of the work.

If an organisation doesn't have an agreement in place with a volunteer or any other third party, the ownership of a work can be transferred later by agreement between the parties. This is done through a document called a 'Deed of Assignment', which transfers ownership from one party to another.

If an organisation doesn't intend to own the works created by its employees or volunteers, it should ensure it has written agreements in place allowing the organisation to use the works.



Example

Justin volunteers at a local environmental protection organisation. He is a keen photographer and takes photographs of trees and other local plants in the area for the organisation to use on its website and social media sites (for example, Facebook and Instagram).

Unless Justin and the organisation have agreed otherwise in writing, Justin owns the copyright in the photographs, and has the exclusive right to control how they are used.

However, the organisation can obtain permission from Justin to use the photographs for the purpose of publishing the photographs on the organisation's website and social media sites.



Tip

For more information about deeds of assignment, see **part 3** of this guide which includes a sample Deed of Assignment that covers confidential information and intellectual property.

Authorised use of copyright (licence)

To use a copyright work owned by another person, permission is required. This permission is referred to as a copyright 'licence'.

Ideally, licence agreements are in writing, providing an explicit understanding of what permissions are being granted, and any associated terms.

Some works may be licensed for use by the public broadly, such as 'Creative Commons' or 'open source' materials. In these cases, it's important to review the terms associated with use of those works, as they may contain limitations. For example, a condition may limit commercial use of a work, which could still prevent use of works by not-for-profit organisations (as the use is not private or domestic).

In some instances your organisation may need to license the use of copyright it owns as part of its arrangements with contractors.



Example – non-exclusive licence

An organisation may engage with an academic to provide pro-bono assistance and prepare a report. It may be agreed that the organisation will own the copyright in the report but the academic will be given permission to use the work on certain terms – such as only publishing the report for academic or research purposes.

This is called a 'non-exclusive licence'.

When licensing copyright and other intellectual property, it's always important to set out the terms of use clearly, including how it can be used, any restrictions and any applicable fees.



Example

Sam drafts an original training manual for a community organisation in 2018, while completing a volunteer placement. Sam assigns the copyright in the works to the organisation as part of his volunteer agreement and later dies in 2021. The work will be protected by copyright, owned by the organisation, until the end of 2092.

Infringement of copyright

A person will infringe another person's copyright if they exercise one of the copyright owner's exclusive rights (such as publication) without the owner's permission.

A person may also be liable for copyright infringement if they are found to have authorised another person to infringe the copyright. 'Authorising' can mean asking someone to infringe copyright or allowing someone working under your supervision to infringe copyright.

Examples of uses of works that may infringe copyright include:

- photocopying, emailing, broadcasting or printing material
- playing music for staff, volunteers or other persons at your organisation without a licence
- recording a video that incorporates music that is subject to copyright protection, and
- communicating material to the public by making it available on a website

There are a limited number of exceptions to copyright infringement, including research and study, parody and satire. However, there is no general exception for not-for-profit community organisations.

If your organisation wants to use the copyrighted work of another person or organisation, you should ensure that you have permission from the copyright owner. This may require you to approach the owner and explain how you will use the works, where you will use the works and for how long your organisation intends to use the works. You may be required to pay a fee, called a 'royalty'. The licence should be documented in writing.

Trade marks, patents and designs

The other main forms of intellectual property are set out below. In all instances, the best way for a volunteer involving organisation to protect these forms of intellectual property is to register them with [IP Australia](#).

Trade marks

A trade mark is a sign used in relation to particular goods or services in order to differentiate them from the similar goods or services of other traders. Common examples include logos and brand names, but trade marks are not limited to words and images, and can be an exclusive right over a phrase, sound, smell, colour, shape or even an aspect of packaging.

In Australia, the *Trade Marks Act 1995 (Cth)* sets out the criteria for registration, rights of the trade mark owner and other matters such as the length of protection (once registered, 10 years from date the application is filed, renewable indefinitely).

Trade marks are registered in relation to the specific goods or services in respect of which they are to be used. It's possible for marks which are substantially identical to coexist, provided they are registered and used in different industries.

Registration confers certain rights (which are legally enforceable) on the holder of a registered trade mark, including:

- the exclusive right to use and authorise the use of the trade mark in relation to the goods or services for which the trade mark is registered
- the right to seek relief if the trade mark is infringed (for example, an injunction or an order to the infringing person to cease using the trade mark)
- the right to assign or license the trade mark, and



- protection of the trade mark rights being infringed by third parties through the imposition of penalties including criminal penalties (for example, penalties for falsifying a registered trade mark or falsely applying a trade mark)



What about unregistered trade marks?

A trade mark does not necessarily need to be registered before it is used by an organisation, and the common law may provide a degree of protection for unregistered marks.

If a trade mark is not registered, the owner has limited rights if it is misused or infringed and legal action is usually limited to a claim of misleading or deceptive conduct under Australian Consumer Law or 'passing off' under the common law.

However, it's often difficult to enforce an unregistered trade mark, particularly where another trader has a registered trade mark. It's therefore recommended that any trade marks are registered to provide the best protection for the organisation.

A trade mark should be registered in the name of the organisation itself, being the legal entity having ownership of the trade mark, even if a volunteer has assisted in the creation of the trade mark. The legal position is different if the organisation is an unincorporated association (see below).



Note – use of the symbols ® and ™

Once a trade mark is registered, the owner is granted the right to use the ® symbol to denote their rights. This symbol must only be used once a trade mark is registered as it is an offence to falsely represent that a trade mark is registered.

The '™' symbol may be used in relation to any trade mark, whether registered or not.

Patents and designs

A patent is a registered intellectual property right which protects an invention or innovation. In Australia, the relevant law is the *Patents Act 1990 (Cth)*. Once registered with IP Australia, protection lasts up to eight years for an innovation patent, 20 years for a standard patent and 25 years for patent of a pharmaceutical substance.

A design registration can protect the shape, configuration, pattern and ornamentation of a product, which gives a product a unique appearance. In Australia the relevant law is the *Designs Act 2003 (Cth)*. Once registered with IP Australia, protection lasts five years from the filing date of the application to register (the registration can be renewed for an additional period of five years). Designs are only able to be renewed once so a design can only be registered for a maximum of 10 years.

In both cases, a patent or design should be registered in the name of the organisation itself, being the legal entity having ownership of the patent or design, even if a volunteer has assisted in the creation of the patent or design. The legal position is different if the organisation is an unincorporated association (see below).



Note – unincorporated associations

While registration of a trade mark, patent or design will usually be in the name of the organisation, this can't be the case where the organisation is an unincorporated association.

This is because an unincorporated association is not a separate legal entity – it can't own intellectual property in its own name.

In this situation, it's common for registration to be in the name of a member of the governing body of the unincorporated association. In this instance, it's important to document in writing that the member of the governing body doesn't hold the registration for their own benefit but for the benefit of the unincorporated association.



For more information on trade marks, patents and designs, see our [webpage on Intellectual Property](#) or refer to [IP Australia](#).

What are moral rights?

Moral rights are the rights of an individual who creates a work to:

- be given credit as the author of the work
- not have someone else credited as the author of their work, and
- not have something done to their work (such as change the work) that would negatively impact the authors reputation

Moral rights continue to be held by the author even if they have transferred ownership of the copyright to someone else. This may limit the copyright owner's ability to deal with a work in certain ways.

In Australia, you can't assign, sell or waive your moral rights. Instead, the author can give their 'consent' to actions which would otherwise infringe their moral rights.

Depending on how your organisation chooses to deal with copyright, you may need to seek a moral rights consent from volunteers. Some organisations prefer to ensure that the author's moral rights are preserved and will attribute the author at all times. However, if an organisation wishes to be able to use a work without crediting its author, or to be able to unilaterally alter that work, it will need to obtain a moral rights consent. This can be included in a volunteer agreement signed at the beginning of the volunteering arrangement (see **part 3** of this guide) or it can occur in writing later.



Example

Kayla volunteers at a local dog rescue home. She writes an article on canine enrichment for adopted dogs for publication on the dog rescue home's website.

Unless Kayla has consented otherwise, she can insist that she be recognised as the author of the article and that the article not be changed in a manner that may negatively affect Kayla's reputation.



Confidential information

Confidential information is any information which your organisation does not want to be public knowledge.

Confidential information is not strictly 'property' – it is a right to have information kept confidential.

To maintain confidentiality, your organisation will need to ensure that any person who receives information is required to keep that information confidential.

Confidential information is often disclosed to employees or volunteers so they can perform their role (for example, an organisation's client and contact lists or funding information). To ensure that employees, contractors and volunteers are required to maintain confidentiality, all agreements with employees, contractors and volunteers should contain appropriate provisions limiting use and disclosure of confidential information.

The best way to make sure people understand they are receiving confidential information is to mark the information as confidential and to make sure the recipient understands it must be treated in confidence. Confidential information should be stored securely with restricted access.

If a person who receives confidential information breaches their duty of confidence, the law may provide a remedy. Often this remedy will be damages (monetary) or an injunction (a court order to stop a person who has threatened to make confidential information public).

Protection of confidential information lasts as long as the information stays confidential. Once confidential information has been disclosed (made public) it will no longer be confidential and can't become confidential again.



Tip

It may be appropriate to include a disclaimer, such as the following example, on sensitive material to help demonstrate that there is no intention to disclose the material publicly, and to remind recipients of the information about its confidential nature:

Important notice:

The information in this document is confidential information of XYZ Community Organisation.

The information in this document is provided only for the purposes of [insert authorised purpose] and must not be disclosed, reproduced, published, performed, communicated to the public or adapted by any person for any other purpose, except with the prior written consent of XYZ Community Organisation.

Using confidentiality agreements

A confidentiality agreement (or non-disclosure agreement) is an agreement between two parties (for example, a volunteer and your organisation) which sets out the terms and obligations that apply to confidential information which is received or shared between the parties.

A confidentiality agreement provides a clear way for your organisation to protect your rights in respect of confidential information. If you expect that volunteers will have access to confidential information, it's a good idea to ask them to sign a confidentiality agreement before they start volunteering.

Terms of confidentiality may be a separate agreement or part of a broader agreement (for example, the volunteer agreement). If an agreement is not put in place before confidential information is disclosed to a volunteer, you should immediately ask the volunteer to enter into an agreement which requires that the volunteer not disclose or use any confidential information received before and after the date of the agreement.

If the volunteer doesn't agree to sign the agreement, your organisation will need to consider if it's appropriate to continue to disclose confidential information to that person.



Example

HealthyHeads is a suicide-prevention charity. It has developed a unique therapy treatment.

Kylie is volunteer who takes initial phone calls from potential clients. As part of her role, Kylie receives some training in how the therapy works. To make sure Kylie can't disclose the workings of its unique therapy, HealthyHeads makes sure her volunteer agreement includes a provision which obliges her not to disclose or use confidential information (including details of the therapy) to anyone outside HealthyHeads.



Tip

A confidentiality agreement should:

- define the information that is considered confidential
- confirm that the confidential information must be kept confidential, and
- clearly define the limited purposes for which the confidential information may be used

Be aware that – even if all steps are taken to protect the confidentiality of information – there are some circumstances in which disclosure can be required by law. For example, courts can impose an obligation that information (including confidential information) be produced to the court through a request (a subpoena) if disclosure of the information is considered to be in the interests of justice.



Tip

For more information about deeds of agreement, see **part 3** of this guide which includes a sample Deed of Agreement that covers confidential information and intellectual property.

Accusations of infringement of another person or organisation's intellectual property

If a volunteer accuses your organisation of infringing their intellectual property:

- try to negotiate with the volunteer to identify what intellectual property they think has been infringed and how
- if feasible, stop using the intellectual property immediately, or come to an agreement with the volunteer to assign the intellectual property to your organisation
- seek legal advice to determine whether the volunteer's claim has merit (that is, whether it's substantial enough that it could be pursued in the courts) and how to resolve the dispute

If you are accused of infringing another person or organisation's intellectual property:

- if you consider the accusation has merit, stop carrying out the allegedly infringing activity as soon as possible, and
- seek legal advice



Who owns the intellectual property?

Understanding the different forms of intellectual property is critical to making sure any intellectual property produced by volunteers is protected.

As outlined above, your organisation can only consider how to best protect the organisation once it understands who owns the intellectual property.

The law in relation to each form of intellectual property and ownership is summarised below.

Volunteer or other unpaid worker – when the creator or author of the material is a volunteer or an unpaid worker (such as a person doing work experience or a vocational placement or internship):

Copyright

If an unpaid worker creates copyright material for your organisation, they will own copyright in the material unless there is a written agreement otherwise.

It's important to have an agreement with unpaid workers, including volunteers, about copyright ownership before they create material for your organisation to make sure copyright is owned by the organisation when it's created.

However, if this doesn't occur, the unpaid worker can agree in writing to assign copyright ownership to the organisation after its creation.



Trade marks, patents and designs

Trade marks, patents and designs are owned by the individual or entity listed as the owner on the Australian Trade Marks, Patents and Designs registers (unless registered fraudulently).

For this reason, an unpaid worker will not possess any rights in relation to a trade mark, patent or design registered with IP Australia in the name of your organisation.

However, if an unpaid worker develops a trade mark (for example, by drawing a logo) the unpaid worker's work may separately be protected by copyright.

Confidential information

The obligation to keep some information confidential may arise in an unpaid worker relationship through a confidentiality agreement (or confidentiality provisions in an agreement). Confidentiality can also arise where information is disclosed to the unpaid worker expressly in confidence, although it's more difficult to enforce.

Moral rights

Unpaid workers will have moral rights in respect of any literary, dramatic, musical or artistic work which they produce. These rights remain with the author of the work at all times, and so consent must be sought for any actions which might otherwise infringe moral rights.

Employee – when the creator or author of the material is an employee:

Copyright

It's an implied term of employment that an employer owns copyright in material created by their employees 'in the course of their employment'.

To remove uncertainties, your organisation should make it clear that it is hiring someone as an employee, and always include terms relating to copyright material in your employment agreements.

Trade marks, patents and designs

It's an implied term of employment that an employer owns a trade mark, patent or design created by their employees 'in the course of their employment'.

To remove uncertainties, your organisation should make it clear that it is hiring someone as an employee, and include protections for intellectual property in their employment agreement.

Confidential information

The relationship between an employer and an employee has been recognised by the courts as a special relationship for the purpose of confidential information.

The law requires an employee to maintain the confidentiality of information disclosed in the course of, or acquired as a result of, employment, irrespective of whether there is a confidentiality provision in an employment contract. It's best practice to address confidentiality in an employment agreement.

Moral rights

Employees will have moral rights in respect of any literary, dramatic, musical or artistic work which they produce for their employer, and so consent must be sought for any actions which might otherwise infringe moral rights.





Contractor – when the creator or author of the material is a contractor:

Copyright

Copyright created by an independent contractor will automatically be owned by the independent contractor unless there is a written agreement otherwise (in a contractor agreement or agreement for services).

The agreement should state that any copyright in material created by the contractor during the provision of services to the organisation becomes the copyright of the organisation when it's created. In the absence of this agreement, the contractor can assign their copyright to the organisation after its creation.

Trade marks, patents and designs

A trade mark, patent or design created by an independent contractor will be owned by an independent contractor unless there is an agreement otherwise.

While these types of intellectual property generally rely on registration with IP Australia, registration by your organisation will not prevent a contractor from making a claim for ownership of intellectual property.

So, to prevent a future dispute about ownership, contractor agreements should provide that any intellectual property created by the contractor as part of their services is owned by the organisation. A contractor can also assign their ownership of intellectual property to an organisation after its creation.

Confidential information

As with a volunteer, a contractor will only be obliged to keep certain information confidential where the information has been communicated in confidence to the contractor or the contractor has agreed to keep the information confidential in their contractor agreement. It's best practice to ensure that agreements with contractors address confidentiality.

Moral rights

As with a volunteer, the individuals working for the contractor will have moral rights in respect of any literary, dramatic, musical or artistic work which they produce for a party to which they are providing services, and so consent must be sought for any actions which might otherwise infringe moral rights.





Privacy



Note

Your organisation is likely to collect, use, store and disclose information about individuals (for example, in the delivery of services or in gathering information about new memberships or volunteers of your organisation).

Under privacy laws, this information will often be classified as 'personal information'. Personal information may include 'sensitive information' and 'health information' – these subcategories of personal information require special treatment.

It's important to consider your legal obligations under privacy laws in all your dealings with personal information, including the sub-categories of sensitive information and health information.

Australia has strict privacy laws regulating how an organisation can collect, use and disclose personal information.

Under these laws, certain organisations must deal with personal information in particular ways to make sure someone's personal information is protected and not misused.



Note

While the privacy laws don't apply to some organisations, these organisations:

- may still have to comply with these laws due to contractual arrangements the organisations have with third parties, or
- may want to follow the privacy laws as a matter of best practice, or by choosing to 'opt-in'.

Your organisation's workers, including volunteers, must understand the organisation's obligations under privacy laws and your organisation must implement policies and practices which reflect those obligations. Workers must be adequately trained to ensure your organisation's ongoing compliance under the privacy laws.

If your organisation is bound by privacy laws (or follows them as a matter of best practice), your organisation should only:

- collect and store personal information (including information about volunteers) with consent from the person involved (unless you have ensured that consent is not required for that collection of information under the privacy laws)
- use or disclose the personal information for the purpose for which it was collected (unless the person has consented to some other use of the information, or you have ensured that the use or disclosure is otherwise permissible under the privacy laws), and
- store personal information securely to ensure there is no unauthorised access

Where an organisation holds information about a person (including a volunteer) the person may have the right to request access to their personal information, and to seek that it be modified or amended to ensure it is correct.

Allowing volunteers to access personal information held by an organisation about other people (for example, information about members of the public assisted by the organisation) may constitute a 'disclosure' of personal information for the purposes of the privacy laws. Organisations should consider whether this is permissible before providing volunteers with access to personal information, and limit such access to the minimum information required by the volunteers to perform their tasks.



Tip

If your organisation uses the sample volunteer agreement (in part 3 of this guide), the agreement makes it clear that your organisation will respect your volunteer's privacy, including keeping the volunteer's private information confidential.



Caution

The information included in this part of the guide is of a generic nature and provides an overview of the Commonwealth and state laws on privacy. It's not intended to replace legal advice. More detailed information is available in our [privacy guide](#).

Privacy laws are complex and are not always easy to apply in practice. If you have any doubts, seek legal advice.

What are the privacy laws?

In this guide, the following legislation is collectively referred to as Privacy Laws:

Commonwealth	<ul style="list-style-type: none"> • Privacy Act 1988 (Cth) (Privacy Act) which includes the 13 Australian Privacy Principles (APPs)
Australian Capital Territory	<ul style="list-style-type: none"> • Information Privacy Act 2014 (ACT) • Workplace Privacy Act 2011 (ACT) • Health Records (Privacy and Access) Act 1997 (ACT)
New South Wales	<ul style="list-style-type: none"> • Privacy and Personal Information Protection Act 1998 (NSW) • Health Records and Information Privacy Act 2002 (NSW)
Northern Territory	<ul style="list-style-type: none"> • Information Act 2002 (NT)
Queensland	<ul style="list-style-type: none"> • Information Privacy Act 2009 (QLD)
South Australia	<ul style="list-style-type: none"> • has no legislative scheme for privacy law, but has an administrative direction on handling personal information that binds the public service: PC012 – Information Privacy Principles (IPPs) Instruction
Tasmania	<ul style="list-style-type: none"> • Personal Information Protection Act 2004 (Tas)
Victoria	<ul style="list-style-type: none"> • Privacy and Data Protection Act 2014 (Vic) • Health Records Act 2001 (Vic)
Western Australia	<ul style="list-style-type: none"> • has no legislative scheme for privacy law, but some privacy principles (dealing with access to information and correction of information) are provided for in the Freedom of Information Act 1992 (WA)



The state and territory privacy legislation applies to agencies of the state and territory governments, but doesn't generally apply to community organisations unless:

- they are required or otherwise agree to be bound by the legislation under a contract (for example, under a funding agreement with a government department), or
- (in some states) they are health service providers

The Privacy Act



Is your organisation bound by the Privacy Act?

The Privacy Act applies to many categories of organisations.

The most relevant categories of organisations are:

- organisations with annual turnover of more than \$3 million in any financial year since 2002
- Commonwealth government agencies
- government contracted services providers, and
- organisations that provide a health service to another individual and hold any health information

There are some exemptions.



Read more about whether your organisation is captured by the Privacy Act in our [privacy guide](#).

Information covered by the Privacy Act

The Privacy Act doesn't regulate or apply to all information that an organisation gathers or deals with – it only applies to information about individuals.

To understand if your organisation has obligations under the Privacy Act, consider whether the information you hold (or want to collect) falls into one of the categories of information described below. The Privacy Act applies to these categories of information in different ways.



Personal information

'Personal information' is information or an opinion about an identified person, or about a person who is '**reasonably identifiable**'.

Personal information can be true or false, verbal, written, photographic, recorded or unrecorded.

Examples of personal information include (but are not limited to) a person's name, address, contact details (such as telephone number or email), date of birth, gender, sexuality and race.



When will someone be 'reasonably identifiable'?

Whether someone is 'reasonably identifiable' from the information you hold depends on factors including:

- the nature and extent of the information
- how the information was received
- how the information will be used and who has access to it, and
- whether it's possible for you to identify the person from the resources you hold (including other information available to you)

Under the Privacy Act, personal information does **not** include:

- anonymous information
- aggregated information (for example, data that reflects trends without identifying the sample)
- de-identified information and information about companies or other entities which does not identify individuals
- information about a deceased person

Information can become personal information if, when combined with other information, it becomes possible, to identify an individual.



Example

Consider a car licence plate. Most people wouldn't be able to identify the owner of a car simply from the registration number. So, to most people, knowing a car's licence plate number would not make the owner of the car 'reasonably identifiable'.

But if you work for an agency responsible for car registration, you may be able to identify the owner of the car because you have access to other information. Holding information about the car registration would make the person 'reasonably identifiable' to you from the information you hold, so the registration number would be considered personal information.



Sensitive information

'Sensitive information' is a special category of personal information under the Privacy Act that is subject to stricter legal requirements for collection, storage, use and disclosure.

Information will be considered 'sensitive information' where it's information or an opinion about a person's:

- health, genetics, biometrics
- racial or ethnic origin
- political opinion, membership of a political association
- religious beliefs or affiliations
- philosophical beliefs
- membership of a professional or trade association, membership of a trade union
- sexual preferences or practices
- criminal record

Identifying sensitive information is important as different requirements and thresholds apply to this kind of information under the Privacy Act.



Health information

'Health information' is a type of sensitive personal information under the Privacy Act that includes information or opinion about a person's:

- physical and mental health
- disability (at any time)
- health preferences (including the provision of future health services)
- use of health services
- bodily donations (for example, blood or organs), and
- genetics



Note

When you are collecting, using, storing, or disclosing information that is considered 'health information', be aware that this type of information is generally afforded a higher level of protection under the Privacy Act and some state privacy legislation.



Examples

Health information may include:

- notes of a person's symptoms, diagnosis, or treatment plan
- specialist reports or test results
- appointment and billing details
- dental records
- a person's healthcare identifier when it's collected to provide a health service
- prescriptions and other pharmaceutical purchases, and
- any other personal information (such as information about a person's sexuality, religion, date of birth, gender) collected to provide a health service

Privacy Act obligations

Many of the key obligations of the Privacy Act are set out in the APPs. These APPs set out rules which must be followed by organisations when they collect, hold, use and disclose personal information.

In addition to the APPs, the Privacy Act sets out specific rules governing the handling of information about consumer creditworthiness, as well as procedures that must be followed in the event of any serious data breach event impacting on personal information.



Note

The Privacy Act has stronger protections for the use, collection and disclosure of:

- sensitive information and health information
- personal information (including sensitive and health information) for marketing activities, and
- consumer credit information (such as credit reports)



Summary of the APPs

In summary, the APPs require an organisation to:

- be open and transparent about its management of personal information, which includes having a culture of privacy compliance, effective privacy processes and a clearly expressed and up to date privacy policy
- take reasonable steps to ensure that people are aware it is collecting 'personal', 'sensitive' or 'health' information about them (and in the case of sensitive or health information, obtain consent to that collection)
- notify people about the purposes for which it is collecting the information and who it might share that information with (among other things)
- comply with restrictions on how personal information can be used and who it can be disclosed to, including at any offshore location where the information may be disclosed
- give people the right to access the information held about them and to have that information corrected or modified
- in the event of a data breach involving personal information, follow the steps set out under the Notifiable Data Breaches Scheme



For more information on privacy go to our [webpage on privacy](#).

This page includes our guide to privacy laws and a fact sheet on the Notifiable Data Breaches Scheme.

State and territory-based privacy laws

Australian state and territory IPPs apply to their respective government agencies (including public sector agencies, local councils, courts, state police).

The state and territory IPPs regulate how government agencies may deal with the personal information of individuals in a similar way that the APPs regulate how private entities deal with personal information.

The laws and directions containing the various state and territory IPPs are:

Australian Capital Territory	• Information Privacy Act 2014 (ACT) sets out 13 Territory IPPs in Schedule 1
New South Wales	• Privacy and Personal Information Protection Act 1998 (NSW) sets out 12 IPPs in Part 2, Division 1
Northern Territory	• Information Act 2002 (NT) sets out 10 IPPs in Schedule 2
Queensland	• Information Privacy Act 2009 (QLD) sets out 11 IPPs in Schedule 3 and 9 National Privacy Principles which apply to health agencies and their contracted service providers in Schedule 4
South Australia	• has no legislative scheme for privacy law, but has an administrative direction on handling personal information that binds the public service: PC012 – Information Privacy Principles (IPPs) Instruction
Tasmania	• Personal Information Protection Act 2004 (Tas) sets out 10 IPPs in Schedule 1
Victoria	• Privacy and Data Protection Act 2014 (Vic) sets out 10 IPPs in Schedule 1
Western Australia	• has no legislative scheme for privacy law, but some privacy principles (dealing with access to information and correction of information) are provided for in the Freedom of Information Act 1992 (WA)



Is your organisation bound by the state and territory based privacy laws?

Each set of IPPs is very similar to the APPs under the Privacy Act.

While the IPPs generally only apply to government agencies, it's not uncommon for a funding contract with a state or territory public agency (for example, Department of Health) to require the funding recipient to comply with the relevant IPPs for the purpose of the funded project.

Always check if your organisation is subject to any state or territory based privacy laws.



If your organisation is contractually bound to comply with any of the state or territory IPPs, make sure:

- volunteers are appropriately trained regarding the organisation's obligations under the relevant IPPs and the funding contract, and
- your organisation complies with the requirements of the relevant IPPs when dealing with the personal information of volunteers

Health specific privacy legislation

Private health service providers are also subject to additional privacy legislation in New South Wales, Victoria and the Australian Capital Territory.

The following legislation sets out Health Privacy Principles (HPPs):

Australian Capital Territory	• <u>Health Records (Privacy and Access) Act 1997 (ACT)</u> sets out 12 HPPs in Schedule 1
New South Wales	• <u>Health Records and Information Privacy Act 2002 (NSW)</u> sets out 15 HPPs in Schedule 1
Victoria	• <u>Health Records Act 2001 (Vic)</u> sets out 11 HPPs in Schedule 1

This legislation generally applies to the collection, use, storage and disclosure of health information of people receiving health services from health service providers.

If your organisation is bound by any of the HPPs, it should ensure its volunteers are appropriately trained regarding the organisation's obligations under the relevant health specific privacy legislation.



Tip

Always check contracts with state or territory government bodies to confirm if the organisation is required to comply with the IPPs or HPPs.



Note

This is a short summary of the types of the above information which are relevant to the application and obligations of the privacy laws. However, you should refer to our [privacy guide](#) for more detailed information.

Obligations under Privacy Laws for organisations and their volunteers

Your organisation, its volunteers and the Privacy Laws

If your organisation is required to comply with Privacy Laws (or chooses to comply as a matter of best practice) and engages volunteers, it will need to take steps to make sure people in the organisation are constantly mindful of their obligations when dealing with personal information.

To embed a culture of privacy, train your organisation's volunteers in privacy compliance and make sure they understand the importance of protecting personal information from the outset.

**Specifically, ensure your organisation's volunteers are appropriately trained regarding:**

The organisation's obligations under the Privacy Act and state and territory-based laws in relation to the collection, use, disclosure and storage of personal information and health information (as applicable or as a matter of the organisation's practice)	<input type="checkbox"/>
How the organisation (and its volunteers) collects, uses, discloses and stores personal information as part of its activities	<input type="checkbox"/>
The types of information, particularly sensitive and health information, which the volunteer may be required to deal with and the organisation's obligations in respect of that information	<input type="checkbox"/>
The organisation's policies in relation to privacy, such as a privacy policy, a data breach policy and response plan and the how a person can make a complaint to the organisation in relation to their personal information	<input type="checkbox"/>
What to do if the volunteer thinks that a data breach may have occurred	<input type="checkbox"/>
How to direct people to the organisation's privacy policy (which may be required by privacy law to be as available as practically possible, such as on the organisation's website), or how to provide people with a copy of the policy. The Privacy Act requires certain information be contained within the policy including: <ul style="list-style-type: none"> – the kinds of personal information that the organisation collects and holds – how personal information is collected and held – the reasons why the organisation collects, holds, uses and discloses personal information – how an individual can access their information – the procedures for collecting, holding, using and disclosing the information, and – an explanation of whether personal information will be disclosed overseas 	<input type="checkbox"/>

**Example**

HelpingHands is a large charity that provides outreach services to the elderly. HelpingHands relies on volunteers to conduct welfare checks on their clients. As part of their role, volunteers receive the personal information (such as the name and address) of clients that they then visit.

Before volunteers begin any activities, HelpingHands makes sure:

- it is able to disclose the relevant personal information to the volunteers under the APPs, and
- the volunteers are trained about HelpingHands' obligations under the Privacy Act, including their practices and procedures

Information about your volunteers and the Privacy Laws

Organisations that engage volunteers must treat volunteers' personal information in the same way they are required to treat personal information of any other individuals under the Privacy Act (and the relevant state and territory privacy laws if the organisation is required to comply with these).



Note

Personal information about employees may be exempt from the requirements of the Privacy Act.



Example

Sam volunteers at a shelter for homeless people. He tells his supervisor, Laureen, that he has tested positive to COVID-19. Both Sam and Laureen must follow the latest government-issued guidance, including any exclusion or self-isolation requirements, to limit the spread.

To the extent that any laws require the homeless shelter to take particular steps, the APPs will not prevent those steps from being taken.

In the absence of any other legal requirements, strict privacy obligations apply when handling this personal health information.

Laureen may only collect, use, store or disclose the minimum amount of Sam's personal information that is required to mitigate risks associated with COVID-19.

When Laureen notifies employees, volunteers and other people who may have had contact with Sam at the shelter of the COVID-19 risk, she should:

- only disclose information that is reasonably necessary to prevent or manage the spread of COVID-19 at the shelter, and
- only reveal Sam's name if this is necessary (for example, by restricting naming Sam to a limited number of people on a need-to-know basis)

Both Laureen and Sam must follow government-issued guidance on whether it is safe for Sam to return to work.



Tip

The [Office of the Privacy Commissioner](#) has [published guides and templates](#) on its website that provide practical information about complying with the Privacy Act.

These include:

- Australian Privacy Principles and Information Privacy Principles — Comparison Guide
- APP quick reference tool
- Guide to developing an APP Privacy Policy
- What to look for in developing a Privacy Policy
- Guide to securing personal information
- Handling privacy complaints
- Privacy Management Plan Template (for organisations)
- Privacy for not-for-profits, including charities



Record keeping

While organisations have limited legal obligations to keep records relating to volunteers, in some circumstances, you may be required to keep records of your volunteers.

It may be necessary for your organisation to keep records relating to your volunteers for a number of reasons including for:

- internal organisational reporting (for example, human resources)
- current or anticipated disputes, or legal action (for example a bullying or sexual harassment claim)
- requirements imposed by a government regulator
- requirements under insurance policies, or
- requirements under funding agreements



Tip

Check your organisation's insurance policies and funding agreements to determine whether your organisation is under a contractual obligation to retain volunteer files or certain records for a specific period.

Keeping records and for how long

We recommend an organisation keep records relating to its volunteers for at least seven years. This is consistent with some regulator requirements (for example, the Australian Charities and Not-for-profits Commission for registered charities), and is important if any legal action is started against the organisation.

Legal action (civil claims) can generally be brought up to six years after an event to which the claim relates occurred (for example, if a former volunteer alleges your organisation's negligence was the cause of an injury to the volunteer).



Note

Some legal claims have even longer limitation periods – such as claims brought in relation to harm suffered by a person when they were a child.

If your organisation works with children or more vulnerable persons, volunteer records should be kept for as long as possible (ideally indefinitely). This is especially the case considering recent child safety reforms and the removal of limitation periods for bringing actions based on child abuse (meaning they can be brought at any time – there is no six year limit).

Your organisation should treat information that it holds about current and former volunteers with care and in accordance with obligations under Australian privacy laws, as discussed above.



Note

The obligations for keeping records under the *Fair Work Act 2009 (Cth)*, for seven years, don't apply to volunteers.

As outlined in part 2 of this guide, it's important that your organisation understand the differences between paid workers (employees and independent contractors) and unpaid workers because the law treats them differently in some instances.

Volunteer safety and record keeping

Workplace health and safety (**WHS**) laws (sometimes referred to as occupational health and safety (**OHS**) laws) require community organisations to keep certain records in relation to workers, including volunteers. See part 4 of this guide which deals with volunteer safety, including what WHS or OHS laws apply to your organisation.

Model WHS laws

Most states and territories – Queensland, New South Wales, Tasmania, the ACT, South Australia, the Northern Territory and Western Australia – have adopted the model WHS laws.

In these states and territories, organisations to which the model WHS laws apply must notify the relevant regulator immediately after the organisation becomes aware of the occurrence of an incident that is considered a 'notifiable incident'.



Notifiable incident

A notifiable incident is:

- the death of a person
- a serious injury or illness of a person, or
- a dangerous incident

arising out of the conduct of a business or an undertaking at a workplace.

The organisation must keep a record of each notifiable incident that has occurred for at least five years from the day they had notice of the incident. A failure to keep these records may lead to individuals incurring fines of up to \$5,000 and organisations incurring fines up to \$25,000.

The model WHS laws also require keeping:

- a 'Register of Injuries' where any workplace incidents or injuries should be recorded no matter how serious they appear to be at the time (there is a penalty for failing to keep a Register of Injuries); and
- records about hazardous substances such as asbestos, lead and carcinogenic materials which may be relevant if volunteers have had any contact with them

Under the model WHS laws, volunteers are included in the definition of 'workers'.

Victorian OHS laws

The Victorian OHS law is in many respects reasonably consistent with the model WHS law.

An organisation that is bound by the Victorian OHS laws must, so far as is reasonably practicable, keep information and records relating to the health and safety of its workers. There are penalties for failing to keep these records.



The organisation is required to notify WorkSafe, the Victorian regulator, of certain incidents and must keep a copy of the record for at least five years. There are also requirements to keep records under the Victorian OHS laws regarding asbestos, lead, carcinogenic substances and other hazardous substances.



Note

Even if the model WHS laws or the Victorian OHS laws do not apply, your organisation has similar obligations arising under the common law (for example, in relation to negligence).

Keeping records will help you show you are meeting these obligations.

Commonwealth and state regulator record keeping

The Australian Charities and Not-for-profits Commission

The Australian Charities and Not-for-profits Commission (**ACNC**) requests information relating to a charity's volunteers in its Annual Information Statement, which most charities must submit annually.

The requested information is currently limited to the number of volunteers a charity engages in its activities. For this reason, a volunteer involving organisation that is a registered charity should retain records about its volunteers so that it can report accurately.

Under the *Australian Charities and Not-for-profits Commission Act 2012 (Cth)* your organisation is required to keep its financial and operational records for seven years.



The ACNC has detailed information on its website in relation to [record keeping for charities](#). Our [guide to running a charitable CLG](#) also has information about keeping charities' records.

The Australian Taxation Office

The Australian Taxation Office (**ATO**) requires that records be kept for five years. Many of the documents relevant to tax affairs will also be covered by the ACNC's record-keeping requirements, including an organisation's governing documents, financial reports, cash books, tax invoices, employee records, bank records, grant documentation and contracts.

Clear records should be kept if payments are made to volunteers, such as reimbursements. Records of payments will also be important if a volunteer changes their status with an organisation and becomes an employee or independent contractor of the organisation. For more information, refer to part 2 of this guide.

State and territory incorporation regulators

All community organisations incorporated under state or territory law will need to keep documents and records.

Requirements to keep certain documents and records may be set out in your organisation's rules, as well as in the relevant state or territory incorporation legislation.

While incorporated association laws do not explicitly require you to keep specific records about volunteers, in some circumstances the organisation may be legally required to (or otherwise choose to) because of the position held by the volunteer (for example, if every person on the management committee is a volunteer).



For more information, see our [fact sheets on keeping and accessing documents, records and registers for each state and territory](#).



Other incorporation regulators (ASIC and ORIC)

If your organisation is incorporated under a Commonwealth law, such as a company limited by guarantee under the *Corporations Act 2001* (Cth) or an Indigenous organisation incorporated under the *Corporations (Australian and Torres Strait Islander) Act 2006* (Cth), it will need to keep financial documents and records for seven years.

Neither of these laws explicitly require the organisation to keep specific records of its volunteers, although in some cases records about volunteers will be kept by virtue of the position held by the volunteer (for example, where every person on the board of directors is a volunteer).

Fundraising regulators

Fundraisers conducting regulated fundraising activities must meet certain obligations under state and territory fundraising laws. These are usually the same regulators as the state and territory incorporation regulators (see above).

These laws differ in each state and territory (except the Northern Territory which does not have any specific fundraising law).

If your organisation is fundraising in several states or territories, you will need to consider the laws in each of those places and whether they apply. Fundraising laws are complex. You may need to seek legal advice in determining which laws apply to your organisation.

In some circumstances the fundraising laws require you to make and keep records of individuals involved in a fundraising activity, including as a 'collector'.

These include:

- **Queensland** – Where a community organisation engages in door-to-door or street collections, each collector must be issued with a distinctive armlet or badge. A record of each collector issued with an armlet or badge must be kept.
- **Victoria** – Fundraising laws require that the name and address of each person who participates in the appeal as a supervisor or manager be recorded – in your organisation this person may be a volunteer. Records must also be kept of any expenditure on commissions or other remuneration in relation to an appeal. Collectors in public places must wear a visible identification badge which shows whether they are a paid collector or a volunteer, which may impose additional record keeping obligations on organisations who must issue these badges.
- **New South Wales** – Where the authority holder engages people to participate in a fundraising appeal (regardless of whether they are paid or volunteers), a register of participants must be maintained.
- **Western Australia** – an organisation involved in street collections (that has the relevant permit) is obliged to consecutively number all the collection boxes and keep a record of which boxes are issued to each collector – in your organisation this person may be a volunteer.

In the other states (South Australia, the ACT and Tasmania) the fundraising laws do not explicitly require keeping a record of people involved in a fundraising activity (for example, a collector). However, in the ACT it is within the power of the regulator (AccessCanberra) to require information it considers necessary to decide whether the licensee has complied with the relevant legislation. In South Australia, the Minister and an inspector have the power to request certain records connected to a fundraising license.

Also note in Victoria and New South Wales – there are additional reasons why you should keep records of your volunteers. In these states there are exemptions from the requirement to get permission (to register as a fundraiser in Victoria and to obtain a licence in New South Wales) where only volunteers are used to collect funds and only a certain amount of money is collected within the financial year.

While your organisation may not be legally obliged to make and keep records of each person involved in a fundraising activity (for example, a collector), such as their name and address and their identifying number (if any), as outlined above, there are many reasons why it's a good idea to keep records (for example, it will help you to demonstrate how you've managed risk, and met your governance obligations).

Records of volunteers involved in fundraising should be kept and maintained with the other records of the organisation and with the requirements (if any) set out in the relevant fundraising legislation and, where applicable, other relevant laws (including privacy laws, as discussed above).



Caution

Just because your organisation may be exempt from a requirement to seek permission from the state regulator to fundraise in that state, it doesn't mean your organisation will be exempt in the other states and the ACT. If you are conducting fundraising activities in other states or the ACT you should check with the local regulator, and if required seek legal advice.



For more information on fundraising Laws in Australia see our [fundraising webpage](#) and for more information on running fundraising events, see our [webpage on holding events](#).



National Standards for volunteer involvement

Volunteering Australia's National Standards for Volunteer Involvement include standards relevant to the matters discussed in this part of the guide. If your organisation complies with its legal obligations as set out in this part (or if not obliged, but does so as a matter of best practice), it will help make sure your organisation meets these standards (and can provide evidence that it does so).

Standard 8: Policies and practices are continuously improved – Effective volunteer involvement results from a system of good practice, review and continuous improvement

8.1 Policies and procedures are designed and implemented to effectively guide all aspects of volunteer involvement.

Evidence of meeting this standard includes: all employees and volunteers are made aware of and understand an organisation's policies and procedures relating to volunteer involvement

Standard 1: Volunteering is embedded in leadership, governance and culture – The governing body and organisation leaders promote volunteering and implement effective systems to support volunteer participation.

1.3 Policies and procedures applying to volunteers are communicated, understood, and implemented across the organisation or group.

Evidence of meeting this standard includes regular monitoring and improvement of compliance with volunteer policies and procedures

1.4 Volunteer records are maintained, and volunteers and employees understand their obligations on information sharing, record keeping and privacy.

Evidence of meeting this standard includes:

- information required to engage volunteers is identified
- information from screening checks for volunteers is documented and secured
- the organisation has documented and implemented processes that comply with privacy legislation for securely managing volunteers personal and confidential information
- records of volunteer contribution, achievements and acknowledgement are maintained
- volunteers understand their obligations relating to information and privacy legislation

Standard 2: Volunteer participation is championed and modelled – Commitment to volunteer participation is set out through vision, planning and resourcing, and supports the organisation's or group's strategic vision.

2.1 The organisation publicly declares its commitment to volunteer participation.

Evidence of meeting this standard includes:

- the governing body and leaders publicly communicate the organisation's philosophy, direction and broad objectives for involving volunteers
- key documents are publicly available

Summary of intellectual property, privacy and record keeping issues

Intellectual property

- The forms of IP are all different in what they protect, how they are protected and enforced and exploited, and the duration of the protection.
- Copyright material created by your volunteer is likely to be owned by the volunteer unless you have a specific agreement otherwise.
- The creator of a work will also have moral rights, including a right to be attributed as the work's author. These rights are personal to the creator, and can't be assigned. If an organisation needs more flexibility to deal with works created by volunteers, it should seek appropriate moral rights consents.
- Your organisation can protect its trade marks, designs and patents by registering them with IP Australia.
- The law will protect confidential information where agreements limit disclosure or other circumstances of confidentiality exist. Ensure appropriate confidentiality agreements are in place with volunteers.



Privacy

- Your organisation may be subject to some or all of the Privacy Laws.
- Even if it's not, it's a good idea to follow them as a matter of best practice
- Privacy laws will govern the manner in which an organisation can collect, hold, use and disclose personal information about people, including about volunteers.
- Any collection, use and disclosure of personal information about volunteers should be considered against the requirements of applicable privacy laws. Be extra careful with 'sensitive' and 'health' information of volunteers.
- Volunteers should also be aware of acceptable procedures for handling personal information as part of their roles.
- The Privacy Act also sets out procedures to follow when a data breach occurs in respect of personal information.

Record keeping

- It's a good idea to keep records of your volunteers, even if your organisation doesn't have obligations at law that require you to keep these records.
- Registered charities are required to provide annual information on the number of their volunteers, and some fundraising laws require you to keep details of those involved in fundraising activity.
- Other reasons to keep records include your organisation's own reporting, requirements under insurance policies (check them) or potential future legal action, for example, by a volunteer alleging your organisation failed to keep them safe while volunteering for your organisation.
- We recommend you keep records of your volunteers for at least seven years and that they be kept and maintained with the organisation's other records.

