

Volunteers and unlawful workplace behaviour

Legal information for New South Wales community organisations

This fact sheet covers:

- workplace behaviours and the laws relating to them
 - the options available to volunteers who are subjected to unlawful workplace behaviour and your organisation's obligations, and
 - what your organisation can do to make sure your volunteers are not subject to unlawful behaviours.
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Your organisation must take reasonable steps to protect volunteers from unlawful workplace behaviour directed towards them. Your organisation can also be held responsible for the actions of your volunteers if they engage in unlawful workplace behaviour towards another person.

This fact sheet covers the following potentially unlawful workplace behaviours:

- sexual harassment
- discrimination
- bullying, and
- victimisation.

Sexual harassment

Sexual harassment laws exist at both a state and federal level and apply to your organisation's volunteers.

The laws relating to sexual harassment that apply in New South Wales (**NSW**) are contained in the *Anti-Discrimination Act 1977* (NSW) and *Sex Discrimination Act 1984* (Cth) (**sexual harassment laws**).

NSW's sexual harassment laws apply to all volunteers in the same way as they apply to employees, which means:

- volunteers in NSW organisations have the same legal rights and protections against sexual harassment as paid staff
- sexual harassment of volunteers, while they are doing their volunteer work, is unlawful, and
- volunteers must not sexually harass others in the workplace (including staff, volunteers, clients, and members of the public)
- organisations could be liable (legally responsible) for any harm, injury or loss as a result of the actions of their volunteers (this liability can be avoided if you organisation takes all reasonable steps to prevent sexual harassment), and

- organisations have a positive duty to eliminate sexual harassment from the workplace.

Sexual harassment occurs when the following two factors are met:

- a person makes an unwelcome sexual advance or request for sexual favours towards another person or engages in other unwelcome conduct of a sexual nature, for example, making a statement of a sexual nature to a person, or in the presence of a person (whether the statement is spoken or in writing), and
- a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the behaviour.

The NSW Anti-Discrimination Board (**ADB**), which administers the anti-discrimination laws and handles complaints under the *Anti-Discrimination Act 1977*, provides the following examples of behaviour that may constitute sexual harassment (provided it is unwelcome):

- staring or leering in a sexual manner
- unwelcome wolf whistling
- comments about a person's physical appearance or sexual characteristics
- sexual or physical contact, such as slapping, kissing, touching, hugging or massaging
- displaying or circulating sexual material, for example on a noticeboard or by email
- repeated sexual invitations when the person has refused similar invitations before
- initiation ceremonies involving unwelcome sexually related behaviour
- intrusive questions about sexual activity, and
- sexual assault (also a crime under the *Crimes Act 1900* (NSW)).

EXAMPLES

- ✘ Two volunteers who met while volunteering at your organisation have started a relationship and are affectionate (but professional) towards each other during the volunteering shifts. This would not constitute sexual harassment as it is a consensual relationship.
- ✔ A volunteer who visits the home of a client tells you that the client keeps commenting on his appearance and asking about whether he is single, whether he is going out on dates, and is always trying to hug him. This makes him uncomfortable. This is conduct constituting sexual harassment as it is a sexual advance and is unwelcome.

What can a volunteer do if they have been sexually harassed?

A volunteer who feels they have been sexually harassed by a staff member, volunteer, client or member of the public (while performing their volunteer duties) should be encouraged to report this to a designated person in your organisation.

The volunteer may also make a complaint to the ADB or the Australian Human Rights Commission, who will attempt to resolve the issue through the process of conciliation. These bodies do not have the power to make orders or award compensation, but many complaints are resolved through conciliation. Outcomes can include an apology, development of new policies and training and, in some situations, the organisation offering to pay financial compensation.

In some cases, the ADB may refer a sexual harassment complaint to the NSW Civil and Administrative Tribunal (**NCAT**) (Administrative and Equal Opportunity Division). This may occur when:

- The ADB accepted the complaint for investigation and later declined it (if this is the case, a volunteer will need to ask NCAT's permission for the complaint to go ahead)
- The volunteer's complaint was not resolved through conciliation, or
- The volunteer's complaint was with the ADB for more than 18 months.

What are your organisation's obligations?

Under the sexual harassment laws, your organisation has a positive duty to take reasonable and proportionate measures to eliminate sexual harassment from the workplace. This means taking steps to prevent this behaviour and not waiting for a complaint before addressing an issue. For example, for a small organisation, this may involve ensuring that staff and volunteers are aware of the organisation's commitment to treating staff with dignity, fairness and respect and making a clear statement about how complaints from staff are managed through clearly defined policies and processes.

Alongside duties owed under sexual harassment laws, there are also common law duties (developed by the courts) to provide employees with a safe workplace. Under common law, your organisation has a duty to take reasonable care to avoid exposing your volunteers (and all who might be exposed to the risks from the business) to reasonably foreseeable risks of injury, which could include harm caused by sexual harassment.

Your organisation could also be liable (legally responsible) for the actions of its volunteers if they sexually harass someone else. This 'vicarious liability' can be avoided if you organisation takes all reasonable steps to prevent sexual harassment.

TIPS

- have a policy that outlines how your organisation will comply with laws about sexual harassment
- have a nominated person to whom complaints can be made
- make sure you have a fair and transparent process for resolving complaints internally
- make volunteers (as well as its employees) aware of the kind of behaviour that is unacceptable, the procedure outlined in the policy and what to do if the process for making a complaint does not resolve the complaint
- conduct ongoing training in relation to appropriate workplace behaviour
- have an appropriate screening process for volunteers to make sure you are not engaging a volunteer with a history of repeated sexual harassment.

Discrimination

Anti-discrimination laws exist at both a state and federal level and may apply to your organisation's volunteers.

At a federal level, anti-discrimination laws are found in a range of Acts that set out protected attributes such as age, race, disability and sex. In New South Wales, further laws are contained in the *Anti-Discrimination Act 1977* (NSW). In this fact sheet, we will refer to all of these laws collectively as '**anti-discrimination laws**'.

Under anti-discrimination laws, discrimination occurs when an act or omission:

- is based on a 'personal attribute' which is protected by the law
- happens in an 'area of public life' which is protected by the law
- results in a person being treated unfavourably, and
- an exception does not apply.

Discrimination can be:

- direct – treating a person with a particular attribute unfavourably because of that attribute, or
- indirect – imposing a condition on a person with an attribute where it is not possible for the person to comply with the condition because of their attribute (where the condition is not reasonable).

Protected personal attributes

Age, sex, race, skin colour, descent, national or ethnic origin, religious belief or activity (or lack of), disability, physical features, sexual orientation, sexual or gender identity, intersex status, marital or relationship status, carer and parental status, pregnancy or potential pregnancy, breastfeeding, family responsibilities, employment and industrial activity, political belief or activity, association with someone who has (or is assumed to have) one of these attributes or an irrelevant criminal record.

Note: The specific wording of the particular personal attributes across the various anti-discrimination laws may differ.

Protected areas of public life

Employment, state education, accommodation, some clubs (defined by the NSW *Registered Clubs Act*), goods and services,

EXAMPLES: IS THIS DISCRIMINATION?



- ✓ An organisation decides not to provide training opportunities for young or mature volunteers because 'it's not worth it' = discrimination on the basis of age.
- ✓ An organisation decides not to engage a volunteer from a particular racial background because they have had volunteers of the same race before and they have had a bad work ethic = discrimination on the basis of race.

'Exceptions': When is it lawful to discriminate?

It may be lawful to discriminate in limited circumstances where an exception applies. Not-for-profit organisations should be careful if they want to rely on these exceptions and may need to seek advice.

In summary, discriminatory conduct may not be against the law if (this is not an exhaustive list):

- it is necessary to comply with an order of a court or tribunal, or is authorised by legislation
- it is necessary to protect the health and safety of any person, including the person being discriminated against (where discrimination is on the basis of disability, pregnancy or physical features)
- it is necessary to protect property (where discrimination is on the basis of disability or physical feature)
- it would cause 'unjustifiable hardship' to the organisation if it were to try and accommodate a person's disability
- people of a certain race are needed for performance, artistic or food/drink service purposes for reasons of authenticity
- a person's sex or age is a genuine occupational qualification for the job (this includes jobs where employees are needed to enter bathrooms, for example, but does not include jobs that require physical characteristics such as strength or stamina)
- your organisation is providing special services, benefits or facilities to meet the special needs of people with a particular personal characteristic
- a service is being provided to meet the special needs of a particular group of people – to promote substantive equality for a group of people who have one or more of the protected attributes, or
- It is a genuine occupational qualification of the position that a person of a particular race, age or sex be employed.

There are also particular exceptions that only apply to certain areas of public life such as accommodation, clubs, education, employment, provision of goods and services, local government and sport and can also apply to specific protected attributes.

EXAMPLES



Protecting health & safety

An elderly person applies for a position in an organisation. The role requires lifting and packing boxes onto shelves. The organisation is not comfortable with hiring this person as she is clearly frail and unstable on her feet and it believes she will likely be injured performing the duties. This discriminatory conduct appears to be necessary to protect the health and safety of the elderly person and therefore would not be against the law.

Increasing employment opportunities for Indigenous Australians

An organisation chooses to target Indigenous people in their recruitment strategy as a part of its broader Reconciliation Action Plan (a document that outlines practical action an organisation will take to build strong relationships and enhance respect between Aboriginal and Torres Strait Islander peoples and other Australians). The organisation is hoping to assist in reducing unemployment amongst local Indigenous communities. This would be considered a special measure and this type of discrimination is lawful.

In situations where an organisation seeks to engage in conduct that is not covered by an exception, anti-discrimination laws provide a method for gaining an **exemption** certified by the NSW Attorney-General.

FURTHER READING



For more information about exceptions where discrimination is allowed and in what circumstances your organisation may need to apply for an exemption, go to the Anti-Discrimination Law section of the ADB [website](#).

What can a volunteer do if they have been discriminated against?

Anti-discrimination laws do not specifically apply to volunteers (volunteering is not included as an 'area of public life' in which discrimination can occur). However, laws may apply where volunteering falls within another area covered by the laws (eg. the provision of goods and services).

If the volunteering falls under a category covered by the anti-discrimination laws, a person who feels they have been discriminated against while volunteering may follow the same process as set out above in relation to sexual harassment.

TIPS



Regardless of whether or not anti-discrimination laws apply to your organisation's volunteers, it is best practice to comply with anti-discrimination laws. Not only is it favourable to your volunteers, employees and members of the public, it will also prevent any bad publicity and reputational damage that may arise from a complaint of discrimination. It is advisable to take all reasonable steps to prevent discriminatory behaviour including:

- checking policies and making sure they specifically and adequately cover discrimination
- making sure all volunteers and staff are trained in relation to these policies
- implementing a complaints procedure to identify and deal with discriminatory behaviour.

FURTHER READING

For more information about how you can comply with sexual harassment and anti-discrimination laws or to deal with complaints, go to the [ADB's Guidelines for managers and supervisors](#). The ADB has also published a number of sample policies for organisations.



Bullying

Bullying laws exist at both a federal and state level. The NSW Work Health and Safety Laws and the *Fair Work Act 2009* (Cth) (**Fair Work Act**) provisions relate to bullying behaviour.

What is bullying?

Under the Fair Work Act, workplace bullying occurs when:

- an individual or group of individuals repeatedly behave(s) unreasonably towards a worker or a group of workers at work in a constitutionally-covered business, and
- the behaviour creates a risk to health and safety.

A 'worker' is defined broadly and extends to volunteers, except those that volunteer in a completely volunteer-based organisation with no employees ('volunteer association').

Being at 'work' is not limited to the confines of a physical workplace. It can occur offsite, at work-related functions and through social media channels.

Working out whether your not-for-profit community organisation is a 'constitutionally-covered business' is not straight-forward, and you may need to seek legal advice. Generally, if your organisation is a company limited by guarantee, incorporated association, cooperative or indigenous corporation, your organisation is a constitutionally covered business.

However, if your organisation does not have any paid staff, then you are not considered a constitutionally-covered business.

EXAMPLES: IS THIS BULLYING?

- ✓ An employee repeatedly makes fun of a volunteer who is learning to use a new database and finding it hard to pick up. This causes the volunteer distress and anxiety. This would constitute bullying behaviour.
- ✗ A group of volunteers play a joke on a new volunteer by putting a derogatory sign on his back. The new volunteer is upset, and no further incidents occur. As the behaviour was a single incident, this would be unlikely to constitute bullying. However, the sign could constitute discriminatory behaviour if this treatment was due to a personal attribute (eg. race or disability).



Management action (eg. performance management or work allocation) will not be considered bullying if:

- it is reasonable for the management action to be taken, and

- the management action is carried out in a manner that is reasonable.

The distinction between reasonable and unreasonable management action depends on the circumstances. It will not be determined based on the worker's perception of the action but from an objective perspective. The management actions do not need to be perfect or ideal to be reasonable.

EXAMPLE: IS THIS BULLYING?



A manager repeatedly tells a volunteer that their performance has been poor.

The manager repeatedly intimidates a volunteer by calling him/her 'argumentative' and 'a blocker' and excluding the volunteer from a full range of their duties without an opportunity to discuss the issue. This may constitute bullying behaviour.

If the manager discusses the poor performance of the volunteer on a number of occasions and decides the volunteer cannot perform the assigned duties because of his/her inability to adequately perform the assigned tasks, then the manager's actions may be considered reasonable management action.

What can a volunteer do if they have been bullied?

Under the Fair Work Act, a worker who believes that he or she has been bullied at work may apply to the Fair Work Commission (**FWC**) for an order to stop the bullying, only if he or she is working in a 'constitutionally-covered business'.

Working out whether your not-for-profit community organisation is a 'constitutionally-covered business' is not straight-forward, and you may need to seek legal advice.

FURTHER READING



For information about workplace bullying and specifically whether your organisation is a 'constitutionally-covered business' and whether your volunteers could apply for an order under the Fair Work Act, go to the [Fair Work Commission's Anti-bullying Benchbook](#).

The FWC may choose to conduct a conference or informal hearing and if it is satisfied that the worker has been bullied and there is a risk that he or she may continue to be bullied, it may make any order it considers appropriate to prevent the bullying behaviour. The orders may apply to individuals, groups or be directed at the organisation. The FWC orders may require monitoring of behaviour, compliance and review of existing policies, further support or training and anything else the FWC thinks appropriate, except an order for payment.

If the FWC has made an order involving your organisation you must comply with all terms of the order. If a breach occurs, the person who has been bullied can apply to a Court for an order for a financial penalty against your organisation (or any other order the Court thinks appropriate).

NOTE

The definition of 'worker' for the purpose of being covered by bullying laws also extends to other workers such as apprentices, trainees or students gaining work experience.

NSW Work Health and Safety Laws

Workplace bullying can also breach the *Work Health and Safety Act 2011* (NSW) (**NSW WHS Act**). This occurs where:

- bullying creates a risk to a worker's or another person's health and safety and the organisation has failed to take all reasonably practicable steps to prevent and address it, or
- a worker has acted in a way that failed to take reasonable care for the health and safety of others at a workplace.

Under the NSW WHS Act, organisations covered by the laws owe various duties to their volunteers including providing and maintaining a working environment that is safe and without risks to health and keeping the workplace safe and without risks to health.

Workplace bullying may amount to a breach of these laws and your organisation (and its individual officers) could be liable for failure to comply where:

- the behaviour has created a risk to a volunteer's health and safety, and
- the organisation has failed to take all reasonably practicable steps to prevent the bullying.

A volunteer may report an organisation to the NSW regulator, WorkCover, if bullying is occurring in breach of the NSW WHS Act.

When do the NSW WHS Laws apply?

The NSW WHS Laws apply to 'persons conducting a business or undertaking'. A 'volunteer association' is taken not to be conducting a business or undertaking and therefore is not subject to the requirements of the WHS Act.

Conducting a business or undertaking

An organisation will be considered to be conducting a business or undertaking whether or not that business/undertaking is:

- conducted for profit or gain
- conducted by an individual or a group of people, or
- is structured as a partnership, incorporated association or unincorporated association.

Volunteer association

A volunteer association is defined under the NSW WHS Laws as:

a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

This means that only not-for-profit community groups which consist solely of volunteers (and not employees or contractors) are exempt from NSW WHS Laws. If your organisation employs anybody (whether casually, part time or as a contractor) it is not a Volunteer Association and must comply with NSW WHS Laws.

It is important to note that payments that are made to volunteers for direct out-of-pocket expenses (such as travel and meals) when carrying out volunteer work will not be regarded as wages or salary.



TIP

Even if your organisation is a volunteer association and is exempt from the NSW WHS Laws, it is a good idea to comply with the general WHS duties under the WHS Act. Australian courts have recognised that volunteers are owed a general duty of care by the organisations that they are engaged by. Complying with the Act will help to ensure this duty is satisfied.

However, if other payments for carrying out volunteer work are made they may constitute a wage or salary and mean that the person is being 'employed' by the organisation.

FURTHER READING

For more information about NSW Work Health and Safety Laws generally and whether they apply to your organisation or to particular volunteers, particular duties you may owe and steps that may be taken to fulfil these duties, go to Not-for-profit Law's Community organisations and work health and safety law Guide on the Information Hub at www.nfplaw.org.au/OHS.



TIP

Alongside the duties imposed on organisations under the NSW WHS Act, there are also common law duties to provide a safe workplace. Under the common law, your organisation has a legal duty to take reasonable care to avoid exposing employees, volunteers, contractors, apprentices/trainees and members of the public to reasonably foreseeable risks of injury.

Therefore, regardless of whether the Fair Work Act or NSW WHS Act apply, as a matter of best practice you should take all reasonable steps to eliminate bullying behaviour from the workplace by:

- checking policies and making sure they specifically and adequately cover bullying
- making sure all volunteers and staff are adequately trained in relation to these policies, and
- implementing a complaints procedure to identify and deal with bullying behaviour.



Victimisation

Laws relating to sexual harassment, bullying and discrimination also prevent victimisation of a person who has made a complaint about such behaviour or exercised other rights under the relevant laws.

In New South Wales, victimisation is prohibited by the *Anti-Discrimination Act 1977* (NSW) and federal anti-discrimination laws.

Victimisation is subjecting a person to any detriment because they have (in good faith):

- made a complaint (to the organisation, another person or the ADB) about being discriminated against or harassed, or
- supported another person with a complaint or acted as a witness.

The *Anti-Discrimination Act 1977* (NSW) applies where victimisation occurs in specified 'areas of public life'. The 'areas of public life' listed in this law do not currently include *volunteering*. However *the provision of goods and services* is listed as an area of public life, so if the offering of 'volunteer' positions can be construed as a service this law could apply. You should seek legal advice about whether the *Anti-Discrimination Act 1977* (NSW) applies to your volunteers.

EXAMPLE

A community house runs educational courses. A volunteer tutor fails a student because she did not complete her attendance requirement. The student complains that she is being discriminated against due to her race. The community house tells the student that this is a ridiculous complaint and that any application to re-enrol next year will not be accepted.

While the student's discrimination complaint appears weak, she could bring a claim for victimisation based on the actions of the community house after receiving the complaint.



CAUTION

Be careful about walking away from a volunteer arrangement (even though you are able to at any time) if there has been a recent complaint made by the volunteer. This could be construed as victimisation against the complainant, even if you have walked away for completely unrelated reasons.



What can a volunteer do if they have been victimised?

A person who feels they have been victimised may follow the same process available for discrimination and sexual harassment matters (see discussion above). Ultimately, the best outcome for all involved would be to resolve the matter internally, without the need to escalate the matter further.

What are your organisation's obligations?

Under the *Anti-Discrimination Act 1977* (NSW), your organisation has a duty to take reasonable and proportionate measures to eliminate victimisation from the workplace as far as possible. This means positive action must be taken to prevent this behaviour.

TIPS

As a matter of best practice you should take all reasonable steps to eliminate victimisation from the workplace by:

- developing policies and procedures about the standards of behaviour expected of everyone in your organisation
- inducting and training volunteers and all others in the organisation on these standards of behaviour and your policies, and
- taking complaints seriously and dealing with them promptly and thoroughly. The ADB has developed a Sample Grievance policy and procedure which can be ordered (for a fee) by filling out the required form found on the [ADB website](#).



Lodging a complaint with the ADB

The ADB investigates complaints about the types of discrimination covered by the *Anti-Discrimination Act 1977* (NSW) (ie. sexual harassment, discrimination and victimisation – see above for further details). The ADB cannot make orders or award money as compensation; rather, complaints are

resolved via conciliation, usually in the presence of an officer from the ADB. Conciliation is an informal and flexible way of resolving disputes.

It is free to lodge a complaint with the ADB. However, if a person/organisation wishes to employ their own lawyer, then they will need to pay for the lawyer's fees.

The ADB can refuse to investigate a complaint if the discrimination or harassment happened more than 12 months before the complaint was lodged. However, this is not automatic. If a person/organisation wishes to lodge a complaint about events which happened more than 12 months ago, an explanation for the delay in lodging the complaint will need to be provided.

Resources

Related Not-for-profit Law Resources

- ✔ Recruitment – www.nfplaw.org.au/recruitment

For more information about discrimination and when anti-discrimination laws may apply to volunteers, go to our Not-for-profit Law fact sheet on Discrimination in recruitment of volunteers and employees.

- ✔ Work Health and Safety – www.nfplaw.org.au/OHS

For more information on occupational health and safety laws and when they might apply to your organisation, read Not-for-profit Law' Work Health and Safety Laws Guide.

Other Related Resources

- ✔ Volunteering Australia – www.volunteeringaustralia.org

Volunteering Australia has a resource which provides an overview of background check requirements and the associated costs across the various states and territories.

- ✔ The Centre for Volunteering – www.volunteering.com.au

The state peak body for volunteering provides information on volunteering and volunteer management.

- ✔ SafeWork NSW – www.safework.nsw.gov.au

New South Wales' workplace health and safety regulator.

- ✔ Safe Work Australia – www.safeworkaustralia.gov.au

Safe Work Australia has published information for volunteer organisations on workplace safety including [The Essential Guide to Work Health and Safety for Volunteers](#).

- ✔ Ant-Discrimination Board of NSW – www.antidiscrimination.justice.nsw.gov.au

The Anti-Discrimination Board of NSW promotes anti-discrimination, equal opportunity principles and policies throughout NSW. It administers the anti-discrimination laws and handles complaints.

- ✔ Fair Work Commission – www.fwc.gov.au

The Fair Work Commission has useful resources on workplace issues and disputes.

- ✔ The Australian Human Rights Commission (AHRC) – www.humanrights.gov.au/our-work/employers

The AHRC is a national human rights institution that resolves complaints of discrimination under federal laws.

Legislation

- ✔ [Anti-Discrimination Act 1977 \(NSW\)](#)

- ✔ [Work Health and Safety Act 2011 \(NSW\)](#)

- ✔ [Fair Work Act 2009 \(Cth\)](#)

- ✔ [Sex Discrimination Act 1984 \(Cth\)](#)

- ✔ [Racial Discrimination Act 1984 \(Cth\)](#)

- ▼ [Disability Discrimination Act 1984 \(Cth\)](#)
- ▼ [Racial Discrimination Act 2004 \(Cth\)](#)
- ▼ [Australian Human Rights Commission Act 1986 \(Cth\)](#)

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