



Government of South Australia

Attorney-General's
Department

DISCUSSION PAPER

Charitable donations: Should the law protect charitable donors of goods and services against legal liability?

The issues for discussion and options for reform in this paper do not necessarily reflect the views of the Attorney-General or the Government. This paper has been prepared for discussion purposes only. Readers should not assume that any of the possible regulatory changes discussed above will necessarily be made. The Government will decide on any changes only after considering submissions.



Background

The Government wishes to consult the public about a proposal to legislate for the legal protection of donors of goods and services to charity.

The proposal arises from amendments moved in Parliament when the *Civil Liability (Food Donors and Distributors) Amendment Act 2008* was being debated in 2008. That Act protects people who donate food to charity, as long as they do not know the food to be unsafe and are not reckless about its safety. Donors and distributors who come within the protection of the Act cannot be sued in negligence if a consumer of the food comes to harm. The policy of the Act was to reduce the legal protection of consumers and increase the legal protection of donors, so as to encourage the donation of safe food to charity. Similar laws had already been enacted in New South Wales, Victoria, Tasmania and Western Australia, as well as in some Canadian provinces. Victoria had already seen a substantial increase in food donation under the new laws.

Amendments were moved to the Bill seeking to extend this protection not only to the donors and distributors of food but to the donors of any type of goods and of services to charity, with the aim of increasing charitable donations generally. The Government did not accept the amendments, which had not been tried in any other jurisdiction nor been the subject of any public discussion. Instead, it agreed that that proposal, because of its wide scope, should be the subject of separate public consultation in 2009. This paper is published for that purpose.

Note that the Government has not taken any decision about donor-protection laws, apart from food-donor protection. The Government will consider all submissions before deciding whether such laws would be a good idea and, if so, what their scope should be.

The reasoning behind the new food-donors law

It is true to say that the new law reduces the legal protection of the consumers of donated food. Instead of being able to sue for negligence, they will now be able to sue only if they can prove that the donor knew that the food was unsafe when it left his possession, or was recklessly indifferent to that fact. The Government thought carefully before reducing consumer protection in this way. It can be argued that the law should ensure the same protection for people who consume donated food as it provides to people who can pay for their food: that the poor should have no less protection than the rich. The Government had to weigh the public interest in consumer safety against the public interest in providing for the poor.

Seeing the success of the experiment interstate, where donations have increased but consumers seem to have come to no harm, the Government decided that the public interest in providing for the poor should prevail. For one thing, food businesses, which are expected to be the main donors, are in a good position to ensure that food is safe. They are regulated under the *Food Act* and well understand how to handle food so that it stays safe to eat. The risk of harm from these donations was judged to be small. For another, food businesses had indicated through their representative body that they would expect to donate more food to charity if the law were changed. The new law also had the support of the charitable sector, through its peak body, the South Australian Council of Social Services, and of the legal profession, through the Law Society. The Government decided that the risk of harm was substantially outweighed by the prospect of the good that the new law might do.



Concerns about the safety of the most vulnerable members of our society are also valid, however, and accordingly, the new law includes a requirement that the Attorney-General must report to the Parliament after two years about how the new law is working.

What about other donations?

Debate on the Bill caused many Members of Parliament to reflect on what could be done to increase charitable donations, not only of food, but of other types of goods and also of services. As the Hon. Mr M. Parnell M.L.C. put it:

'What barriers are standing in the way of South Australians being more generous in supporting charitable or community endeavours? If those barriers are legal barriers, then let us have a look at removing them. If the barriers are social or cultural, then perhaps legislation is not the way to go. We can ask ourselves a whole lot of subsidiary questions, such as: why, as a society, are we increasingly selling our second-hand goods on eBay or through the Trading Post, rather than giving them to charity or to op shops, as we used to nearly always do? The question is, is there a risk, a threat or a perceived risk of legal action that is standing in the way of people donating goods, time and services?'

In the case of food donors, there was reason to think that the threat of legal action was an important, and perhaps the main, barrier to donation. That hypothesis fitted with what the food industry told the Government and also with the experience in Victoria. Little is known, however, about whether and how far the risk of legal liability also discourages the donation of other kinds of goods and services.

What is donor protection?

Donor protection is an immunity from the risk of being sued if the goods or services you have donated cause harm. In general, the law of negligence sets safety standards for society. It imposes duties of care in some circumstances. Where a duty of care is owed, the person who owes the duty must look out for dangers that can reasonably be foreseen and take reasonable action to minimize or avoid the risk of harm to others. For example, before food-donor protection laws existed, a restaurant or catering business that donated food without taking reasonable care to see that the food was safe could have been sued if the person who ate it came to harm. Likewise, it is the law of negligence that allows people to claim damages if they are injured in a collision caused by the carelessness of another driver or allows a patient injured by a doctor's malpractice to obtain compensation for those injuries.

The purpose of a duty of care is to inhibit behaviour that poses a risk to others. It can encourage people to stop and think before acting. It may make them choose not to go ahead with their planned action or to modify it in some way so that it will be safer for others who might be affected. In organisations, it can encourage the development of policies and practices to keep staff and clients safe.

Donor protection laws remove or reduce this inhibiting factor with the aim of increasing donations to charity. They reflect the view that it is better to accept a higher level of risk in return for increased benefits to charitable causes.

So far, there are no general laws in Australia giving immunity to the donors of other types of goods apart from food, nor any laws immunizing the donors of services. Apart from some overseas laws that include grocery products along with food, it would seem that there are currently no general donor-protection laws anywhere in the world.

Donation of goods

Common forms of donation of goods include:

- individuals donating second-hand goods to charitable organisations, churches, service clubs etc. that, in turn, either give or sell the donated items to third-party consumers. Examples include clothing donations to charity shops, bric-a-brac contributed to a church jumble sale or surplus furniture donated to the local Lions Club. In many cases, these donations are anonymous e.g. they are left in collection bins without any way of identifying who has left the goods. In this case, because the donor is generally untraceable by the ultimate consumer of the goods, the risk of legal liability of the donor is small. If the donor were to sue anyone, it would more likely be the charity, church or club that distributed the goods. If the goods were sold by the charity, then ordinary consumer laws would apply. The retailer of a defective product is legally obliged to make good the defect by repair, replacement or refund. The retailer of a dangerous product that causes harm can be legally liable for the harm.
- individuals or businesses donating new or second-hand goods to projects run by charitable or community service organisations, where the donor is identified, for example, where a local trader donates building materials to be used by a service club to build a children's playground. The club might publicly thank the donor, making it possible for a person who later suffers harm to identify and sue the donor, if he or she were negligent.
- individuals donating to other individuals but on the basis of need rather than as a gift, for example, where a neighbour offers surplus household items to another neighbour's child who is moving out of home.
- charities donating goods other than food to recipients, for example, handing out blankets and clothing to the homeless. In this case the charity can usually be readily identified.

Many donated goods carry little or no risk to the recipients, for example, clothing, books and furniture are unlikely to cause harm to the recipients. Other items carry greater risk, for example, some second-hand children's toys may be risky because of small parts and second-hand vehicles may be dangerous if they have not been properly maintained.

Second-hand electrical goods may carry a risk of electrocution, depending on their age and history. Typically, the risk arises because the item may be old, may have deteriorated with time or may have been damaged, misused or poorly maintained by the donor.

Food donation poses a risk only to the person who consumes the food. A person who is worried about the risk can choose not to eat donated food. In the case of other goods the risk could extend to third parties. For example, if a mechanic who donates his services to a charity is negligent in repairing a vehicle belonging to the charity, that risk could affect not only the charity as owner of the vehicle, but also anyone who drives it or rides in it and also others who use the roads, even though they have not consented to the risk.

In some cases, the risk presented by the goods will be apparent to the recipient charity. The charity might decide not to pass on the goods or it might try to overcome the risk by mending the goods. At present, it is possible that a donor could be legally liable if it knowingly passed on to a recipient donated goods that presented a risk of harm, or at least, if it did so without warning the recipient.

On the one hand, it may be that more goods will be donated if donors are protected against such liability. On the other hand, to do so may increase the risk of harm to the recipient.

Will donation of goods increase if donors are protected from liability?

Experience interstate shows that food donations have increased after the passage of donor-protection laws. It is not clear whether this experience would be replicated if the law also protected the donors of imperishable goods. These goods do not need to be used immediately so surplus is not a problem and these goods are not likely to be wasted in the way that food previously was. Goods such as furniture, clothing and household items, if not in immediate use, can be stored indefinitely. Imperishables are more likely to be donated only when the owner decides he or she has no further use for them, for example:

- when they are replaced by new items
- when they are outgrown, obsolete or damaged
- in an occasional clear-out
- when the owner moves house or
- in response to an appeal, such as the recent Victorian bushfires.

Also, because they are imperishable, the owner has more options than just charitable donation or wastage. In particular, he or she has the option of selling the goods, for example, in a garage sale, through a classified advertisement or on the internet. It may be that some owners prefer to sell their unwanted imperishable items rather than give them away, because they want whatever value they can get for them. To the extent that that is true, donor-protection laws are unlikely to change their preferences.

There may, however, be situations where owners would like to donate goods, whether new or second-hand, to charity in preference to selling the items. That might occur where, for instance, a cause that the owner strongly supports is appealing for the items. For example, a trader may choose to donate stock to a service club to which he or she belongs to support a project by that club.

Questions for comment

- 1.1 Are there other examples of charitable donation of goods that should be considered here?
- 1.2 To what extent are people currently discouraged from donating goods to charity by the fear of legal liability? Is there reason to think that donations would increase if donors were protected? Or will people prefer to dispose of imperishable goods in other ways despite legal protection?
- 1.3 Is it desirable to reduce the legal risk to donors, so as to increase the donation of goods, even if this also reduces the legal protection of recipients, in that they would be unable to sue if harmed by the goods (unless the donor was recklessly indifferent about the safety of the goods)?
- 1.4 If there were to be donor-protection laws, should they protect donations of all types of goods equally, or is there a basis to treat some types of goods differently from others?
- 1.5 Is there a risk that donor-protection laws would encourage the dumping on charities of goods that neither the owner nor the charity wants? If there is, is this of concern or should it be accepted as a minor side-effect of increased donation of useful goods?

Should the law aim to protect all donors of goods to the same extent?

(a) insurance

Donors may be individuals, businesses or charities themselves. One factor that may vary is whether the donor carries insurance against the risk of suit. Most individual donors will not do. Many charities, however, may carry such insurance as a matter of routine. Some businesses may carry such insurance and others not. In general, businesses are not legally required to carry this insurance.

If a donor is insured against the risk of liability to a recipient, then that may reduce the donor's concern about the risk of suit over donated goods. In that case, donor-protection laws would not materially increase the quantity of donations from that person. Indeed, it could be argued in that case that donor-protection laws would simply remove protection from the recipient, to the benefit of the insurer. That may, however, have benefits if the cost of insurance reduces as a result. Equally, it can be argued that even an insured donor will take the risk of suit into account, because of the inconvenience of litigation and the possibility that his or her premium may increase in future.

Alternatively, it might be that donor protection laws would obviate the need for insurance for some donors, saving expense to businesses and charities that now buy this cover. That depends on what are the particular risks against which the donor insures. It also depends on how risk-averse the donor is. A donor who is highly risk-averse would only cancel his or her insurance if the law ensured that he or she could never be sued for any risk covered by the policy. A donor who is less risk-averse might be prepared to cancel insurance if the law protected him against the more common or more expensive risks, and to take the chance that a minor mishap might result in his bearing some loss himself.

(b) what can reasonably be expected of the donor?

There is also the question of whether individual donors should receive a higher level of protection than businesses or charities. For example, if a charity makes a practice of regular and large-scale donation of goods, should the charity be expected to take reasonable care about the safety of the goods? Arguably, the charity is in a position to inspect the donated goods and, if necessary, to test them, before deciding whether to give them away. If the charity is protected by law, then one incentive to make such checks is removed and, possibly, the risk of donating something dangerous is increased. On that view, it would not be good policy to remove the charity's legal liability. On the other hand, if the burden of taking reasonable care over the safety of donated goods is using up a substantial part of the charity's resources, then there may be policy reasons to reduce this burden so that the charity can deliver more services.

In the case of a trader, it can be argued that the trader has, or should have, some knowledge of the likely risks of the goods that he or she sells. Should a trader have to take reasonable care over the safety of donated goods or would that unnecessarily impede the donation of safe goods? Is the trader in a different position from an individual donor, who will not necessarily have any special knowledge of the risks? Or is the better argument that, because individuals will donate smaller quantities of goods, and usually goods that have been in their possession for some time, they are well placed to make decisions about whether the goods are safe?

Questions for comment

- 2.1 Is there a case to treat charities, traders and individual donors differently, or should the law treat these all alike? If there is an argument for different treatment, which ones should receive the protection?
- 2.2 Would donor protection laws mean that donors can cease buying some of the insurances that they now buy? Would that in turn enable these donors to donate more goods?
- 2.3 Would donor protection laws reduce the cost of liability insurance?

Should all goods be treated alike?

Some goods pose little or no risk of injury. Others pose a risk if misused but not if used carefully. Others pose risks that cannot be avoided by careful use because they are hidden, for example, a faulty electrical appliance.

Under the law of negligence, it is safest for a donor to give away goods that he or she knows to carry minimal risk to the user. Perhaps few people would be discouraged from giving away books or clothing by concerns about liability. More might hesitate to give away electrical goods or children's toys, especially if they are known to be faulty. To this extent, it can be argued that the law of negligence inhibits donation appropriately, tending to ensure that the safer items are more likely to be donated than unsafe items.

If there is blanket protection of donors against legal liability, then donors might be more inclined to treat all goods alike. This may increase the quantity of donated goods but may also increase the risks to the consumers of the goods, because there is likely to be little change in the donation of harmless goods, which is not inhibited, but more change in the donation of potentially harmful goods. On the other hand, it can be argued there is little value in a law that only covers goods that are inherently unlikely to cause any harm. There is also the problem that potential donors need to be able to establish readily whether they are protected or not. If the law is complicated, then they might be discouraged from donating goods that would have attracted the protection, because they are not certain where they stand.

Question for comment

- 3.1 If there were to be laws protecting the donors of goods from legal liability in negligence, should these laws apply equally to all goods? If not, to what goods should they apply?

Donation of services

In many professions and trades, business people contribute their time and energy to good causes without asking for payment. The full extent of this donation can, perhaps, never be known. Examples include the nurse who volunteers to staff a first-aid station at a community event, the tradesman who makes repairs to the premises of a service club of which he is a member and the accountant who does the books for a non-profit organisation at no charge.

Commonly, service providers owe duties of care to the recipients of the services. For example, a builder, plumber, electrician, lawyer, doctor or nurse owes a duty to see that he

or she carries out the work with reasonable care to avoid harm to others. In these cases, the consumer is relying on the trader's skill and knowledge. If the trader is careless, the consumer and others can come to harm. For instance, if a builder uses materials that do not meet the specifications for the job, a building may collapse, causing injury. Legal liability exists to redress this harm.

It has been proposed that where services are donated, this legal liability should be very limited. If the trader were negligent in carrying out the service, thereby causing damage to the recipient's property or injuring the recipient or a third person, no legal liability would exist. However, if the trader is recklessly indifferent about whether the services are safe, the trader would be liable. It is argued that service-providers would donate more services under these conditions.

Services are different from goods in some ways. The problem of surplus or unused services is less acute. If a service-provider has free time, for instance, because demand is low or because jobs are cancelled, he or she may be able to use this time for other tasks required by the business, such as paperwork. There is not the same risk of waste that arises with food or, perhaps, other goods. Also, services do not wear out, so there is not the question of donating something that has no further value to its owner. The ability to provide a service retains its value as long as there is a market for the service. This raises the question of to what extent the risk of legal liability is a factor discouraging skilled people from giving their services free of charge for the public good.

Commonly, also, service providers carry insurance against the risk of being sued in negligence. In a few cases, such as lawyers, the insurance is a legal requirement. In other cases, it is a business decision for the trader. Even where it is not a legal requirement, many traders choose to buy this insurance, if they can afford it, rather than run the risk of having to pay claims from their own pockets. The cost of the insurance is built in to the price of the service so that, in reality, consumers pay for the insurance that protects them against this risk. It can be argued that a consumer who does not pay, because services are donated, should not be covered by the trader's insurance, to which he or she has not contributed. On the other hand, it can be argued that the recipient has not contributed because he or she is disadvantaged and cannot afford to pay for the services required.

An obvious question is whether all services are comparable for this purpose or whether there are relevant differences that would support an argument for restricting the protection. If fear of legal liability is a disincentive, does it operate equally over all services or does it affect some more than others? For example, is the builder who puts up a new shelter shed at the local child-care centre more concerned about the risk of suit than the teacher who conducts free literacy classes? Would the donation of services increase more in some areas than in others if legal liability were reduced or removed?

For example, it may be that a mechanic would repair more vehicles free of charge if protected from liability for negligent repairs, but would a private school, say, provide more scholarship places if the scholarship students could not sue if negligently injured on a school camp? Is it the fear of being sued by a scholarship student that limits the number of scholarships offered or are other factors, such as cost, more effective constraints?

Questions for comment

- 4.1 To what extent are service providers discouraged from donating their services to charity for fear of legal liability? How big a factor is fear of liability, compared with other factors influencing the decision? Does it vary depending on the service and, if



so, which services are more likely to be donated to charity if liability for negligence were abolished?

- 4.2 If you are a service-provider, would you expect to donate more services to charity if you were protected from legal liability to the recipient? Can you estimate the increase in donation of your services?
- 4.3 If you are a service-provider, would you discontinue buying insurance, or some of your insurance, if protected from legal liability for donated services? If you would not, why not?

Other issues

If there are any other matters that the Government should consider in deciding whether general donor-protection laws would be a good idea or in deciding about the scope and effect of those laws, please address these in your submission.

Request for submissions

You are invited to make a submission commenting on any of the questions raised in this paper or any other matter that should be taken into account in deciding whether to extend donor-protection laws. Submissions should be sent to:

Donor protection discussion paper
c/o Legislation and Legal Policy
Attorney-General's Department
G.P.O. Box 464
ADELAIDE S.A. 5001

or by email to LLPSubmissions@agd.sa.gov.au

or can be sent by facsimile transmission to (08) 8204 1337.

The due date for submissions is 31 August, 2009.

Please note that submissions may be published on the Attorney-General's Department website. Please do not include in your submission anything that is confidential.

All submissions will be taken into account in the Government's decision about whether any and what legislation on this topic is appropriate.