

Volunteers and unlawful workplace behaviour

Legal information for Victorian 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 these unlawful behaviours.
-

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 Victoria are contained in the *Equal Opportunity Act 2010* (Vic) and *Sex Discrimination Act 1984* (Cth) (**sexual harassment laws**).

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

- volunteers in Victorian 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
- 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 your 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, and
- a reasonable person would have anticipated that the other person would be offended, humiliated or intimidated by the behaviour.

The Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) provides the following examples of behaviour that may constitute sexual harassment (provided it is unwelcome):

- comments about a person's sex life
- sexually suggestive behaviour (such as leering or staring)
- brushing up against someone, touching, fondling or hugging
- sexually suggestive comments or jokes
- displaying offensive screen savers, photos, calendars or objects
- repeated requests to go out
- requests for sex or other sexual acts, and
- sexually explicit emails, text messages or posts on social networking sites.

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 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 VEOHRC or the Australian Human Rights Commission, who will attempt to resolve the issue through conciliation. These Commissions do not have the power

to make orders or award compensation, but conciliation can result in an apology, development of new policies and training, and in some situations, the organisation offering to pay financial compensation.

If the issue cannot be resolved, the volunteer may choose to bring an application at the Victorian Civil and Administrative Tribunal (**VCAT**). The right to make this application exists regardless of whether a complaint has been made with either Commission first.

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.

Alongside duties owed under sexual harassment laws, there is also a common law duty (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 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 your 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
- conduct ongoing training – for volunteers as well as employees – on appropriate workplace behaviour, your organisation's policy, and the procedure for making complaints
- have an appropriate screening process for volunteers to make sure you are not engaging a volunteer with a history of repeated sexual harassment

FURTHER READING

For more information about how you can comply with sexual harassment laws under the Equal Opportunity Act, including processes for dealing with complaints internally, go to [VEOHRC's guideline on 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 Victoria, further laws are contained in the *Equal Opportunity Act 2010* (Vic). 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 (explained below)
- happens in an 'area of public life' which is protected by the law (explained below)
- 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, education, accommodation, some clubs, goods, facilities and services, land sales and transfers, local government, administration of government laws and programs, and sport.

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
- a religious body or organisation discriminates in:
 - ordaining or appointing priests, ministers of religion or members of a religious order (or training or educating those people seeking appointment)
 - selecting or appointing people to perform functions relating to, or participating in, any religious observance or practice
 - conforming to the doctrines, beliefs or principles of the religion or where it is reasonably necessary to avoid injury to the religious sensitivities of people who follow the religion (where discrimination is on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity)
- 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 features)
- your organisation is providing special services, benefits or facilities to meet the special needs of people with a particular personal characteristic, or
- a special measure is being taken to promote substantive equality for a group of people who have one or more the protected attributes.

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 others that 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 that 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, VCAT may grant temporary **exemptions**, allowing discrimination in some circumstances.

FURTHER READING



For more information about exceptions and exemptions under Victorian anti-discrimination laws, go to the [Victorian Human Rights and Equal Opportunity Commission 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, the 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, best practice is to comply with anti-discrimination laws. Not only is it favourable to your volunteers, employees and members of the public, but 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 prevent discriminatory behaviour including:

- checking policies and making sure they specifically and adequately cover discrimination
- making sure all volunteers and staff are given training on these policies
- implementing a complaints procedure to identify and deal with discriminatory behaviour

Bullying

Bullying laws exist at both a federal and state level. The Victorian OHS 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 behaves unreasonably towards a worker or a group of workers at work, 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. However, this law only applies to behaviour in a 'constitutionally-covered business'. Working out whether your not-for-profit community organisation fits this definition 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. A management action does 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.

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, except an order for payment. The orders may apply to individuals, groups or be directed at the organisation – for example, monitoring of behaviour, compliance and review of existing policies and further support or training,.

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.

Victorian Occupational Health and Safety Laws

Workplace bullying can also breach the *Occupational Health and Safety Act 2004 (Vic)* (Victorian **OHS Laws**). This occurs where:

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

Under the Victorian OHS Laws, 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.

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 WorkSafe Victoria if bullying is occurring in breach of the Victorian OHS Laws.

When do the Victorian OHS Laws apply?

The Victorian OHS Laws apply to all community organisations that have employees, and may also apply to community organisations that are completely volunteer-based where they conduct work or activities at a "workplace".

To work out whether the Victorian OHS laws apply to your community organisation, you will need to consider whether your organisation:

- is an 'employer', and/or
- is an organisation that has 'management or control of a workplace' (a place, whether or not in a building or structure, where employees or self-employed persons work).

EXAMPLE

A community centre or community hub may have a range of organisations that operate within the same building. Some of the community organisations operating out of the centre may be entirely volunteer-based, whereas others have employees. If this is the case, a volunteer-based organisation with management and control of the centre will still be required to comply with the 'workplace' duties in the OHS Act.



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

FURTHER READING

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

Safe Work Australia has also published a Guide for preventing and responding to workplace bullying.



TIPS

Alongside the duties imposed on organisations under the Victorian OHS Laws, 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 Victorian OHS Laws 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
- 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 Victoria, victimisation is prohibited by the Equal Opportunity Act and federal anti-discrimination laws.

Under the Equal Opportunity Act, victimisation is subjecting or threatening to subject a person to any detriment because they, or a person associated with, them have:

- made (or threatened to make) a complaint about an equal opportunity matter (eg. being sexually harassed or discriminated against)
- asserted their rights under the Equal Opportunity Act, or
- refused to do something because it would be discrimination, sexual harassment or victimisation.

The Equal Opportunity Act 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, in some circumstances, the engagement of a volunteer may fall under the 'provision of goods and services' – another area of public life. You should seek legal advice about whether the Equal Opportunity Act 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 this matter internally, without the need to escalate the matter further.

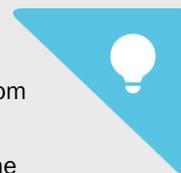
What are your organisation's obligations?

Under the Equal Opportunity Act, 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
- taking complaints seriously and dealing with them promptly and thoroughly. VEOHRC has developed a [Template Policy: Complaint resolution policy and procedure](#), which can be found on the VEOHRC website



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.

- ✔ Occupational 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's Occupational Health and Safety Laws Guide.

Other Related Resources

- ✔ Volunteering Victoria www.volunteeringvictoria.org.au

Volunteering Victoria has published a [Volunteer Management Toolkit](#) with information on developing policies and procedures.

- ✔ WorkSafe Victoria www.worksafe.vic.gov.au

WorkSafe Victoria has published a document relating to [Workplace Bullying – Prevention and Response](#)

- ✔ Victorian Equal Opportunity and Human Rights Commission (VEOHRC) www.humanrightscommission.vic.gov.au

VEOHRC has developed [Right Smart Tool Kits](#) to help organisations comply with obligations under the *Equal Opportunity Act 2010* (Vic).

- ✔ 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 a Guide for preventing and responding to workplace bullying.](#)

- ✔ 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

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

Legislation

- ✔ [Equal Opportunity Act 2010 \(Vic\)](#)
- ✔ [Occupational Health and Safety Act 2004 \(Vic\)](#)
- ✔ [Racial and Religious Tolerance Act 2001 \(Vic\)](#)
- ✔ [Charter of Human Rights and Responsibilities Act 2006 \(Vic\)](#)
- ✔ [Fair Work Act 2009 \(Cth\)](#)
- ✔ [Sex Discrimination Act 1984 \(Cth\)](#)

- ✔ [Racial Discrimination Act 1975 \(Cth\)](#)
- ✔ [Disability Discrimination Act 1984 \(Cth\)](#)
- ✔ [Age Discrimination Act 2004 \(Cth\)](#)
- ✔ [Australian Human Rights Commission Act 1986 \(Cth\)](#)

Funded by
a grant from

**Victoria Law
Foundation**

A NFP Law Information Hub resource. Access more resources at www.nfplaw.org.au

© 2015 Justice Connect. You may download, display, print and reproduce this material for your personal use, or non-commercial use within your NFP organisation, so long as you attribute Justice Connect as author and retain this and other copyright notices. You may not modify this resource. Apart from any use permitted under the *Copyright Act 1968 (Cth)*, all other rights are reserved.

To request permission from Justice Connect to use this material, contact Justice Connect at PO Box 16013, Collins Street West, Melbourne 8007, or email nfplaw@justiceconnect.org.au.