



Volunteers and the Equal Opportunity Act 2010

> Discrimination – Frequently asked questions

How could the discrimination provisions in the *Equal Opportunity Act 2010* apply to our volunteers?

The application of the discrimination provisions in the *Equal Opportunity Act 2010* to volunteers is not straightforward. While the discrimination provisions don't cover volunteering as a separate area of public life, they may apply to volunteers in certain circumstances depending on the type of organisation with which they volunteer and the nature of the volunteering opportunity. Areas in which the discrimination provisions may be found to apply to volunteers include club membership, sporting activities and where goods or services are being provided.

These provisions may apply differently depending on the type of relationship an organisation has with its volunteers. For example, some organisations have a structured volunteering program, while others engage with members of the community in an ad hoc way when they offer to help out at an event or activity. An organisation with a formal relationship with its volunteers through a structured volunteer program, for example, may more likely to be considered legally responsible if one of its volunteers sexually harasses or discriminates against another person.

The discrimination provisions in the *Equal Opportunity Act 2010* are more likely to be found to apply to your volunteers if your organisation:

- > is a club covered by the *Equal Opportunity Act 2010*
- > facilitates sporting activities
- > has a structured volunteering program in which volunteers are required to undertake training or skill development in order to

volunteer, or gain an accreditation or professional experience as part of their volunteering, or

- > provides goods and services.

Could our organisation be liable for discrimination if we refuse an applicant for a voluntary role because we think they can't perform the tasks associated with the role?

No organisation is required to take on a prospective volunteer for a role that they believe they are unable to perform. But, as with paid staff, problems can arise if a person applying for a volunteer role feels treated unfairly on the basis of a personal characteristic covered by the *Equal Opportunity Act 2010*.

To ensure that you don't risk discriminating against potential volunteers, it is good practice to draft a volunteer position description prior to recruiting for a volunteer role. As you would do when recruiting for paid positions, ensure that any requirements relate to the skills and experience needed for the role and avoid references to attributes under the *Equal Opportunity Act 2010* which a person may or may not have, for example, gender or age.

What kinds of questions can we ask volunteers as part of the selection process?

There is no requirement for an organisation to conduct a formal selection process to take on volunteers. If your organisation does conduct a recruitment process, it is worth preparing a list of questions that relate directly to the role requirements as you would do when recruiting for paid positions. Avoid asking questions that may be presumed to be relevant only to certain people, such as women, older people or people

with a disability. Instead, prospective volunteers should be asked whether they can fulfil the key requirements of the role.

Is it discrimination not to take on a volunteer with a criminal record?

Discrimination on the basis of criminal record is not covered by the Victorian *Equal Opportunity Act 2010*. However, under federal law, the Australian Human Rights Commission may investigate complaints of discrimination in employment and occupation on the basis of criminal record and, where appropriate, try to resolve these complaints by conciliation.

This provision may be relevant in relation to a volunteering role in which a volunteer gains skills or professional experience that are relevant to their occupation, for example, a law graduate undertaking a work experience placement at a legal centre.

For more information about discrimination in employment and occupation on the basis of criminal record, contact the Australian Human Rights Commission.

Our insurance will only cover volunteers up to the age of 70. Are we liable for discrimination if we don't take on volunteers over 70?

Age discrimination is prohibited under Part 4 of the *Equal Opportunity Act 2010*. This provision applies to volunteers in a range of areas including club membership, sporting activities and provision of goods and services. Where a volunteer-involving organisation or volunteering opportunity is covered by the *Equal Opportunity Act 2010*, the provisions relating to age discrimination will apply.

It's generally regarded as best practice for volunteer-involving organisations to have personal accident insurance for volunteers, however some insurance companies won't extend this insurance to volunteers over a certain age. This may be discriminatory.

The *Equal Opportunity Act 2010* contains an exception allowing insurance companies to discriminate in the provision of insurance or on the terms on which an insurance policy is offered if certain factors apply. It is up to the insurer in the case of a complaint to prove that

the exception applies. If not, the insurer may be found liable for discrimination. This exception only deals with the liability of the insurance company in offering the product.

In the case of a complaint in which a volunteer was excluded from a volunteering opportunity because the organisation's insurance would not cover them, the organisation may be liable for discrimination if the decision to exclude them was not found to be reasonable.

Before excluding older volunteers because your insurance won't cover them, it is advisable for your organisation to make reasonable efforts to obtain insurance that will cover older volunteers.

What sort of reasonable adjustments do we have to make for a volunteer with a disability?

Under the *Equal Opportunity Act 2010*, organisations may be required to make reasonable adjustments for staff and clients with a disability. These provisions under the *Equal Opportunity Act 2010* may apply to volunteers in certain circumstances – this will depend on the type of organisation with which they volunteer and the nature of the volunteering opportunity. In any event, organisations with paid staff and those providing services to clients need to be aware of their obligations to provide reasonable adjustments to enable people with a disability to gain paid employment and to access services.

Some adjustments that organisations providing services should make to meet their obligations under the Act will benefit volunteers, any paid staff and clients as well – for example, making sure their premises are accessible to people with a physical disability. An adjustment would not be considered reasonable if the organisation could not afford it, or if people with a disability could not participate even after the adjustments were made.

It's good practice to ask a volunteer with a disability what changes could be made to the role to accommodate their disability. These don't need to be expensive – for example, they may need to take more frequent breaks, shorter shifts or may not be able to perform heavy lifting.

Regardless of whether an organisation may be legally required to make a particular adjustment for a volunteer, it is good practice

for organisations to be as accommodating as is reasonably practical of the diversity of people wanting to volunteer with them.

How do we ‘manage out’ a volunteer who is no longer able to perform their role without discriminating against them?

As with paid staff, problems can arise if a volunteer feels unfairly treated at key points in the volunteering relationship, such as at the recruitment stage or when ending their involvement with the organisation. While there is no formal ‘dismissal’ process an organisation is legally required to follow for ‘managing out’ a volunteer. Exercising particular care at this time can help prevent volunteers feeling that they have experienced discrimination.

If you’re considering managing a volunteer out of a role because they can no longer perform the requirements of the role, think about whether you could make reasonable adjustments to enable them to continue as a volunteer. For example, could they take more frequent breaks, perform less physical duties or be transferred to a role that is more suitable?

If there are no other alternatives to discontinuing their relationship with your organisation, it is good practice to have a process around this rather than just letting them go. In any discussion, focus on their ability to fulfil the requirements of the role rather than attributes under the *Equal Opportunity Act 2010* which they may or may not have, for example, age or disability.

Having a process that makes the volunteer feel valued and recognises the important role that volunteering with your organisation may play in their life will mean that they are less likely to feel unfairly treated. Perhaps you could farewell the volunteer with a celebration as you would a staff member who was retiring and present them with a gift or certificate acknowledging their contribution.

What if one of our volunteers discriminates against one of our service users?

Discrimination in the provision of goods and services is unlawful under Part 4 of the *Equal Opportunity Act 2010*. In some circumstances the *Wrongs Act 1958* will be relevant here as well. This Act provides that an incorporated

community organisation may be held responsible rather than the volunteer for things done in good faith when undertaking community work. This protection will not apply when the actions are not in good faith or when they were contrary to instructions given by the community organisation.

If a volunteer discriminates against a service user, the organisation could be responsible where the volunteer was acting as their agent or where the organisation’s conduct could be taken to have authorised or assisted the discrimination. The volunteer could also be personally liable for discriminating in the provision of goods and services.

The best thing for an organisation to do is to provide clear guidance on what volunteers are authorised to do, for example, by providing a role or position description, and to make clear its expectations that sexual harassment is not acceptable.

What if one of our volunteers is racially abusive?

Verbal abuse towards someone on the basis of their race or religion may be considered racial or religious discrimination if it occurs in an area of public life covered by the *Equal Opportunity Act 2010*. Such behaviour may also be considered vilification under the *Racial and Religious Tolerance Act 2001*.

Vilification is behaviour that incites or encourages hatred of, serious contempt for, revulsion or severe ridicule of another person or group of people on the grounds of their race or religion. This behaviour doesn’t need to occur in a particular area of public life to be unlawful under the Racial and Religious Tolerance Act, so a volunteer may be covered by this Act if they vilify someone in any public context, for example, where it may be heard or seen by someone else.

Are we liable for the actions of ‘spontaneous volunteers’, for example, people who turn up to an event and just start helping out?

Possibly. There is no legal definition of a ‘volunteer’ – some organisations have a structured volunteering program, while others engage with members of the community in

an ad hoc way when they offer to help out at an event or activity. An organisation with a formal relationship with its volunteers through a structured volunteer program, for example, may more likely to be considered legally responsible if one of its volunteers sexually harasses or discriminates against another person.

Where a volunteer-involving organisation allows a person to provide a service on its behalf, it may be liable if that volunteer discriminates against another person while providing that service. This will depend on the circumstances, but letting someone help out can be a sufficient connection to your organisation for you to be liable for their behaviour. Consider how you may have 'authorised' their participation – for example, by not stopping them from doing certain activities. You don't need to have an ongoing relationship with them to be liable for their behaviour.

What happens if one of our volunteers makes a complaint to the Commission?

Under the *Equal Opportunity Act 2010*, the Commission provides a free and fair dispute resolution service.

The Commission is not a court and cannot make a decision about whether a breach of the law has occurred.

When a complaint is made the Commission may contact the person or organisation the complaint is made against and try to resolve the issue. The Commission does not advocate or act for people making a complaint.

Complaints to the Commission are resolved through a process known as conciliation. This is where the people involved in a dispute talk through the issues with the help of the

Commission, and with the aim of reaching an agreement on how the dispute will be resolved.

The aim of conciliation is for the complainant and respondent to reach an agreement about resolving the complaint. The Commission does not have the power to make orders or award compensation. Many complaints are resolved at conciliation and outcomes may include:

- > an apology (verbal or written, private or more public)
- > financial compensation
- > access to a previously denied job opportunity or service
- > an agreement to change or stop behaviour
- > an agreement to amend or develop policies.

The Commission does not handle complaints related to the Charter of Human Rights and Responsibilities. Complaints about breaches of the Charter can be made to the Victorian Ombudsman.

If a complaint can't be resolved by the Commission, the complainant may make an application to the Victorian Civil and Administrative Tribunal (VCAT) to have the matter listed for hearing.

Under the *Equal Opportunity Act 2010*, a person who feels they have experienced discrimination could also make an application directly to VCAT for hearing. However, if a settlement agreement has been reached at the Commission, the matter cannot be reopened by making an application to VCAT.



Victorian Equal Opportunity
& Human Rights Commission

Need more information?

Contact the Commission:

Enquiry Line 1300 292 153
Telephone 1300 891 848
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TTY 1300 289 621
Email enquiries@veohrc.vic.gov.au
Website humanrightscommission.vic.gov.au

We welcome your feedback!

Were these resources useful? Easy to use?
Would you like to see something else included?
Please email us at research@veohrc.vic.gov.au

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Disclaimer: This information is intended as a guide only. It is not a substitute for legal advice.