

Protection of Volunteers in the Workplace

a pilot study of GREAT Community Transport (GCT) Inc
Blue Mountains and Penrith, NSW

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The views expressed in this Report are those of the contracted organisation (GREAT
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Oppenheimer and Adam Edwards, and are not the views of ADHC. This report and its
recommendations are presented to ADHC for consideration.

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Executive Summary

In April 2008 an accident occurred involving a GREAT Community Transport Inc (GCT) volunteer driver using his own car and the death of a client. The volunteer was charged with negligent driving causing death. In the aftermath of this 'critical incident', a number of issues arose concerning the role and responsibility of volunteers, the adequate protection of volunteers, the role and responsibilities of third parties and funding bodies, and how small community non-profit organisations in New South Wales such as GCT can best prepare themselves, and their volunteers, against such incidents in the future.

GCT is one of around 130 Community Transport providers in New South Wales. There are around 150,000 clients with around 2.5 million passenger trips per annum, 4,000 Community Transport drivers, with over 3,000 of these volunteer drivers across the State. Of these 3,000 drivers, around 2,000 regularly use their own private vehicles.

In 2009-2010, GCT provided transport for 2,229 individuals with 62,870 passenger/trips travelling over 601,292 kilometres. Most trips were to hospitals, doctors, shopping outings and centre based meals. GCT is managed by a volunteer committee, is incorporated as an association and is a registered charity. GCT currently has around 29 paid and casual staff and 126 volunteers. In many Australian workplaces today, including GCT, there is little if any difference between a paid worker and a volunteer. Despite this, paid workers are the focus of a comprehensive system of Federal and State industrial laws built up over many years, while volunteers are often overlooked.

Although GCT had all the best practice insurance cover and relevant policies and procedures in place, when criminal charges were laid against the volunteer driver, the incident fell outside the ambit of GCT's insurance cover. This meant that the organisation could not offer any financial assistance to the volunteer driver to help him defend the charge. GCT could not use any of its funding for lawyers; it could not offer the volunteer anything.

The report explores this significant problem and argues for urgent attention. It is a problem for governments, for the community sector in Australia whose non-profit organisations are involved in transport, for the thousands of volunteer drivers without whom the service could not be delivered, and ultimately for the clients, who, without community transport options, can remain isolated in their own homes and possibly have to re-locate to a care facility.

A number of recommendations are made in this report. They include:

- The development of a uniform handbook for distribution to all community transport driver volunteers with information on safe procedures to minimise accidents, outlining their exposure to civil liability and the lack of immunity from criminal charges (in line with any other driver).
- That a specific indemnity fund be established to enable small community organisations to offer financial relief to volunteers who find themselves defending a strictly limited list of criminal charges.
- That the accreditation rules be amended for the Public Passenger Vehicle Driver Authority so that volunteer transport drivers have the same requirements as paid transport drivers.
- That NSW legislation be amended to more clearly define who is and who is not a volunteer especially in terms of Centrelink Mutual Obligation clients or other ‘volunteers’ who receive remuneration in some form for their volunteer work [excluding petrol allowances].
- Recognition from government authorities that small community based organisations with whom they have funding arrangements may, at times, require legal assistance with civil and (strictly limited) criminal issues.
- Changes to insurance cover for community organisations to allow for contingency measures, for example, to provide legal costs for volunteers if involved in (strictly limited) criminal matters such as that with volunteer drivers.
- Changes to labour laws to recognise binding relations without a contract of employment, that is to recognise, legitimise and formalise volunteer workers.
- To ensure that the new Commonwealth national not-for-profit regulator formally assists small non-profit organisations with limited capacity to access legal help and to assist with the formal protection of volunteers in the workplace.

‘Whoever comes to the rescue, the law should see that he does not suffer for it’.¹

1. Introduction

1.1 About GREAT Community Transport (GCT)

GREAT Community Transport Inc (GCT), formed in July 2004, is a community based non-profit organisation that operates in the Blue Mountains and Penrith in western Sydney, New South Wales.² It forms part of the not-for-profit sector, once termed a ‘loose and baggy monster’, and according to the recent Productivity Commission’s report, comprises around 600,000 organisations across Australia.³

GCT is an amalgamation of two services, Mountains Community Transport, formed in November 1986, and Nepean Community Transport Inc in 1987. Funded by Home and Community Care (HACC), an initiative between Commonwealth and State governments established in 1986, GCT provides safe, accessible, reliable and appropriate transport assistance for people who are elderly, people who are disabled or who have special needs. Along with a range of other services, for example Meals on Wheels, Home Care and Neighbour Aid, the aim is to enable people and their carers to remain living independently in their own homes for as long as possible. Transport issues including lack of available public transport especially in regional and remote areas, isolation and financial limitations all impact on this vulnerable group in our community. GCT, therefore, offers a range of transport services in the Blue Mountains and Penrith area including assisting eligible clients with shopping, hospital and medical appointments, oncology transport, centre-based meals, as well as social and respite outings.

In 2010, transport resources for GCT included four mini-buses, seven wheelchair accessible vans, two twelve-seater vans, one five seater van ‘Barbs Buggy’ for oncology patients, and one sponsored Windsor Toyota Van. These transport options are supplemented by volunteers using their own comprehensively insured cars.⁴ In 2009-2010, GCT provided transport for

¹ Lord Denning, *Videan v British Transport Commission* [1963] 2 QB 650 at 669, quoted in Michael Eburn, *Emergency Law. Rights, liabilities and duties of emergency workers and volunteers*, 3rd edition, The Federation Press, Sydney, 2010, p. 270.

² There are a number of different ways to refer to these types of organisations. We have used ‘community non-profit’ organisation in this report but other forms are used interchangeably. For example, not-for-profit, third sector, voluntary, non-government, etc.

³ Productivity Commission, *Contribution of the Not-for-Profit Sector*, Australian Government, Canberra, January 2010, p. xxiii.

⁴ GCT Inc, *6th Annual General Report, 2009-2010*. ‘Barbs Buggy’ is named after a long time volunteer.

2,229 individuals with 62,870 passenger/trips travelling over 601,292 kilometres. Twenty-four per cent of all trips were to hospitals; 26 per cent were to doctors; 23 per cent were shopping outings; 16 per cent were to centre based meals; with 7 per cent on social outings or respite care.⁵ GCT travels as far west as Bathurst and to hospitals throughout the Sydney Metropolitan Area including Hornsby Hospital, Liverpool, Prince of Wales, Royal North Shore, St George, St Vincents as well as Westmead Hospital.

GCT is typical of many small community-based non-profit organisations around Australia, with a small number of paid staff, mostly casualised, and a large number of volunteers. Those involved with GCT know that their service would simply not be possible without the assistance of unpaid workers. GCT is managed by a volunteer committee, a Board of Management, chaired by Ann Murray, is incorporated as an association and is a registered charity. GCT currently has around 29 paid and casual staff and 126 volunteers. Full-time staff includes a manager, client assessor, and two service co-ordinators for the Penrith and Lawson offices. Casual drivers and carers make up the bulk of the other paid staff. In terms of volunteers, there are ten members of the Management Committee, over 50 drivers, 40 carers and around 30 volunteer office receptionists with some of these volunteers doubling up in positions, that is a volunteer may both be a driver and office receptionist.⁶

It must be noted here that there are also two types of ‘volunteers’ at GCT – those attached to Centrelink Mutual Obligation, a program along with Work for the Dole that has evolved since the mid-1990s, where clients have to complete 15 hours each week to receive benefit – and those who have retired from the paid workforce but want to give something back to the community. Both groups are labelled ‘volunteers’ by GCT but in fact the former are not volunteers if one uses the definition of volunteering from the Australian Bureau of Statistics (ABS). Volunteering is defined as ‘unpaid help, in the form of time, service or skills, through an organisation or group’ and is carried out willingly without coercion.⁷ While there is no intention to downplay the work of these ‘volunteers’, as they are volunteers from the perspective of GCT as they are unpaid workers and are counted as such, the distinction is an important one to make in terms of this pilot study and the reasons for this will be discussed in detail later in the report.

⁵ GCT Inc, *6th Annual Report, 2009-2010*. The previous year GCT assisted 2,956 individuals providing 56,344 passenger transports, with vehicles travelling 545,035 kilometres.

⁶ All data sourced from the GCT Inc, *6th Annual General Report, 2009-2010* and interview conducted with Helen Walker, Manager, GCT Inc, 2 December 2010, copy in possession of author.

⁷ ABS, *Voluntary Work, Australia 2006*, AGPS, Sydney, July.

There has been significant growth and consolidation in the services provided by GCT over 25 years, including moving to larger premises at Kingswood in November 2010. However, at the time of preparing this report, the proposed COAG Reforms including the restructure of the HACC program [where the Commonwealth government will take over full responsibility for aged care with the State government focusing on disabled youth] makes the future directions unclear for GCT and all community non-profit organisations involved in the sector. It is hoped that under the management of Helen Walker, OAM, a well-known and highly-respected individual within the sector, and its volunteer Board of Management, GCT, with a 'high profile and reputation for good service delivery', will find its 'niche and strength to continue on after these changes are implemented'.⁸

1.2 Background to pilot study

In 2010, GREAT Community Transport (GCT) received a non-recurrent grant from Ageing, Disability and Home Care (ADHC) and Transport NSW to undertake a research project focusing on the protection of volunteers in the workplace. Associate Professor Melanie Oppenheimer from the University of New England, an expert in volunteer research, agreed to complete the project from July-February 2011. Mr Adam Edwards, a law graduate from UNE, has assisted her with research and co-authored this report.⁹

The pilot study, requested by the Executive of GCT and Manager, Helen Walker, follows on from a tragic accident in April 2008 involving a GCT volunteer driver using his own car and the death of a client. In the aftermath of this 'critical incident', a number of issues arose concerning the role and responsibility of volunteers, the adequate protection of volunteers, the role and responsibilities of third parties and funding bodies, and how small community non-profit organisations in New South Wales such as GCT can best prepare themselves, and their volunteers, against such incidents in the future.

Despite the devastating nature of the incident and the serious implications, both for community-based organisations that rely on volunteers to carry out a particular service and volunteers themselves, it was felt that there was a lack of research, information and most importantly assistance for those involved. If volunteers are not adequately protected and duty of care not adhered to, and risk management strategies agree that volunteers should no longer

⁸ GCT Inc, *6th Annual Report, 2009-2010*.

⁹ See Appendix for brief author CVs.

be used in such positions, the effects on public policy and government programming within transport, aged care and disability services sector in New South Wales and beyond could be profound.

This pilot study therefore aims to do the following:

- Conduct a literature review on position of protection of volunteers, especially transport volunteers in the workplace;
- Determine the legal position of volunteers [especially transport volunteers] including risk assessment, OHS, WorkCover and duty of care as compared with paid staff undertaking the same work in community organisations;
- Assess the implications where criminal charges and/or civil charges involve a volunteer; and
- Suggest possible solutions.

1.3 Methodology

After the grant was secured, a volunteer research steering committee was established and a meeting was held with at TRI Community Exchange, Penrith, on 6 July 2010. Representatives from GCT, Community Transport Organisation (CTO), Ministry of Transport (MOT), ADHC and HACC met with Associate Professor Oppenheimer to discuss the issues of volunteer protection and the time frame of project.

Associate Professor Oppenheimer hired law graduate Mr Edwards in August 2010 to assist with research on the literature review and legal matters. Informal discussions were held with a number of individuals including the lawyer who represented the volunteer in a pro-bono capacity and the Manager of GCT. A UNE Human Research Ethics Committee application was completed and approved [HE10/183] on 1 November 2010. Interviews with members of GCT [both paid staff and volunteers] were held at GCT offices in Penrith on 2 December 2010. The interviewees signed consent forms and were recorded.

All data and research materials were collated, analysed and written up by Associate Professor Oppenheimer between December 2010 and February 2011. As Mr Edwards contributed valuable knowledge and expertise to the overall project, he has been named as a co-author of the pilot study.

1.4 Background Literature Review

One of the key issues identified by GREAT Community Transport (GCT) Manager, Helen Walker, was the lack of research and information on the issue of volunteer protection in the workplace. Secondly, her experience suggested that there was a lack of support for small community-based non-profit organisations like GCT when faced with an accident of this magnitude. This is an under-researched area in the volunteering literature with volunteer workers generally remaining in the shadow of their paid counterparts. I believe that volunteering remains a ‘blind spot’ in government policy and there is little real understanding of its connections with and underpinning of the non-profit sector.¹⁰ This is despite the acknowledgement that Australia has \$5.4 million adult volunteers with their labour contributing an estimated \$14.6 billion to the economy. Recent reports such as the Productivity Commission’s Report on the *Contribution of the Not-for-Profit Sector*, released in January 2010, devoted only ten of 441 pages to volunteers and volunteering, a surprising outcome considering the reliance of non-profit organisations, such as GCT, on its unpaid workforce.¹¹

1.4.1 Volunteers as ‘workers’

The idea that volunteers are ‘workers’ and should be considered as such is a relatively new one. The view that volunteers have rights and responsibilities similar to, and compatible with, paid workers has not often be considered or acknowledged as a relevant or important discussion point.¹² Although an integral part of our history, and despite being touted as a nation of volunteers, until very recently volunteers and volunteering generally were rarely discussed, and we have only recently begun to research and write about how and why Australians volunteer. Warburton and Oppenheimer’s 2000 book, *Volunteers and Volunteering*, was one of the first comprehensive studies published in Australia, and Oppenheimer’s 2008 study, *Volunteering. Why we can’t survive without it*, explored the

¹⁰ See Melanie Oppenheimer, ‘Submission to the Productivity Commission’s Not-for-Profit Sector Study’, 29 April 2009, http://www.pc.gov.au/data/assets/pdf_file/0007/88351/sub004.pdf. Accessed 10 February 2011. See also Vern Hughes, ‘Non-profits lose sight of volunteer heritage’, *Sydney Morning Herald*, 4 February 2011. <http://www.smh.com.au/opinion/society-and-culture/nonprofits-lose-sight-of-volunteer-heritage-20110203-1afbi.html>. Accessed 10 February 2011.

¹¹ Productivity Commission Research Report, *Contribution of the Not-for-Profit Sector*, Commonwealth of Australia, Melbourne, January 2010, pp. 250-260.

¹² Melanie Oppenheimer, ‘Rights and protection of volunteer workers. Some preliminary considerations’, *Australian Journal on Volunteering*, vol. 6, no. 2, 2001, pp. 139-144.

largely untold history of volunteering in Australia, especially from 1945.¹³ Mark Lyon's book, *Third Sector*, too was one of the first studies on Australian non-profit and co-operative enterprises, published in 2001.¹⁴ Finally, the Commonwealth government only began collecting regular data on volunteering in the 1990s with the first Australian Bureau of Statistics (ABS) report published in 1995. So, unlike paid workers, we have little long-term data on the role and impact of volunteers generally.

Two international events - the 2000 Sydney Olympics Games and the United Nations International Year of Volunteers in 2001 – had a significant impact on the shape and form of Australian volunteering. Led by South Australia, State governments began a series of new initiatives establishing offices within government departments and appointing Ministers for Volunteers. There was a corresponding and sustained interest from Australian academics and advocates. One area of research relevant to this report concerned the changing attitudes towards volunteers and the consideration of their rights and protection in the workplace. Researchers such as Lyons, McGregor-Lowndes, Cuskelly and Brosnan, Tapsell and Oppenheimer published papers highlighting issues such as occupational health and safety, civil liability, risk management, and employment relations.¹⁵

It could be argued, too, that one of the most highly visible volunteer roles in the community, that of emergency services, are also the most regulated and therefore, protected by labour laws. Legal academic, Michael Eburn, has been publishing in this field for some time.¹⁶ Here specific laws, primarily at the State level, have been enacted that apply to both paid staff and volunteers. For example the State Emergency Services (SES) and volunteer fire fighters are mentioned in the *Fire and Emergency Services Act 2005 (SA)* and the *Rural Fires Act 1997 (NSW)*. The 'danger' volunteers are the only volunteers covered by workers compensation legislation under the *Workers Compensation (Bush Fire, Emergency and Rescue Services) Act 1987* and updated in 2000.¹⁷ Despite this, the legal situation for emergency service

¹³ Jeni Warburton and Melanie Oppenheimer (eds.), *Volunteers and Volunteering*, The Federation Press, Sydney, 2000; Melanie Oppenheimer, *Volunteering. Why we can't survive without it*, UNSW Press, Sydney, 2008.

¹⁴ Mark Lyons, *Third Sector. The Contribution of nonprofit and cooperative enterprises in Australia*, Allen and Unwin, Sydney, 2001.

¹⁵ Community Council of Advice, *Draft National Agenda on Volunteering: Beyond the International Year of Volunteers*, unpublished draft paper, October 2001; Graham Cuskelly and Peter Brosnan, 'Volunteers and employment relations issues in the not for profit sector', *Australian Journal on Volunteering*, vol. 6, no. 2, 2001, pp. 99-107; M. McGregor-Lowndes, S. Marsden and C. Vincent, 'Volunteering in the New Tax System', *Australian Journal on Volunteering*, vol. 6, no. 1, 2001, pp. 21-29; Kieran Tapsell, 'Immunity of Volunteers from liability', *Law Society Journal*, December 2005, pp. 70-73.

¹⁶ See, for example, his book *Emergency Law*.

¹⁷ See Oppenheimer, *Volunteering*, pp. 191-193; Michael Eburn, *Emergency Law*.

organisations, like other non-profit community groups that are reliant on volunteers, becomes increasingly complex. As Dunlop suggests, ‘changes in both the law and in community expectations have increased the legal responsibilities, liabilities and the legal scrutiny’ of emergency service organisations in particular and not-for-profit organisations more generally.¹⁸ While the responsibilities of the organisations have increased, the status of their volunteers has not necessarily changed.

But there are ongoing problems around the delineation between paid and unpaid workers, where different State government approaches ensure no uniformity of volunteer protection, and especially the vexing question of who, exactly, constitutes a ‘volunteer’. In 2006, Jill Murray’s article, ‘The Legal Regulation of Volunteer Work’ appeared in a labour law publication, acknowledging that labour law academics had, to date, shown little interest in research on ‘the role law plays in the formation and management’ of volunteer labour.¹⁹ Murray argued that there was little regulation of volunteer work in laws established to regulate the general workforce, with the 1996 Commonwealth *Workplace Relations Act* not applicable to volunteers unless employed under contract. Within labour law, it is the centrality of the contract, and with it payment (which is not present with volunteering) that means that volunteers are unlikely to be given protection under labour law because the contract of employment involves a ‘mutuality of obligation, that is exchange of labour for wages.’²⁰ Murray argues that the absence of a wage should not be the determining factor as to whether there is a contract of employment and that the British method that recognises the intention of binding relations without a contract of employment should be considered in Australia.²¹

In many Australian workplaces today, including GCT, there is little if any difference between a paid worker and a volunteer. Despite this, paid workers are the focus of a comprehensive system of Federal and State industrial laws built up over many years, while volunteers are often overlooked. By continuing not to recognise and represent volunteer work because there is no remuneration for work performed, the Australian industrial relations system remains an archaic reminder of a century past and not representative of the twenty-first century workplace.

¹⁸ Catherine Dunlop, ‘Legal issues in Emergency Management: Lessons from the last decade’, *The Australian Journal of Emergency Management*, vol. 19, no. 1, March 2004, pp. 26-33.

¹⁹ Jill Murray, ‘The Legal Regulation of Volunteer Work’, in Christopher Arup (eds.), *Labour Law and Labour Market Regulation*, The Federation Press, Sydney, 2006, pp. 696-713.

²⁰ Murray, ‘The Legal Regulation of Volunteer Work’, p. 704.

²¹ Murray, ‘The Legal Regulation of Volunteer Work’, p. 713.

1.4.2 Pressures on small non-profit community organisations

In 2011, the complexity of the delineation between paid and unpaid workers, the different State legislative approaches, the changing taxation landscape with the addition of GST payments, and the requirement of volunteer-based organisations to provide public risk policies, personal accident insurance, professional indemnity insurance, directors' and officers' liability for its volunteers places enormous pressures on both voluntary organisations and volunteers.

The collapse of insurance companies such as HIH, in 2001, increased insurance premiums and the expansion of liability to include volunteers caused significant problems for the non-profit sector, including the question of the protection of volunteers in the workplace. Developments in the law of negligence and the resulting implications for the non-profit sector, for both the organisation and the volunteer, and the findings of the Ipp Committee that reviewed the laws of negligence, resulted in the creation of a raft of legislation across Australian jurisdictions. There was a real fear within the community sector that emergency volunteers or 'Good Samaritans' especially would be exposed to civil liability. In that context, it is notable that the Ipp Committee did not recommend the introduction of 'Good Samaritan' legislation due largely to the lack of evidence that it was required.²²

Discussion of the impact of negligence laws on the sector and especially volunteers was led by volunteer emergency law expert, Michael Eburn, who argued that rather than having a 'principled development of the law' we now had a hotch potch of 'ad hoc reforms to liability, with different rules for different classes of people'.²³ The lack of clarity in this area certainly remains for volunteers and their organisations despite work completed by McGregor-Lowndes, Eburn, and others since 2002.²⁴ Discussion of the civil liability legislation as it affects volunteers will occur later in the report.

²² David Ipp *et. al.*, 'Review of the Law of Negligence, Final Report', Commonwealth of Australia, Canberra, 2002.

²³ Michael Eburn, 'Protecting volunteers?', *The Australian Journal of Emergency Management*, vol. 18, no. 4, November 2003, p. 11.

²⁴ See, for example, Myles McGregor-Lowndes, 'Australian volunteer protection provisions', *Australian Journal on Volunteering*, vol. 8, no. 2, 2003, pp. 42-53; Myles McGregor-Lowndes, 'Volunteer Protection in Queensland', *Queensland Lawyer*, vol. 24, 2003, pp. 81-94; Myles McGregor-Lowndes and Scott Edwards, 'Volunteer Immunity and local government', *LGLJ*, vol. 10, 2004, pp. 53-72; Michael Eburn, 'Liability of volunteers and good Samaritans: making it safe to volunteer or restricting claims for damage?', *Australian Civil Liability*, July 2010, pp. 14-18.

In April 2010, Volunteering Australia released a paper ‘Issues Related to Insurance Protection for Volunteers’.²⁵ While providing a brief, but useful, overview of the current status of volunteer protection including workplace legislation, there was no mention at all of criminal liability, a key issue for consideration in this study.

1.4.3 Access to quality legal advice for non-profit community organisations

One of the emerging issues within the community sector in recent years, which directly impacted on the GREAT Community Transport (GCT) experience, is access to quality legal advice and the legal challenges faced by voluntary organisations and their volunteers. In 2007, the Centre for Volunteering in NSW released a report, funded by the Law and Justice Foundation, which examined the issue of accessibility of legal information, resources and support for volunteer organisations.²⁶ It found that there was no single comprehensive guide to assist volunteer organisations with specific legal issues in New South Wales. The lack of precedent case law testing the issues was also pointed out as a key problem. While the lack of case law may suggest this is no problem, the lack of clarity with certain issues, with volunteering problems seen as ‘too hard’, was common. The report also noted that the larger non-profits had their own legal teams and could access legal advice internally, whereas the smaller community based organisations such as GCT relied on *pro-bono* legal services and paid legal services.²⁷

The *Report on the National Law Firm Pro Bono Survey 2010* revealed that Australian law firms are receiving more requests from the non-profit sector than they can handle. This, it argues, reflects the increasing complexity and changing landscape of the non-profit sector generally especially in terms of taxation matters.²⁸ In Victoria, this unmet demand for legal assistance was noted and PilchConnect was established in November 2008 to provide low cost legal help to not-for-profit community organisations in that State.²⁹ This site was initially funded with the assistance of the Victorian Law Foundation and now receives funding from the Victorian State government’s Office of the Community Sector, the Legal Services Board

²⁵ Volunteering Australia, ‘Issues Related to Insurance Protection for Volunteers’, Issues Paper April 2010, pp 1-11.

²⁶ Centre for Volunteering, ‘“It’s a bit of a minefield”’. Findings from the Legal Issues and Resources Survey of NSW Volunteering Organisations’, The Centre for Volunteering, 2007.

²⁷ ‘It’s a bit of a Minefield’, p. 18.

²⁸ Report on the National Law Firm Pro Bono Survey 2010, www.nationalprobono.org.au. Accessed 5 February 2011.

²⁹ See www.pilchconnect.org.au. Accessed 5 February 2011. Pilch NSW was originally started in 1991 and a year later in Melbourne the Public Interest Pro Bono Clearing House (Pilch) was established by the Fitzroy Legal Service and the Consumer Law Centre of Victoria.

and the William Buckland Foundation. Unfortunately although it is a current and active site, the sections on ‘Incidents or accidents’ and ‘criminal conduct’ - areas of critical interest for GCT and this pilot study - have been under construction since 3 July 2009.

Pilch NSW also has a website, mentions ‘Justice for Not-For-Profit Organisations’ and assists such organisations, and may provide pro bono work if its services are in the public interest and if the organisation has limited resources.³⁰ The Manager of GCT did contact PILCH in regards to general legal advice for organisations and their Duty of Care to their Volunteers in July 2008 but did not receive specific assistance.³¹ One of the key issues for GCT in dealing with the critical incident in 2008 was the perception of a lack of available, accessible and affordable legal advice for small community organisations and their volunteers.

David Bradbury, local Federal MP for Lindsay, spoke in the House of Representatives on 16 October 2008 about the increasing complexity of legal obligations and requirements concerning small community organisations and volunteers. He specifically raised the ‘dreadful accident’ incurred by one of GCT’s volunteers and the fact that the volunteer driver had been charged with a criminal offence – negligent driving causing death. Because of the criminal charge, the liability was of a type that could not be insured against.³² The volunteer had to ‘manage his own legal liability and exposure through the court system’, that is incurring considerable personal cost and expenses defending the case that occurred while the volunteer was working for GCT. The issue of duty of care and the exposure of volunteers where the community organisation is funded by a third party – in this instance both the Federal and NSW State governments - requires close examination by all involved.

1.4.4 Community transport volunteers

As this pilot study is the result of an accident involving a GREAT Community Transport (GCT) transport volunteer driver, it is important to focus on transport volunteers specifically for there are a number of issues to consider. GCT is one of approximately 130 Community Transport providers in New South Wales, which is one of the strongest supporters of Community Transport across all Australian States and Territories. Community Transport is described by the recent Productivity Commission’s report on Aged Care as a ‘low intensity’

³⁰ <http://www.pilchnsw.org.au>

³¹ See GREAT Community Transport, ‘Volunteer Incident April 2008, what do we say to our volunteers?’, unpublished document, GCT.

³² Any civil liability that may arise from the incident is entirely separate, as discussed below.

or low-level community type service.³³ From a budget perspective, community transport is a small program, with around \$36 million per annum in New South Wales, plus \$3 million for transport disadvantaged. There are around 150,000 clients in the State with around 2.5 million passenger trips per annum.³⁴ According to the Community Transport Organisation (CTO), the peak body representing the sector, there are around 4,000 Community Transport drivers across New South Wales, with over 3,000 of these volunteer drivers. Of these 3,000 drivers, around 2,000 regularly use their own private vehicles.³⁵ Put quite simply, community transport in this State would not exist without the extensive use of volunteer drivers.

Community Transport remains 'outside' any specific legislative framework, which, according to Professor Corinne Mulley remains a problematic part of the policy debates and limits the growth and development of Community Transport. Community Transport should be included within legislation if operating passenger transport services.³⁶ This would provide Community Transport with increased recognition as transport operators and increase their role in offering a broader range of transport options within their communities especially in rural and remote areas of the State.³⁷

In March 2009, the National Council of Social Service (NCOSS) and CTO published a report on the accreditation of community transport in New South Wales that focussed on the impact of Community Transport being included in the *Passenger Transport Act 1990* (NSW).³⁸ In New South Wales today, all drivers working for payment need a Public Passenger Vehicle Driver Authority, which is issued by Transport NSW under the above Act. One issue contained in the report was the question of Driver Authorities for volunteer drivers within

³³ Productivity Commission, *Caring for Older Australians*, Draft Report, January 2011, p. 17.

³⁴ Community Transport Organisation State Conference, Albury, October 2010.
http://sydney.edu.au/business/_data/assets/pdf_file/0019/82342/CTO.pdf. Accessed 21 January 2011.

³⁵ Community Transport Submission to the Senate Inquiry into Commonwealth and State Investment in Public Transport Services and Infrastructure, 28 April 2009,
<http://www.cto.org.au/images/newpdfs/090501%20Community%20Transport%20Senate%20Submission.pdf>
 Accessed 30 November 2010.

³⁶ Corinne Mulley and Rhonda Daniels, Institute of Transport and Logistics Studies, University of Sydney, 'Overcoming Barriers to implementing flexible transport services in NSW', Paper presented to NCOSS Transport Policy Advice Group, 24 November 2010.
http://sydney.edu.au/business/_data/assets/pdf_file/0008/86048/NCOSS.pdf. Accessed 20 January 2011.

³⁷ Corinne Mulley, 'The future of community transport – directions for change in NSW'. Community Transport Organisation NSW State Conference, Albury, 18-20 October 2010. With the changes to HACC and the general shift in funding and general Commonwealth government policies underway through 2011, it remains to be seen how funding models will change and affect Community Transport in New South Wales and therefore GCT. http://sydney.edu.au/business/_data/assets/pdf_file/0019/82342/CTO.pdf. Accessed 21 January 2011.

³⁸ NCOSS and CTO, *Accreditation of Community Transport. A Report on the impacts of Community Transport being included within the Passenger Transport Act NSW*, March 2009, pp. 1-47.

community transport that involved completing a first aid course, and passing a criminal record and health check.

There is no maximum age limit to the Driver Authority, although cl 29(1) (d) of the Passenger Transport Regulation 2007 (NSW) requires that the driver be 'medically fit' for the job. The medical requirement for these 'commercial' drivers is more stringent overall than for private vehicle drivers. Age itself is not considered a 'medical condition' in this context, but other relevant conditions are likely to manifest themselves with advancing age. In New South Wales, private vehicle drivers (that is standard license holders) must undergo an annual medical assessment from age 80 and an annual driving test from age 85 (age 80 for light rigid vehicles and motorcycles). However, all holders of a Public Passenger Vehicle Driver Authority must undergo medical assessment every three years, regardless of age. Annual medical assessments for these drivers commence at age 60 and annual road tests commence at age 80.

The NCOSS report wanted to ascertain the costs involved in mandating that volunteer drivers acquire a Driver Authority and the impact on volunteers. Most importantly, the study wanted to know whether volunteers would turn away from community transport if there were more regulation and compulsion forced upon them. The survey results from 105 community transport organisations revealed that, in early 2009, there were 2,688 volunteers currently driving within the community transport network, driving buses, service owned cars and their own personal cars. Only 200 or 7.4 per cent of the volunteers held Driver Authorities with many more having completed a medical, criminal record check or first aid training. While many organisations already subsidised their volunteers for these checks and offered training, almost 65 per cent of community organisations believed that mandated Driver Authorities on all volunteers would dilute the volunteer base because of the time consuming paperwork involved and the compulsion for medical checks and first aid training.³⁹

In conclusion, the report found that if the Community Transport industry was to be regulated into the *NSW Passenger Transport Act 1990*, all Community Transport Services and Drivers would need to be included in the Act, and currently volunteers are not included in the Act. The option of all drivers holding a Driver Authority was rejected as too costly to implement and the possible impact on volunteers was perceived as 'high risk'. A third option, to be

³⁹ NCOSS and CTO, *Accreditation of Community Transport*, p. 25.

implemented over three years, of requiring the drivers of service owned vehicles only (both bus and car) to be issued a Driver Authority, was the preferred option in terms of budget cost and affordability and the fact that it covered 80 per cent of all drivers, both paid and volunteers. After a three-year period, the issues of accrediting all drivers could be considered again.⁴⁰

This recommendation is interesting because in the case of GCT and the accident, it was a volunteer driver in his own car who was involved, a category of driver not considered for Driver Authorities in NCOSS and CTO's report due to cost and the perception of volunteer resistance. Nevertheless requiring volunteer drivers, irrespective of what type of vehicle they drive, to hold a Public Passenger Vehicle Driver Authority would help maintain higher standards of fitness for the tasks undertaken. In terms of risk management and duty of care by the community organisation and the funding bodies towards the volunteer, this seems like a good option. Balanced against this, of course, is the added cost – a Bus Authority is \$70.00 per renewal (every 3 years) and a hire car is \$45.00. These extra requirements may be perceived as an unnecessary burden for volunteer drivers, and it may provide a disincentive to volunteer, although the Ministry of Transport may consider funding the fees for volunteer drivers.⁴¹ Finally it must be noted that South Australia has recently regulated to exclude volunteer drivers from their equivalent accreditation process.⁴²

1.4.5 Volunteers and criminal charges

One of the key issues in this case study is that although GREAT Community Transport (GCT) had all the best practice appropriate insurance cover and relevant policies and procedures in place, and the community organisation was responsible for implementing 'Critical Incident' procedures such as counselling immediately after the accident occurred, the whole situation fundamentally changed once the incident became a criminal matter. When criminal charges were laid against the volunteer driver, the incident fell outside the ambit of GCT's insurance cover. This meant that the organisation could not offer any financial assistance to the volunteer driver to help him defend the charge. It followed that the volunteer was responsible for paying his own legal costs and arranging his own legal defence with lawyers and barristers. 'At least a paid staff member can get workers compensation if off work due to stress' and continue to be paid but it is a different scenario with volunteer drivers. The

⁴⁰ NCOSS and CTO, *Accreditation of Community Transport*, pp. 26-27.

⁴¹ NCOSS and CTO, *Accreditation of Community Transport*, pp. 26-27.

⁴² *Passenger Transport Regulations 2009* (SA) r 7(4)(b).

Manager of GCT, Helen Walker, ‘rang around Australia and no-one could advise’ her, she said. Helen discovered that GCT could not use any of its funding for lawyers; she could not offer the volunteer anything.⁴³

As the Manager of GCT, Helen felt morally responsible to assist the volunteer driver and she believed GCT had a ‘duty of care’ to do so. With the support of the Board of Management, debriefing with a professional counselling service was organised for all staff and volunteers. Relevant funding bodies, WorkCover and GCT’s insurer were advised and updated regularly and extra meetings were convened. Peak bodies representing the sector including NCOSS, Volunteering Australia, CTO and others were contacted for information and advice. State and Federal politicians, Senators, and local councillors were informed, as well as transport community groups, many of whom were unsure what was required for their volunteers in regards to insurance, training and procedural matters. Everyone was very sympathetic, but the overall opinion was that there was nothing anyone could do to assist GCT. The organisation and their volunteer were on their own. GCT eventually managed to arrange pro-bono lawyers and barristers who took charge of the case on behalf of the volunteer.⁴⁴

There is very little information or even a mention of this delicate topic of ‘volunteers and criminal charges’ in the literature. In 2009, NCOSS put out an Insurance Information Sheet ‘Insurance and Driving as part of Volunteering’ that includes a short section on the issue and suggests that it is a ‘subject that deserves further investigation’. It does suggest, however, that it may be possible for an organisation that uses volunteer drivers, such as GCT, to establish a policy that can offer financial assistance to its volunteer drivers if a criminal charge is laid and later found not guilty. They also recommend that the fund be limited to, for example, \$5,000 and for driving offences only.⁴⁵ This is similar to a suggestion made by Helen Walker – put aside a small amount each year for legal contingencies and make it a line in the budget. But funding bodies would not allow GCT to do it. Under the funding contracts, GCT could not use government funding to assist a volunteer in a criminal matter. Similarly with legal aid,

⁴³ Interview with Helen Walker, Manager of GCT, 2 December 2010, copy in possession of author.

⁴⁴ Interviews with Ann Murray, Chair of Board of Management, GCT and Helen Walker, Manager, GCT, 2 December 2010, copy in possession of author.

⁴⁵ NCOSS, ‘Insurance and Driving as part of Volunteering’, Insurance Information Sheet, June 2009. <http://www.ncoss.org.au/projects/insurance/downloads/VolunteerPublicLiability.pdf>. Accessed 5 February 2011.

they could provide advice but not represent, because according to Chairperson, Ann Murray, ‘it does not fit their criteria’.⁴⁶

2. Legal Discussion

2.1 Legal position of volunteers undertaking same work as paid employees

This pilot study seeks to determine the legal position of volunteers as compared to paid employees undertaking the same work in community organisations, and arises from a particular accident that resulted in the death of a client of a community transport organisation. The volunteer driver faced a criminal charge (negligent driving occasioning death) and was convicted.⁴⁷ This caused considerable distress for the volunteer driver and a reluctance to ever participate in such volunteering again. There is concern that this type of incident may discourage other volunteers in future. The overall conclusions from the legal research indicate that, for criminal matters, there is little if any difference in the status of volunteers as compared to their employed counterparts.

For the separate area of civil liability, however, the volunteers may be in a better position than employees due to the protection afforded them in certain circumstances by part 9 of the *Civil Liability Act 2002* (NSW). Also, under current Occupational Health and Safety (OHS) legislation, both employers⁴⁸ and employees assume a responsibility for workplace safety⁴⁹ (and may be prosecuted), whereas volunteers do not. This means that volunteers will not themselves be liable to OHS prosecutions, although the controlling organisation (that is GREAT Community Transport) will be. This has not been tested in court, and may never be if proposed OHS legislative reforms, currently under review by parliament, are enacted.

Any reluctance to participate on the part of volunteers may stem, at least in part, from a misunderstanding of the legal issues involved. While the accident in question was devastating for the volunteer concerned, the research suggests that such liability is not a major issue for volunteers in general. Similarly, civil and OHS liability may sound intimidating, but does not

⁴⁶ Interview with Ann Murray, Chairperson, GCT, 2 December 2010, copy in possession of author.

⁴⁷ The charge was, presumably, brought under *the Road Transport (Safety and Traffic Management) Act 1999* (NSW) s 42(1)(a).

⁴⁸ *Occupational Health and Safety Act 2000* (NSW) s 8.

⁴⁹ *Occupational Health and Safety Act 2000* (NSW) s 20.

in fact appear to be a particular burden for volunteers. An explanation of each of these topics in turn will hopefully dispel some of the fears.

2.1.1 Criminal Liability

The principal problem in the example raised by the case study is that the volunteer was charged with a criminal offence. From a strictly legalistic perspective, no real distinction is made between serious crimes of intent (like assault or murder) and those ‘less-serious’ crimes such as driving offences. Few Australians realise, too, that driving infringements are actually criminal offences. Whether there should be such a distinction is more a sociological question than a legal one, however it is noted that negligent driving occasioning death is defined as a ‘major offence’ in the legislation.⁵⁰ This no doubt reflects the seriousness of the outcome for the victim, regardless of the intent of the driver. With all these issues, this discussion should be closely noted by community transport organisations that use volunteer drivers extensively.

I : Immunity from Criminal Liability

Given the generally serious nature of criminal offences, immunity from prosecution is rarely found in the legislation. One distinct example, however, is the status of some emergency services workers when acting in certain circumstances. While this legislation would not affect volunteer drivers, the example illustrates the strict limits on such immunity. For instance, in South Australia, no ‘civil or criminal liability will attach to a member of an emergency services organisation ... for an honest act or omission’ whilst exercising powers or duties under the *Fire and Emergency Services Act 2005* (SA).⁵¹ Such clear criminal immunity appears to be unique to South Australia. In New South Wales, for example, the legislation is less definite in that it offers immunity from ‘any action, liability, claim or demand’.⁵² The term ‘action’ is defined elsewhere to include ‘any proceeding in a court’,⁵³ and therefore a criminal matter might be thought to be covered by the immunity.

While these ‘immunities’ may seem clear on their face, the courts have always interpreted them narrowly. Neither of the above provisions has been tested directly, but similarly worded provisions in other statutes have been judicially considered. For example the *Fire Brigades*

⁵⁰ *Road Transport (General) Act 2005* (NSW) ss 3 (definition of ‘major offence’ para (a)), 188(1) (definition of ‘convicted person’ para (c)(ii)).

⁵¹ *Fire and Emergency Services Act 2005* (SA) s 127.

⁵² *Rural Fires Act 1997* (NSW) s 128.

⁵³ *Limitation Act (1969)* (NSW) s 11(1) (definition of ‘action’).

Act 1989 (NSW) s 78 provided that an act done by the Fire Commissioner (or a fire-fighter) does not, ‘if the matter or thing was done in good faith for the purposes of executing this or any other Act, subject such a person personally, or the Crown, to any action, liability, claim or demand’. However, this was held to ‘not provide a general immunity from criminal liability’.⁵⁴ In that case, the Commissioner was not immune from prosecution under OHS legislation for deaths and injury at a fire.

The South Australian example appears to show that legislatures are prepared to clearly grant criminal immunity in certain circumstances. This provision does not appear to have been directly tested by the courts either, but case law indicates that there would be limits to the immunity provided. There are, for example, numerous instances of police and emergency services drivers (both volunteers and paid) being prosecuted for serious driving offences.⁵⁵ The reason for this is that the activity of driving is not a ‘power or duty’ under the act which might confer the immunity. The sort of crimes that may be covered, for example, could include damage to property, if done in good faith and for the bona fide purpose of preventing the spread of a bushfire.⁵⁶

The point here is that while some legislatures have been prepared to provide immunity from criminal prosecution, the scope must be very limited. In light of the very limited immunity afforded police and emergency workers, it is difficult to envisage parliament granting a general criminal immunity for day-to-day volunteer activities. Any specific immunity is only ever likely to be granted in response to a specific issue that is pervasive enough to require legislative action. From the legal research undertaken for this pilot case study, no such issue appears to exist although we now have the documented incident of GCT to consider as evidence. There may well be other similar types of incidents that have not been reported.

From a practical perspective, the community transport volunteer is equally exposed to criminal prosecution as if, say, they had been transporting a friend to a medical appointment when an accident occurs. The increased risk is a temporal one – the volunteer will be

⁵⁴ *Inspector Mayo-Ramsay (WorkCover Authority of NSW) v The Crown in the Right of the State of New South Wales (NSW Fire Brigades)* [2006] NSWIRComm 356 (10 November 2006), Boland J in obiter at [51].

⁵⁵ See, for example, *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105), *Hughes v Police* [2009] SASC 57 (4 March 2009) and also <http://www.theage.com.au/national/suspended-sentence-for-black-saturday-firefighter-who-killed-teen-in-smash-20091023-hcdn.html>.

⁵⁶ See, for example, *Fox v Coates* [2010] NTSC 46 (30 September 2010), [42] where an immunity was upheld, albeit with strictly limited scope, for ‘assaulting’ a mentally ill patient for the purpose of restraining him for treatment.

spending more time in their car because of their community activity than they otherwise might. But when the HACC target group of clients for the community transport service is taken into account that is frail aged and people with disabilities and their particular needs, the risk for volunteer drivers is increased and this must be considered. The question remains whether criminal liability is a significant issue for volunteer community organisations such as GCT.

II : Is there a real problem?

One of the difficulties in determining the frequency of cases of this nature is that they rarely appear in legal reports. Most cases are only reported when they are appealed to higher courts, and this usually only happens when a question of law must be answered. The GCT volunteer's case would not show up in any court reports, and nor would any similar matters because there is no novel question of law to be answered. To quantify the problem, it may be necessary to survey community organisations to determine whether their volunteers have faced a similar issue, or whether people are reluctant to volunteer for fear of such a problem arising. It is suggested that the incidence is low and that most potential volunteers never turn their mind to the possibility that they will be any more or less exposed to criminal liability as a result of their volunteering. Volunteer drivers for specific community transport organisations, such as GCT however, may be more at risk because of the nature of their volunteering. That is, those volunteers who drive either their own cars or vehicles owned by the community organisations may be more at risk simply by the fact that they are spending most of their time on the roads.

Whether there is other protection (for example union or 'employer' support) is entirely a matter of policy for the organisation concerned. Some unions representing public transport drivers, for example, do maintain 'indemnity funds' for their members. Members can pay a small annual subscription in return for the fund undertaking to pay traffic fines incurred by the drivers while on duty (subject to conditions and limits).⁵⁷ Clearly, union support is dependant on membership and there is no union for community transport volunteers.⁵⁸ However, nothing (apart from funding restraints) is to prevent community organisations from offering assistance or from arranging legal aid for volunteers if required.

⁵⁷ See, for example, the 'Bus & Tram Division Traffic Fund' of the NSW branch of the Rail, Tram and Bus Union at <http://www.rtbu-nsw.asn.au/about/topics/2171.html>. Accessed 13 December 2010.

⁵⁸ Unions and associations do exist for some of the emergency volunteer bodies – see, for example, the NSW Rural Fire Service Association and the NSW SES Volunteers Association.

However, in this case, although legal aid was consulted they could only ‘provide advice but not represent’ the volunteer.⁵⁹ The background information for the case study indicates that no insurance was available to fund the defence of the criminal charge – this is to be expected of public liability type policies. However, it must be noted that CGT require their volunteer drivers to carry comprehensive motor vehicle insurance and that legal defence of traffic charges is often provided as a component of both comprehensive and third-party-property motor vehicle insurance policies.⁶⁰ This undertaking to defend is to be distinguished from the subrogation of the rights of the insured to the insurer. Subrogation occurs when the insurer is exposed to civil liability because of the actions of the insured, and so ‘takes on’ the case in order to protect the interest of the insurance company. This civil liability is wholly distinct from criminal liability, and it is this topic which will now be addressed.

2.1.2 Civil Liability

The issue that was not directly raised by the case study, but which has generally been the central concern of many community and volunteer organisations is that of civil liability, and negligence in particular. This is perhaps because of the perceived scope for significant financial burdens in the event of an adverse finding. A secondary point is that most volunteers probably do not see themselves as potential criminals, but can possibly imagine how inadvertent negligence could lead to injury and therefore expensive litigation. The poor reputation of negligence law most likely stems from the so-called ‘insurance crisis’ that arose around the turn of the twenty-first century and mentioned earlier in this report. Payouts for personal injury cases were seen as unsustainably high, and were leading to difficulties for some organisations wishing to obtain affordable liability insurance.⁶¹ While the literature suggests that the likelihood of litigation (particularly against volunteers) is actually very low, all Australian jurisdictions now have legislation aimed at protecting volunteers from civil liability, including negligence.⁶²

⁵⁹ Interview with Ann Murray, Chairperson, GCT, 2 December 2010, copy in possession of author.

⁶⁰ See, for example, <http://www.nrma.com.au/documents/policy-booklets/motor-policy-nsw.pdf> p. 21.

⁶¹ David Ipp *et al*, *Review of the Law of Negligence Final Report*, September 2002, p. 26.

⁶² See, for example, Ipp *et al*, *Review of the Law of Negligence Final Report*, p. 170; Michael Eburn, ‘Liability of Volunteers and Good Samaritans: Making it Safe to Volunteer or Restricting Claims for Damage?’ *Australian Civil Liability*, vol 14, July 2010, p. 16; but cf Kieran Tapsell, ‘Immunity of Volunteers from Liability’, *Law Society Journal*, vol. 70, December 2005, p. 70.

Immunity from Civil Liability

To use New South Wales as the example, part 9 of the *Civil Liability Act 2002* (NSW) was drafted to ensure that volunteers do ‘not incur any personal civil liability in respect of any act or omission done or made by the volunteer in good faith when doing community work ... organised by a community organisation, or ... as an office holder of a community organisation’.⁶³ This would include negligence and all forms of civil wrong (such as trespass to land and private nuisance), with the exception of defamation.⁶⁴

Three important provisos must be noted here. The first is that the protection from liability is excluded if the volunteer was ‘engaged in conduct that constitutes a [criminal] offence’.⁶⁵ It is not necessary for any conviction to have been recorded to activate this exclusion, simply that the relevant conduct be proven to the civil standard (that is, on the balance of probabilities).

The second proviso is that the immunity only applies when the volunteer is acting within the scope of the activities authorised by the organisation and is following relevant instructions.⁶⁶ For example, if volunteer drivers had been instructed to never reverse into a client’s driveway, then the immunity would not apply to a volunteer who injures a client whilst doing so.⁶⁷ The third proviso is that the ‘community organisation’ must be a body corporate (for example, an incorporated association), a church or religious organisation or an authority of the state (for example, a local council).⁶⁸

It is interesting to note, however, that New South Wales is unique in also protecting the community organisation (or any body that utilises volunteers) from vicarious liability for the actions of its volunteers. In contrast, other jurisdictions have made a point of enacting ‘respondeat superior’ provisions.⁶⁹ These provisions explicitly transfer to the community organisation the liability that would otherwise have been incurred by the volunteer. This enables the injured plaintiff to recover for their losses from a body that is, presumably, in a better position to pay by virtue of holding appropriate insurance cover.

⁶³ *Civil Liability Act 2002* (NSW) s 61.

⁶⁴ *Ibid* s 59(1).

⁶⁵ *Ibid* s 62.

⁶⁶ *Ibid* s 64.

⁶⁷ There may be other issues raised by the use of motor vehicles, as discussed below.

⁶⁸ *Ibid* s 60(1).g

⁶⁹ See, for example, *Volunteers and Food and Other Donors (Protection from Liability) Act 2002* (WA) s 7.

Insurance

Of course, when analysing the problem, it is always helpful to stand in the shoes of the theoretical injured party. The nature of injury compensation in New South Wales means that a person with debilitating and possibly permanent injuries effectively must find somebody to sue in order to pay for their costs.⁷⁰ These costs may include medical fees, rehabilitation, ongoing care, modifications to dwellings and the loss of present and future income, to name the most common. In practice, this usually means finding a defendant with the deepest pockets – generally someone who has insured against such losses. If the present case had involved a civil liability claim unconnected with driving, then GCT’s insurer would bear the loss unless the volunteer was self-insured. For example, most home contents insurance policies include cover for death or injury caused to another person by the insured householder. The accident concerned need not occur on the insured premises, but rather the cover extends to anywhere in the country.⁷¹

If insurance against a particular civil liability is required to be held for or by the volunteer under a New South Wales State Act, then the *Civil Liability Act* immunity will not apply in respect of that liability.⁷² There does not seem to be any legislated requirement for organisations like GCT to carry insurance,⁷³ however government contracts cannot be won without it, and appropriate insurance is considered best practice for all community-based organisations. Third party personal injury insurance is of course compulsory for all motor vehicles.⁷⁴ Further, there is no immunity in the *Civil Liability Act* for the negligent volunteer for motor vehicle accidents, presumably because of the availability of the third party insurance cover to compensate the plaintiff.⁷⁵ Had any civil liability arisen from the case study incident, then any compensation payable would have simply been covered by the no-fault third-party personal insurer for the vehicle.

⁷⁰ This ignores the possibility of self-insured plaintiffs carrying, for example, personal injury or income protection insurance.

⁷¹ See, for example, http://www.suncorp.com.au/sites/default/files/suncorp/personal/home_contents_insurance/pdf/pds_home_insurance.pdf clause 17b (page 39). Such policies, however, usually exclude motor vehicle accidents and criminal activities.

⁷² *Civil Liability Act 2002* (NSW) s 65.

⁷³ DADHC administer the *Disability Services Act 1993* (NSW), the *Home Care Service Act 1988* (NSW) and the *Youth and Community Services Act 1973* (NSW); none of these acts nor their regulations require funded organisations to carry any particular insurance – however, see the discussion below.

⁷⁴ *Motor Vehicles (Third Party Insurance) Act 1942* (NSW) s 7.

⁷⁵ *Civil Liability Act 2002* (NSW) s 66.

For most civil actions not involving a motor vehicle, the community organisation is, in practice, the most likely target of litigation. The organisation would be vicariously liable for their volunteer (except, perhaps, in New South Wales), and the organisation will be insured against such loss. Injured parties will not want to sue volunteers because, firstly, they *are* just a volunteer and secondly, because they are unlikely to be able to afford to pay any compensation awarded.

Unexpected Side Effects of the Immunity?

The immunity provided for volunteers is reassuring for them, but leaves the question of whether the public might be reluctant to deal with volunteers because they fear they will have no hope of recovery if they were to be injured through negligence. This fear may be compounded in New South Wales because the volunteer organisation may also be beyond reach.⁷⁶ It seems unlikely that many people will turn their mind to this possibility, but it is a question that cannot be meaningfully answered without further empirical research.

Employees and Civil Liability

Of course, employees of GCT and similar bodies do not enjoy the protection of part 9 of the *Civil Liability Act 2002* (NSW), and are therefore exposed to the ordinary laws of negligence. Broadly stated, the organisation owes a duty of care to clients and others not to place them at risk of personal injury during the conduct of their activities. GCT is vicariously liable for the actions of the paid employees acting within the scope of their employment, and carries liability insurance to cover this risk. In many ways, the exercise of reasonable care in this regard will mirror that required under OHS legislation.

2.1.3 Occupational Health and Safety

In New South Wales, the *Occupational Health and Safety Act 2000* (NSW) imposes a general duty on employers to provide a safe place of work for both employees and ‘others at [the] workplace’.⁷⁷ The ‘place of work’ is not limited to the employer’s premises, and encompasses any place where the work is carried out. This would include the home of a client of an employer such as GCT. A breach of this general duty would leave a corporation liable to prosecution with a penalty of up to \$550 000 for a first offence.

⁷⁶ In practical terms, however, it may well be possible to sue a NSW-based organisation in negligence rather than being concerned about their vicarious liability for the actions of the volunteer.

⁷⁷ *Occupational Health and Safety Act 2000* (NSW) s 8.

The duty is expressed very simply – essentially, the employer ‘must ensure that ... the premises are safe’.⁷⁸ This imposes an extremely broad duty. With the benefit of hindsight, any activity, procedure or thing in the workplace that has caused an injury or death could be classed as having been unsafe. Until recently, prosecutions under this section succeeded in imposing this broad, unspecified duty on employers. A very recent High Court decision, however, means that any prosecution must now specifically link an accident to a particular act or omission of the employer.⁷⁹ A court (or, rather, the New South Wales Industrial Relations Commission) can no longer infer that the workplace was unsafe simply because an accident has occurred. This decision may go some way to alleviating the (anecdotally reported) fear of prosecution felt by many employers.

A duty is also imposed on all employees to take ‘reasonable care’ for others at the place of work and to cooperate with the employer in safety matters.⁸⁰ The ‘others’ in this case would include volunteers and clients. If convicted for not taking reasonable care under this section, an employee may be liable to pay a penalty of up to \$3 300 for a first offence. As the OHS legislation currently stands in New South Wales, a volunteer doing the same work as a paid employee would not be liable to prosecution. An employee is clearly defined in the Act,⁸¹ and has been held not to include a volunteer.⁸² A second research project to examine the role of community based organisations and their responsibilities in relation to transport volunteers more broadly within New South Wales and specifically the Sydney North Metropolitan area has just received funding and will commence in mid-2011.⁸³

Aside from noting this distinct difference between employees and volunteers, further analysis of OHS law may be largely redundant at this stage. A proposed *Model Work Health and Safety Bill* has been published by Safe Work Australia pursuant to the Intergovernmental Agreement for Regulatory and Operational Reform in OHS, as signed by the Council of Australia Governments (CoAG) in 2008. The draft bill makes many changes, but a simple and significant one is to amend the definition of ‘employee’ to one of ‘worker’ which specifically

⁷⁸ *Occupational Health and Safety Act 2000* (NSW) s 8(1).

⁷⁹ *Kirk v Industrial Relations Commission* [2010] HCA 1.

⁸⁰ *Occupational Health and Safety Act 2000* (NSW) s 20.

⁸¹ *Occupational Health and Safety Act 2000* (NSW) s 4 (definition of ‘employee’).

⁸² *WorkCover Authority of New South v Kuipers* [2004] NSWIRComm 393, [16] (obiter).

⁸³ This research project will focus on GREAT Community Transport and other Local and Community Transport organisations in the ADHC Region and Local Planning Area of the North Metropolitan although it will be of great value to all Community Transport organisations across New South Wales.

includes ‘a volunteer’.⁸⁴ If implemented as proposed on 1 January 2012, this bill would remove a significant difference between employees and volunteers in organisations such as GCT.

Such an amendment may be seen to place an additional burden on volunteers, however it may also simplify induction and training procedures for the non-profit community organisation. Nonetheless, the proposed OHS changes may present a greater challenge to volunteers in the future than the prospect of criminal or civil liability has presented in the past.

2.2 Mutual Obligation ‘volunteers’

As mentioned earlier in the report, there are two types of volunteers working for GREAT Community Transport (GCT) – people who are volunteering of their own free will and are receiving no remuneration for their labour, and volunteers who are clients of Centrelink and placed at GCT to work 15 hours per week in return for social security benefits. The criminal implications for these ‘Centrelink volunteers’ are no different to employees or ‘real’ volunteers. Whether they are protected from civil liability will depend on whether they are classed as true volunteers under the *Civil Liability Act 2001* (NSW). Section 60(2)(a) of the CLA excludes from protection any ‘volunteers’ doing work under the order of the court (that is Community Service Orders). But the position of Mutual Obligation ‘volunteers’ is less clear because the Act simply defines a volunteer as ‘a person who does community work on a voluntary basis’. By way of comparison, in South Australian legislation, a volunteer is defined as one who ‘receives no remuneration for the work’ and excludes work done under a court order or bond conditions.

Centrelink does not take any responsibility for the fate of its Mutual Obligation clients, presumably because they have little or no control over the work they undertake in a wide variety of workplaces. Organisations that wish to take on unemployed ‘volunteers’ must register with Centrelink and provide evidence of holding appropriate public liability and personal accident insurance. There is evidence that some community organisations are having difficulty in obtaining insurance cover for Centrelink ‘volunteers’ because of their ambiguous status.⁸⁵ Secondly, in terms of OHS legislation, Centrelink Mutual Obligation clients would almost certainly not be classed as employees, rather they would be classed the same as

⁸⁴ *Model Work Health and Safety Bill* s 7.

⁸⁵ [Http://www.ncoss.org.au/bookshelf/mutual_obligation/articles/0122_mutual.html](http://www.ncoss.org.au/bookshelf/mutual_obligation/articles/0122_mutual.html)

ordinary volunteers. In terms of criminal liability, the outcome at GCT would have been no different if the volunteer transport driver had been one of the Centrelink Mutual Obligation clients. For any civil liability matters, the question may remain as to what role, if any, the Commonwealth government has in offering a 'duty of care' towards these clients, apart from mandating that they be covered by GCT's insurance at the organisation's cost.

3. Responses of Great Community Transport

3.1 Aftermath

It is almost three years since the accident and in that time GREAT Community Transport (GCT) has gone through a series of assessments and action plans including the implementation of a Strategic Plan for an OHS Management System. All their policies, operating procedures, risk assessment including orientation and mentoring, providing additional supervision and support and additional procedural matters such as duty of care involving volunteers have been reassessed, refined and actioned.

The focus on volunteer needs and protection in the workplace at GCT is clearly evident. For example, a volunteer support worker was appointed to assist with volunteer recruitment, co-ordination, and training, and the volunteers now have their own uniform to wear. Revised job descriptions for specific volunteer positions include the volunteer medical car drivers driving their own cars; the volunteer medical car drivers driving GCT service vehicles; the office volunteer; the volunteer carer; and the volunteer bus carer. There is also a general volunteer car driver agreement, which is valid for a 12-month period and includes references to duties, reimbursements [out of pocket expenses including a per kilometre petrol rate and lunch allowance], insurance, code of behaviour, support and training, and grievance procedures. As part of the implementation of the new OHS Management System, a consultation session with volunteers was undertaken in March 2010 through an Impact Training and Assessment Consultancy.⁸⁶ Training in first aid, OHS and driver skills ('low risk thinking & driving' and 'assisting techniques' were two recent training sessions for volunteers in late 2010 for example) are undertaken annually and although not compulsory for volunteers, notice is now given to volunteers that unless they comply with these training requests, they may be 'let

⁸⁶ Volunteer Consultation report prepared for Great Community Transport by Impact Training & Assessment Consultancy, April 2010.

go'.⁸⁷ There has been more training since the accident and more emphasis on driving skills for both paid and unpaid transport drivers.⁸⁸

Although GCT has no difficulty in recruiting volunteers, with an increasing number coming from Centrelink, there is a constant turnover. Volunteers from Centrelink generally stay an average of six months and then some leave when they secure paid work elsewhere. These volunteers have to fill in time sheets for their 15 hours per week 'volunteering'.⁸⁹ Often these volunteers return to GCT, 'the vollies we have here are invaluable, they really, really are ... we have people that have to be here but now they are here because they really want to be here', stated one salaried GCT driver/carer.⁹⁰ The situation is certainly not black and white.

4. Summary of Findings

4.1 What if this happened to you?

On 18 April 2008, an experienced long term GCT volunteer driver in his own comprehensively insured car went to pick up a client to drive her to a medical appointment. It was a normal pick up, as volunteers with their own cars generally do the 'one on one' jobs. This was not one of his regular runs and the volunteer had not been to the address [a villa complex] before, so the driver was unsure of the exact location. He parked the car, got out, saw the client waiting and then walked over to her. He saw her walking frame, told her to wait for him and he would reverse the car up the drive to collect her. GCT states that all clients are told to wait in their houses until picked up but older people 'never like to keep you waiting' and this particular client was used to being picked up by GCT from the front of her house so she started to walk down the drive. Meanwhile the volunteer driver, thinking that the client was waiting where he originally saw her and instructed her, began reversing the car up the driveway.

This report has outlined in some detail what happened next including the impact of the accident on the volunteer driver and the community organisation he worked for, GREAT Community Transport (GCT). We must also not lose sight of the devastation and impact on the family of the victim. But if any good is to come of this story, it has to be in the recognition

⁸⁷ Great Community Transport, Volunteer Newsletter, Spring 2010.

⁸⁸ Interview with salaried driver/carer, 2 December 2010, copy in possession of author.

⁸⁹ Interview with office co-ordinator, 2 December 2010, copy in possession of author.

⁹⁰ Interview with salaried driver/carer, 2 December 2010, copy in possession of author.

that a significant problem has been identified and needs urgent attention. It is a problem for governments, for the community sector in Australia whose non-profit organisations are involved in transport, for the thousands of volunteer drivers without whom the service could not be delivered, and ultimately for the clients, who, without community transport options, can remain isolated in their own homes and possibly have to re-locate to a care facility.

The reasons why people volunteer is a complex one and it is outside the confines of this report to detail the range of motivational studies that have been carried out. But generally people volunteer because they want to help others, to make a difference, to assist those in need – and certainly the need is there in our Australian communities to do almost any type of volunteering. As I have written elsewhere, ‘there is almost no area of human activity in which volunteers are not involved’.⁹¹ A transport volunteer with GCT for eight years described himself as a ‘Good Samaritan more than a volunteer’.⁹²

This view of volunteering as helping strangers is comparable with transport volunteer drivers who offer assistance to people that they do not know, and reflects Lord Denning’s famous 1963 quotation at the beginning of this report, ‘Whoever comes to the rescue, the law should see he does not suffer for it’.⁹³ Yet clearly, in regards to this case of the GCT volunteer transport driver, the law most certainly did not assist and the volunteer suffered greatly for his unpaid charitable labour.

There is also the consideration of ‘discretion’ in the charging of the volunteer by police in this instance. The police believed they had to charge the volunteer irrespective of the circumstances, but the lawyer who acted in a pro-bono capacity for the volunteer believes that discretion could have been exercised differently, as in ‘criminal cases there is always a discretion as who gets charged with what’.⁹⁴ And with discretion comes a ‘public interest’ consideration as well. Was it in the best interests of the public to prosecute the volunteer in this case? These points raise some interesting issues of education and consideration by a range of authorities when exercising their discretion in specific volunteer cases.

Another question that has been asked in this report is what is the role of government in all of this – here they are funding the service that GCT undertakes on its behalf, with the extensive

⁹¹ Oppenheimer, *Volunteering*, p. 5.

⁹² Interview with Bob Whalen, volunteer driver, 2 December 2010, copy in possession of author.

⁹³ Quoted in Eburn, *Emergency Law*, p. 270.

⁹⁴ Email from pro-bono lawyer, Sydney, 4 March 2011.

use of volunteers, but they offers no support or liability if things go wrong. The structure of community transport appears complex at first, but is actually quite straightforward.

Government has taken care to ensure that they will not be held liable for civil wrongs, although it is not guaranteed that they have succeeded. The Home and Community Care (HACC) program is federally funded, and administered by the various State governments. In New South Wales, the program is currently administered by the Department of Ageing, Disability and Home Care, (ADHC).

An important point to note is that most (if not all) of these arrangements are neither legislated nor regulated. That is, they are not the direct result of parliamentary action, but rather part of the general operation of the relevant departments. This means that, often, there may be limited access to the relevant documentation. It also means no clear demarcation as to where civil liability may begin or end. Legally, it will end when someone is found to have owed a duty of care to an injured party. In practice, this will (hopefully) also be the person or body that carries appropriate insurance against such injury. In the case study, had there been any civil liability, this would have fallen upon the third party insurer of the motor vehicle.

As an example of the funding and organisational arrangements, the community transport portion of HACC is contracted out to various community organisations (like GCT) through a tender process or invitation of submissions. The contracts are administered either by ADHC or the Ministry of Transport (known as MoT or Transport NSW). The pro-forma contracts are publicly available and require that non-government community organisations be incorporated and (crucially) carry insurance for public liability, directors' and officers' liability and professional indemnity (GCT carries all these insurances). Who pays for that insurance cover would be a matter for negotiation between ADHC and the community organisation as to whether it is paid by the community or from grant funding.

During the 'critical incident', the issue that caused the 'biggest shock' for GCT Manager, Helen Walker, was the performance of the funding bodies. Rather than offer support, assistance and advice, 'they stepped back and simply became another group I had to account to ... you keep us up to date and tell us what's happening. Not one iota of support' recounted Helen. The only advice she did receive was that using volunteers should be risk assessed by the service as the responsibility of the organisation, that is GCT.⁹⁵ The problems were

⁹⁵ Interview with Helen Walker, Manager, GCT, 2 December 2010, copy in possession of author.

especially critical in regards to accessing legal advice and legal representation. Despite the resources of government departments, nothing was forthcoming. One could ask where is the moral obligation of the government bodies who, effectively, require that volunteers do their work? Over the past ten years, governments have increasingly relied on small non-profit organisations and volunteers to do their work (the Mutual Obligation scheme is a good example), which produces considerable savings and creates a good sense of community engagement, social cohesion and builds social capital. That is until something goes wrong, then the volunteers and their community organisations are on their own.

General legal opinion, including that presented in this report, believes ultimately that there is little to worry about because there are few legal precedents and seemingly few issues of this kind arising. The GCT critical incident was a one-off and is unlikely to happen again. But the accident did happen, the volunteer was charged with a criminal offence and was dragged through the courts resulting in a good behaviour bond, the community organisation had no legal resources, the funding bodies did not assist. Although no studies have been undertaken, anecdotal evidence suggests that accidents of this type have occurred before in other community based organisations that use volunteer drivers but these incidents have been swept ‘under the carpet’ for fear of damaging an organisation’s reputation or threatening to lose their funding, or simply the terror of not knowing what to do. A research study focussing on this would be useful in this context.

GCT, however, wanted answers and changes to the system so that no small community based volunteer non-profit organisation in Australia has to endure this experience again. But most of all, we need to bring this issue out into the open, to educate volunteers about their (often limited) liabilities, and to find appropriate ways to protect our volunteers in the workplace where necessary. It is important that volunteers are not placed in such an untenable situation again, either through ignorance of their own obligations or through a lack of resources to pursue any rights that they may have. We also need to educate the community of the limitations of current volunteer protection. Otherwise, we decide it is simply too risky to use transport volunteers, and that would simply be a disservice at all.

The current Federal Labor government recently announced its intentions to implement key regulatory reforms for Australia’s non-profit sector. The centrepiece of this reform includes the establishment of a new, national ‘one-stop-shop’ regulator, and consultations are currently

under way to decide the possible design options for such a body.⁹⁶ This initiative is supported by the establishment of an Office for the Non-Profit Sector within the Department of Prime Minister and Cabinet and the convening of a Non-Profit Sector Reform Council. These are all welcome and long overdue initiatives. There are real possibilities that we are on the cusp of real change in Australia. Let's make sure that volunteers and volunteering are placed at the centre of these reforms. For without volunteers, there would be no non-profit sector to regulate.

5. Recommendations

- That a uniform handbook be developed for distribution to all community transport driver volunteers. This would primarily document safe procedures to minimise accidents, but also outline both the (fairly limited) exposure to civil liability and the lack of immunity from criminal charges (in line with any other driver). A centrally produced document would partially relieve the burden of many small organisations each developing their own handbook and/or safety policies.
- That a specific fund or indemnity fund be established to enable small community organisations to offer financial relief to volunteers who find themselves defending a strictly limited list of criminal charges. This can either take the form of indemnity fund or be factored into funding agreements.
- That the accreditation rules be amended for the Public Passenger Vehicle Driver Authority so that volunteer transport drivers have the same requirements as paid transport drivers. This will not affect criminal or civil liability, but may help to minimise risk.
- That NSW legislation be amended to more clearly define who is and who is not a volunteer especially in terms of Centrelink Mutual Obligation clients or other 'volunteers' who receive remuneration in some form for their volunteer work [excluding petrol allowances]. This could be extended to ensure that relevant civil liability insurance extends to cover (defined) volunteers.
- Recognition from government authorities that small community based organisations with whom they have funding arrangements may, at times, require legal assistance

⁹⁶ Attorney-General's Department, 'Scoping study for a national not-for-profit regulator', Consultation Paper, Commonwealth of Australia, January 2011
http://www.treasury.gov.au/documents/1934/PDF/Scoping_Study_Report_Consultation_Paper.pdf. Accessed 1 February 2011.

with civil and (strictly limited) criminal issues. This could be used to cover transport volunteers in the first instance.

- Changes to insurance cover for community organisations to allow for contingency measures, for example, provide legal costs for volunteers if involved in (strictly limited) criminal matters such as that with volunteer drivers – to bridge the gap and for ‘duty of care’.
- Changes to labour laws to recognise binding relations without a contract of employment, that is to recognise, legitimise and formalise volunteer workers.
- To ensure that the new Commonwealth national not-for-profit regulator plays a part in formally assisting small non-profit organisations with limited resources and limited capacity to access legal help and to assist with the formal protection of volunteers in the workplace.

6. Appendix

6.1 About the Authors

Melanie Oppenheimer

Melanie was awarded her PhD from Macquarie University in 1997 with a thesis that examined the role of volunteers during World War Two in Australia. After 13 years at the University of Western Sydney, she is now based within the School of Humanities at the University of New England. Melanie is one of the leading researchers on volunteering in Australia and has an international reputation as a leading scholar in the field. Her most recent book, co-edited with esteemed British academic Nicholas Deakin, *Beveridge and Voluntary Action in Britain and the wider British World* (Manchester University Press, 2011) will be launched at the London School of Economics in April by Justin Davis-Smith, CEO of Volunteering England. Her other publications include *Volunteers and Volunteering* (The Federation Press, 2000) (with Jeni Warburton) *All Work. No Pay. Australian Civilian Volunteers in War* (Ohio Productions, 2002), that was short listed for the NSW Premier’s History Awards in 2003; and the well-received *Volunteering: Why we can’t survive without it* (UNSW Press, 2008). She talks regularly on ABC radio and was responsible for the series *Vita Activa*, heard on Radio National’s *Life Matters* program from 2007-9. In 2009/2010, she

was appointed by Senator Ursula Stephens to the Federal government's Volunteer Advisory Group.

Adam Edwards

Adam graduated in 2009 with First Class Honours in law at the University of New England and is currently lecturing at the university. His legal research background is primarily focussed on tort law, with an emphasis on the practical implications of both legislation and common law. His work has been used by industry bodies and is recognised as contributing to the understanding of tort law issues by both legal and non-legal audiences.

