Publica

Strengthening family and community in a post-Christian society

Submission to Productivity Commission: Philanthropy Inquiry Draft Report

About Publica

Publica (www.publica.org.au) is a not-for-profit public policy organisation concerned with strengthening family and community relationships throughout Australia. It has connections with church leaders across Australia.

One way of strengthening communities and building connections between the generations is through the involvement of volunteers. In this context, particularly, Publica has a particular interest in regulation that impacts upon volunteers.

The Board of Publica is chaired by Rev. Dr Michael Jensen, and its Executive Director is Dr Patrick Parkinson AM, Emeritus Professor of Law at the University of Queensland.

About this submission

We welcome a great many aspects of this draft report. In particular, the recommendations that expand the scope of DGR status will assist local churches that are active in social welfare, as a great many are, to assist more people.

This submission is limited to issues concerning volunteers, and in particular, the importance of local, state and federal governments looking at the regulatory burdens that inhibit organisations from using volunteers, and that may discourage people from volunteering. This follows on our earlier submission in which we urged the Commission to incentivise the use of volunteers.

We must be cautious about regulations or policies that discourage people from volunteering. If we impose upon people unnecessary burdens or subject them inappropriately to serious legal risks as a result of volunteering, we will make it harder to find volunteers, whether in the school canteen, helping out with coaching children and young people's sports, visiting people in aged care, serving on the boards of not-for-profit organisations or in a myriad other ways. This will be greatly to the detriment of the community.

We offer four examples of the problem of over-regulation.

1. Over-regulation in terms of child protection training

There has been a huge amount of work done on prevention of child sexual abuse in the last twenty-five years. The Royal Commission on Institutional Responses to Child Sexual Abuse has further extended this preventative work. A great many of its recommendations have been taken up by State and Territory governments.

Some measures, such as working with children checks, place a minimal burden on volunteers, while having substantial benefits in terms of prevention. However, there has been a tendency for organisations to place undue burdens on volunteers that go far beyond this, without paying enough attention to the costs.[1]

One example of such a burden is child protection training. There are two issues concerning this that ought to be addressed. The first is who should be required to undergo the training, and the second is how credit can be given for training already undertaken.

(a) Who should be required to undergo child protection training?

Typically, the problem of overburdening arises because very occasional volunteers, or those with only incidental contact with children, are treated in the same way as regular volunteers or paid staff who have a substantial involvement in the care of children.

Of course, people who work with children, whether in paid roles or as volunteers, should undergo some training in child protection. This has now been widely accepted. Schools require this of their staff. Churches require it of those in children's and youth ministry.

A rational approach to the requirement for child protection training would be that the greater the level of engagement with children, the greater should be the demands in terms of training. There is a considerable difference between the work of a classroom teacher in a school, who has the care of children for up to seven hours each weekday during termtime, and the level of contact with any individual child that a parent has when he or she helps out in the school canteen for a couple of hours on Fridays.

However, in some jurisdictions, such sensible differentiation has been abandoned in favour of a one-size-fits-all approach that places considerable burdens on volunteers who offer a limited amount of time to a school or other organisation that works with children.

Victoria provides an example of this problem. The Royal Commission into Institutional Responses to Child Sexual Abuse recommended ten principles to promote the safety and wellbeing of children by organisations. These are known as the National Principles for Child Safe Organisations. They were developed in the context of responding to the issue of child sexual abuse, and were intended to be understood as principles to be applied flexibly, recognising that organisations vary enormously in their size, their workforce (which could be entirely voluntary)

[1] This discussion is derived from a paper given by Prof. Parkinson at the Association of Independent Schools (NSW) conference in September 2023, entitled "Ecologically Sustainable Child Protection."

and the degree of risk of harm in each organisational context. One of those principles concerns child protection training.

In some jurisdictions, the National Principles have been given legislative force. As legislated by governments, they are typically concerned with all forms of child abuse and neglect. An example of sensible regulation, reflecting the Royal Commission's recommendations, is the Child Safe Scheme in NSW. As the Office of the Children's Guardian explains the approach:

> The Standards are principle-based and focused on outcomes, not prescriptive compliance. This means organisations will have the flexibility to implement them in ways that are meaningful, achievable and related to their size, resources and workforce. With the right focus and effort, the Standards will support the development of strong organisational cultures that keep children safe.
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> Implementing the Standards should not be a burden but a way to embed child safety in the attitudes, behaviours and practices of organisations and the people who work for them.

This is backed up by legislation to enforce compliance with the Standards, but the Office of the Children's Guardian has made it clear that in exercising its statutory responsibilities, it will take a responsive, risk-based approach, focusing on regulating areas where there is greatest potential harm to children and young people.

By way of contrast, Victoria seems to have chosen the route of very heavy-handed regulation. Changes were made to the law by the *Child Wellbeing and Safety (Child Safe Standards Compliance and Enforcement) Amendment Act 2021*. New Child Safe Standards were introduced from mid-2022. There are minimum standards, breach of which could lead to fines being imposed.

Standard 8 is as follows: "Staff and volunteers are equipped with the knowledge, skills and awareness to keep children and young people safe through ongoing education and training." To comply with Child Safe Standard 8 an organisation must, at a minimum, ensure:

> 8.1 Staff and volunteers are trained and supported to effectively implement the organisation's Child Safety and Wellbeing Policy.
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> 8.2 Staff and volunteers receive training and information to recognise indicators of child harm including harm caused by other children and young people.
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> 8.3 Staff and volunteers receive training and information to respond effectively to issues of child safety and wellbeing and support colleagues who disclose harm.
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> 8.4 Staff and volunteers receive training and information on how to build culturally safe environments for children and young people.

In Victoria, the legal obligation to train volunteers who may only be involved for an hour a week in a situation that presents little or no opportunity to be alone with children, is the same as for full-time paid staff. Furthermore, there is no minimum period of engagement to be considered a volunteer. So a very occasional volunteer needs to be trained to the same level as a full-time staff member. Child safety training is mandatory not only on induction but also at regular

intervals. That ought to be expected of the paid staff; but the volunteer parents who serve for an hour or two a week in the school canteen or in the uniform shop? There really is only so much that a school canteen volunteer can be expected to know, and only so much time that can be demanded of them without deterring them from volunteering in the first place.

The Victorian legislation is so broad that the Commission for Children and Young People even defines a volunteer as including people who have no contact with children at all:

> Volunteer means any person engaged by or a part of an organisation who provides a service without receiving a financial benefit, regardless of whether their role relates to children.

The training requirements also go far beyond the prevention of child abuse. Volunteers must also be trained in relation to "cultural safety", a concept of uncertain meaning beyond broad generalities about respect for cultural differences.

(b) Credit for child protection training

A further issue concerns volunteers who serve in more than one organisation, as many active Christians, for example, do. They may have a role in their local church, and be involved as well with a community organisation. Some people are on several boards of not-for-profit organisations, all of which might require board members to undergo the same child protection training as the paid staff. People in paid work with children might also have a volunteer role in another organisation, and so find they have to do further duplicative child protection training.

The problem of volunteers being required to do multiple overlapping training courses is probably not one for the Productivity Commission to solve; but it might be helpful to draw attention to it and to encourage organisations to develop policies around giving credit for suitable training taken elsewhere.

It ought to be possible to streamline these requirements by accepting the training of one reputable organisation as sufficient to satisfy the similar requirements of another.

2. Placing excessive demands on volunteer-run organisations

Another problem is burdening volunteer organisations with such onerous compliance obligations that they have to close. The regulatory and insurance burdens may simply be too high.

Victoria's *Child Wellbeing and Safety (Child Safe Standards Compliance and Enforcement) Amendment Act 2021* has already been introduced above. Apart from the child protection training requirements, it imposes a myriad of other obligations on any organisation, however small, that has any involvement with children.

The Commission for Children and Young People's guidance document runs to 175 pages (compared with 50 pages for the OCG guidance in NSW). Many of the requirements advance policies that may well be beneficial, but have little to do with child protection.

For example, the legally enforceable minimum requirements include that racism within the organisation is identified, confronted and not tolerated. All of the organisation's policies, procedures, systems and processes must together create a "culturally safe and inclusive environment" for Aboriginal children and young people. Children and young people must be informed about all of their rights, including (but therefore not limited to) safety, information and participation. The importance of friendships must be recognised, and support from peers is encouraged, "to help children and young people feel safe and be less isolated". Organisations must "provide opportunities for children and young people to participate and be responsive to their contributions, thereby strengthening confidence and engagement". Families and communities must be able to have a say in the development and review of the organisation's policies and practices.

Children and young people must have access to information, support and complaints processes in ways that are culturally safe, accessible and easy to understand. That might be a challenge to do properly in areas where there are thirty or more different cultural groups of significant size, and where a great many of the children speak another language at home. The organisation must pay particular attention to the needs of children and young people with disability, children and young people from culturally and linguistically diverse backgrounds, those who are unable to live at home, lesbian, gay, bisexual, transgender and intersex children and young people, and Aboriginal children and young people. Other detailed requirements apply to complaints processes, and a range of other matters. The list of obligations is very long and in places, quite aspirational, notwithstanding that these are said to be "minimum" requirements.

The mandated measures must be adopted by every organisation that falls within the legislative descriptions, however small and whether or not they have any paid staff. So for example, a local amateur dramatic society that involves children or young people in its productions, whether as stage performers or in backstage roles, or even just selling tickets at their school or in their neighbourhood, must comply with the same panoply of requirements as schools with the vast organisational resources that, for example, Victoria's Department of Education has. All religious organisations are included, even if the only activity that they have specifically for children is a mothers and toddlers playgroup. These obligations may apply even to sole practitioners if they engage any contractors, employees or volunteers (of any age) as part of providing their services or facilities.

If voluntary organisations are overburdened with compliance requirements, the long-term outcome is likely to be that fewer such organisations will exist, and that existing organisations will find it very difficult to find leaders who are willing to take responsibility for compliance. The long-term harm of this could be considerable. Vulnerable children experiencing stress and difficulty at home can benefit enormously from involvement in religious groups and community organisations such as sports. It takes a village to raise a child, as the saying goes, so best not to make it too hard for the village to provide that support.

3. Offence provisions applicable to volunteers

As the Commission says in the draft report (p.6), "volunteering at an aged care home…may contribute to social norms, networks and trust that facilitate co-operation within or between groups and promote co-operative behaviour". Volunteers can do much to reduce the loneliness and social isolation that many people in aged care experience. Some residents would otherwise have no-one at all to visit them. Volunteers can also provide entertainment such as performing as part of a choir or helping run a games afternoon.

What the vast majority of volunteers may not know is that if they offer their time in this way, they are exposed to very considerable legal risk. The federal *Aged Care and Other Legislation Amendment (Royal Commission Response) Act 2022* introduced very heavy fines for aged care staff who breach the statutory code of conduct. The provision is as follows:

> (1) An aged care worker of a registered provider must comply with the provisions of the Aged Care Code of Conduct that apply to the worker.
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> 2) An aged care worker of a registered provider contravenes this subsection if the worker fails to comply with the provisions of the Aged Care Code of Conduct that apply to the worker.

There is a penalty for breach which is 250 penalty units. Each penalty unit is $313 so the maximum fine is $78,250. This is more than the majority of people earn after tax in a whole year.

The definition of aged care staff includes volunteers. Section 7 of the *Aged Care Quality and Safety Commission Act 2018*, as amended, provides that an aged care worker includes a volunteer "who provides care or other services to the care recipients provided with aged care through an aged care service of the provider". At least in the 2022 Act a volunteer must be involved in some way in the care of elderly people, for the purposes of prosecuting a breach of the code of conduct; but in an exposure draft of the Aged Care Reform Bill, currently out for consultation, the risk of heavy fines applies to volunteers of any kind, whether or not involved in direct care, and however limited their time commitment to the organisation. It is enough that the volunteer is "engaged by" the registered aged care provider or an associated provider – for example another organisation that supplies the volunteers (*Aged Care Reform Bill 2023* s.10(4)).

Furthermore, as an offence provision, the section is very poorly conceived. It is axiomatic that before someone is subjected to punishment, it must be clear what behaviour the law forbids, or put differently, what exactly it is that the law requires. The court also must be able to know when the law has been broken in order to determine whether an offence has been committed.

The nature of a code of conduct is that it sets standards. There is conduct that clearly meets the standard, and conduct that clearly does not; but in between those two poles is a great range of conduct that falls short of excellence but is somewhere above appalling.

The current code of conduct exemplifies this:

> When providing care, supports and services to people, I must:

(a) act with respect for people's rights to freedom of expression, self-determination and decision-making in accordance with applicable laws and conventions; and

(b) act in a way that treats people with dignity and respect, and values their diversity; and

(c) act with respect for the privacy of people; and

(d) provide care, supports and services in a safe and competent manner, with care and skill; and

(e) act with integrity, honesty and transparency; and

(f) promptly take steps to raise and act on concerns about matters that may impact the quality and safety of care, supports and services; and

(g) provide care, supports and services free from:

(i) all forms of violence, discrimination, exploitation, neglect and abuse; and

(ii) sexual misconduct; and

(h) take all reasonable steps to prevent and respond to:

(i) all forms of violence, discrimination, exploitation, neglect and abuse; and

(ii) sexual misconduct.

Some of these represent clear "do nots", for example (g) and (h); but others set a standard of behaviour and it cannot really be determined where the line falls between legality and illegality. When, for example, can it be said that an aged care worker has not acted with sufficient "respect for people's rights to freedom of expression, self-determination and decision-making"? It is also not clear how serious the breach must be before a prosecution will be launched. Is a once-off failure enough, or must the failure be repeated?

The Explanatory Memorandum to the 2022 Bill says that the reason why volunteers were included was to ensure that "the Code will apply to a broad range of workers, including volunteers and employees of contractors of approved providers where they provide care or other services to care recipients." It is one thing to require that volunteers be made aware of the code of conduct – that is a reasonable and proportionate regulatory strategy. It is another thing entirely to make them liable for the same huge fines as full-time aged care workers for perceived breaches of the code of conduct. The legislation will diminish the lives of people in aged care if it deters volunteers from engaging with the sector, for example by visiting the lonely in residential care facilities.

4. The risk of imprisonment for volunteer board members

The federal *Aged Care Reform Bill 2023* (exposure draft) places volunteer members of not-for-profit organisations at a particularly high level of legal risk. Section 119 imposes the same liability for failing to comply with the code of conduct as has already been discussed in relation to volunteers generally.

Section 121 imposes various due diligence requirements on responsible persons, including board members. They must ensure that registered providers "do not cause adverse effects to the health and safety of individuals to whom the provider is delivering funded aged care services." There

are numerous offences that follow from any failure to exercise that due diligence. For the most part, these are strict liability offences, subject to a defence of having acted reasonably. These offences refer to "conduct", but that word is defined in s.7 as including omissions to act.

It follows from this that a failure of service that exposes an individual resident to a risk of death or serious injury or illness could result in all board members receiving a maximum fine of nearly $47,000 as well as the registered provider being fined (s.120(4); s.121(4)). If the failure results in death, serious injury or illness of an individual, then each board member could be fined up to $156,500, as well as the registered provider being fined (s.120(6); s.121(6)). Both of these are strict liability offences, subject to a defence of reasonable excuse.

Section 121(7) is identical to s.121(6) except that it is defined as a fault liability offence. That is, the prosecution must prove not only that the conduct or failure to act had a causal connection with the death or serious injury or illness of the individual, but that the responsible person was at fault. Presumably this means intentional, reckless or negligent conduct or an intentional, reckless or negligent omission to act. The maximum penalty for breach of s.121(7) is a fine of $313,000 or five years imprisonment or both. The quite recent experience of the Covid pandemic will no doubt raise questions in the minds of board members of not for profit organisations that run aged care facilities about whether they are prepared to accept such a severe legal risk. A number of aged care homes experienced multiple deaths as the coronavirus spread among the residents, in circumstances where the organisation received some blame.

Conclusion

These examples illustrate that the Productivity Commission is right to be concerned about the way in which laws and policies may have the unintended consequence of discouraging volunteers. We submit that this problem should be addressed more fully in its final report with reference to the examples given.

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