

# Submission to VEOHRC Issues Paper - Volunteering and the Equal Opportunity Act 2010

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# 1. Executive summary

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PilchConnect, a program of the Public Interest Law Clearing House (**PILCH**), welcomes the opportunity to respond to *Volunteering and the Equal Opportunity Act 2010 – Issues paper* (the **Issues Paper**) released by the Victorian Equal Opportunity and Human Rights Commission (the **Commission**).

PilchConnect is PILCH's specialist legal service for not-for-profit community organisations (**NFPs**). We provide a range of legal services tailored to the NFP sector, including a legal information webportal ([www.pilchconnect.org.au](http://www.pilchconnect.org.au)), legal training programs and telephone advice. We also refer NFPs with complex legal issues to PILCH member law firms for *pro bono* legal assistance.

PilchConnect commends the Commission on the initiative to undertake research which examines the needs of the not-for-profit (**NFP**) sector to better understand how equal opportunity legislation applies to volunteers. In our experience, many NFPs are confused about the way equal opportunity and anti-discrimination legislation applies to people involved in their organisations, including to their volunteers. In general, when changes to legislation are made, legal education programs are often targeted at the for-profit (business) and public sectors, and the impact on the NFP sector is often overlooked.

Given the changes introduced by the *Equal Opportunity Act 2010* (Vic) (**the Act**), we welcome the Commission's focus on providing information about the Act to the NFP sector.

PILCH advocates for the elimination of all forms of discrimination, conduct constituting sexual harassment and victimisation. When the 2010 Act was being drafted, we supported the inclusion of 'volunteering' as an area of public life in which sexual harassment and discrimination on the basis of a protected attribute should be unlawful. We urged the Victorian Government to commit to clear legislative drafting about volunteering (eg. as an area of public life in its own right) as well as an information and education campaign to help Victorian NFPs understand and comply with these obligations.

We welcome the application of Part 6 of the Act, prohibiting sexual harassment in relation to volunteers (although in our view, achieving this by way of a technical amendment to the definition of 'employee' is unfortunate as it is likely to cause confusion for NFPs). We note that the Act still does not categorically prohibit discrimination against volunteers on the basis of a protected attribute, so that providing information to NFPs about this issue remains a difficult task.

While the Issues Paper provides clarity around the rights and obligations of volunteers and NFPs relating to sexual harassment, further work is needed to clarify how Parts 4, 5 and 7 of the Act (relating to unlawful discrimination) apply to volunteers and NFPs. We note that case examples and real life scenarios, tailored to the NFP sector, would help to explain obligations under the Act. We also think it is vital that NFPs and volunteers understand their legal rights and obligations under the Act, while also being encouraged to adopt a 'best practice' approach to this important, but complex and evolving, area.

The Issues Paper was released 31 May 2011 with comments due by 10 June 2011. This timeframe has not allowed us time to consult with our NFP client base about this submission. Our response is brief, and based on the advice sought by NFPs that contact our Telephone Advice Service for help with complying with anti-discrimination and equal opportunity laws, or who have attended our training on volunteer issues. However we are happy to expand on this submission, or provide further feedback to the Commission if this is desirable. Our contact details are on the inside cover of this document.

## 2. About PILCH and PilchConnect

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### 2.1 About PILCH

PILCH is a leading Victorian not-for-profit organisation. It is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education. In carrying out its mission, PILCH seeks to:

- ▶ address disadvantage and marginalisation in the community;
- ▶ effect structural change to address injustice; and
- ▶ foster a strong pro bono culture in Victoria and increase the pro bono capacity of the legal profession.

### 2.2 About PilchConnect

PilchConnect is PILCH's specialist legal service for Victorian not-for-profit community organisations. In particular PilchConnect's focus is on providing legal help to NFPs that work with marginalised or disadvantaged Victorians. Our legal services for NFPs include free and low cost legal information (via our webportal, [www.pilchconnect.org.au](http://www.pilchconnect.org.au)), legal training, telephone legal advice and referral of eligible NFPs to PILCH member law firms for pro bono assistance. PilchConnect also engages in law reform and advocacy work on systemic issues about the regulation of the NFP sector. Our submission work is based on empirical evidence and practical examples drawn from our legal inquiry, advice and case work.

Our service is unique within Australia. Our aim is to 'help the helpers' by supporting the establishment and the effective running of well-governed community organisations. We seek to develop a sector-based hub of NFP legal expertise which can be drawn on by NFPs to achieve excellent standards of governance and regulatory compliance, so their economic and social contribution to the community is maximised.

PilchConnect welcomes the opportunity to respond to the Commission's Issues Paper.

### 3. Introduction: Volunteering in Victoria

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We commend the Commission's initiative to focus education and resources on helping volunteers and the Victorian NFP sector to understand Victoria's new Equal Opportunity Act. By way of context and to give some indication of the size and importance of volunteering and Victoria's NFP sector, we note that it is estimated that:

- there are 120,000 NFP organisations in Victoria of which:
  - about one third have a formal legal structure (eg. an incorporated association under the *Associations Incorporation Act 1981 (Vic)*; a company limited by guarantee under the *Corporations Act 2001 (Cth)* or a co-operative under the *Co-operatives Act 1996 (Vic)*); and
  - two-thirds are unincorporated (eg. people who have come together to pursue a common purpose but without a formal legal structure and with differing levels of formality about their operations);
- there are approximately 35,000 incorporated associations in Victoria and the majority of incorporated associations are small - more than 50% have fewer than 50 members and 25% have less than 20 members - and approximately 90% rely on volunteers;
- an estimated 40% of Victorians volunteer their time in NFP organisations;
- the 2006 Census data showed that 712,231 Victorians had volunteered through an organisation or group in the preceding twelve months;
- the NFP sector delivers over \$2.2 billion of Victorian Government services per year (2006/2007 figure);
- in 2006-2007 the economic contribution of volunteers in Australia was estimated at \$14.6 billion.

In January 2010, the Productivity Commission released a report on the *Contribution of the NFP sector* (available at [www.pc.gov.au/projects/study/not-for-profit/report](http://www.pc.gov.au/projects/study/not-for-profit/report)). We note chapter 10 of that report examines the role and economic and social value of volunteers involved in Australia's NFP sector, as well as the increasing costs and risks (including legally-related) that NFPs face when engaging volunteers. We commend this chapter of the Productivity Commission's report and suggest it may be a useful resource for the Commission's work with the NFP sector.

Given the significant contribution of the NFP sector, it is important that volunteers and NFP organisations have access to tailored, practical information to help them to identify relevant legal rights and obligations, to take effective steps to ensure compliance with equal opportunity laws and promote an organisational culture where equality, dignity and respect for all people is paramount.

### 4. How does the Act apply to volunteers and NFPs?

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The Commission's Issues Paper sets out an explanation of how the Act applies to volunteers and NFP community organisations, and then poses two questions:

1. Does this information adequately clarify the rights of volunteers and obligations of organisations under the Equal Opportunity Act 2010?
2. Are there any areas that require further explanation?

We have answered these two questions by looking separately at the rights and obligations of volunteers, and then the obligations of NFP organisations. We have also separated out the issue of sexual harassment from the issue of discrimination.

#### 4.1 Does the information adequately clarify the rights and obligations of volunteers under the Act?

We welcome the application of the prohibition of sexual harassment (Part 6 of the Act) to volunteers. However in our view, the inclusion of volunteers in this part of the Act has been achieved using an unfortunately technical drafting approach (ie. the definition of 'employee' expressly includes volunteers and unpaid workers for the purposes of Part 6 of the Act, but otherwise excludes them from the definition). We urge the Victorian Government to revisit the drafting of the Act and consider introducing clearer legislative provisions relating to volunteering contexts (eg. prohibiting discrimination in volunteering as a discrete area of public life). However as the Act stands, we consider it important that NFPs and volunteers are provided with clear and accurate information about when a volunteer's rights and obligations are the same as a paid employee, and when they are (or may be) different.

##### **Sexual harassment**

The information relating to the **rights of volunteers** to be protected from sexual harassment under Part 6 of the Act is clearly stated. The Issues Paper clarifies that 'volunteers will have the same protection against sexual harassment as paid employees'. Information is provided about what constitutes sexual harassment.

Examples tailored to the NFP sector would assist to ensure that people involved in NFPs fully understand this point. At a recent seminar, we were approached by the members of a wholly volunteer-run seniors' organisation. One member of the Committee of Management had used his position in the organisation to access the contact details of other volunteers. He then rang those volunteers to ask them on a date. He kept contacting the same volunteers repeatedly, despite their refusals. Under Part 6 of the new Act, the behavior of the Committee member is likely to be unlawful and the volunteers contacted would have a legal right to make a complaint to the Commission.

The information relating to the **obligations of volunteers** not to engage in conduct that is sexual harassment is also clear. The text says that 'volunteer workers must not sexually harass another employee or volunteer, their employer or any other person seeking to work with the employer'. However it might be useful to highlight that volunteers both have rights under Part 6 of the Act (not to be sexually harassed) as well as corresponding legal obligations (not to sexually harass anyone). Again, examples set in the NFP context would be useful to clarify this.

##### **Discrimination**

The information relating to the **rights of volunteers** to be protected from discrimination, and the **obligations on volunteers** not to engage in conduct that is discriminatory under Part 4 of the Act, is less clear.

Our experience dealing with NFPs is that many do not fully understand this issue under the *Equal Opportunity Act 1995*, so intimating that the rights of volunteers with respect to discrimination have stayed the same is of little assistance. On the other hand, suggesting the new Act has substantially changed the law with respect to discrimination against volunteers (without providing more detail) is also confusing, and may give rise to an assumption that the same rights and obligations attach to volunteers as they do to employees throughout the whole Act which is not the case.

The Issues Paper states that it 'may' be unlawful to discriminate against a volunteer on the grounds of a protected attribute. It also says that 'in certain circumstances' volunteers 'may' also be protected under the Act when applying for volunteer roles and while volunteering. However in our experience, volunteers want clear guidance as to when this will occur.

We understand that this is complex and unclear area of the law. The definition of 'employee' excludes a volunteer or unpaid worker for the purposes of Part 4, 5 or 7 of the Act. The Act does not separately define 'volunteer' or expressly include 'volunteering' as an area of public life where discriminating against a volunteer (or a potential volunteer) with a protected attribute would be unlawful. However there are other ways that volunteers could have rights and obligations under the Act, including:

- Discrimination in the provision of goods or services

Discrimination in the provision of goods or services is prohibited under Part 4 of the Act and there may be circumstances where the offering of volunteer positions or experiences may be construed as provision of a service. It is our understanding that the Commission is open to taking a broad view of these provisions. It would be useful to explain in what circumstances a volunteering relationship may involve a provision of goods or services (for example perhaps a volunteer who receives on-the-job training or professional development as part of their voluntary work) and what rights and obligations will attach (for example, a requirement to make reasonable adjustments for a volunteer with a disability).

- Discrimination against members of certain clubs

Discrimination against members of certain clubs is prohibited under Part 4 of the Act, and where a volunteer is also be a member of such a club, discrimination by or against them may be unlawful. The broad reference in the Issues Paper to 'volunteers who are members of the club or organisation with which they volunteer' being protected from discrimination requires clarification, as the definition of a club in the Act is restricted to those over a certain size and with a liquor licence. Many NFPs we work with do not fit this definition.

Our approach to providing legal training to NFPs on this issue for volunteers is to emphasise best practice. We try to make the following points:

- There are many anti-discrimination and equal opportunity laws (both state and federal) that may apply to the volunteer relationship. While some laws expressly do not cover 'volunteers' or 'unpaid workers' in relation to discrimination, the laws generally are moving in the direction of covering volunteers, so best practice is to act like they do currently apply.
- Many people involved in community organisations wear multiple 'hats' – some people are a member and an employee as well as a volunteer. Others might volunteer for a NFP and be a client of the NFP. As anti-discrimination laws apply differently to different people in different roles or areas of public life, the safest way to ensure you are on the right side of the law is to make sure you do not engage in conduct that is discriminatory. Treating all people equally and with respect (no matter what their status in the workplace) is the easiest way to be make sure you are meeting the standards of behaviour required by these laws.
- It is very easy to comply with laws prohibiting discrimination and most volunteers do so naturally – however we remind volunteers of the 'protected attributes' and note that over time these have changed (and will continue to change) to reflect community standards and expectations.

- Many NFPs will have policies about acceptable behaviour while engaged in any kind of work (whether paid or unpaid). These policies will often prohibit any form of discrimination, and volunteers will be required to comply with these standards. Volunteers will also be able to expect these standards will be adhered to by others and often can access a complaints procedure when they are not.

We also use case examples to provide volunteers with concrete examples of how laws prohibiting discrimination might apply to them.

#### 4.2 Does the information adequately clarify the obligations of organisations under the Act?

The information in the Issues Paper sets out the new positive duty on organisations to eliminate discrimination, sexual harassment and victimisation. An example is given of how a small community organisation could comply with this requirement, by having policies to explain prohibited behaviour and how complaint mechanisms operate.

Again we note the complexity of the different treatment of volunteers in various part of the Act, that is:

- With regard to sexual harassment, the Act includes volunteers in the definition of 'employee';
- With regard to discrimination in employment, the Act excludes volunteers in the definition of 'employee';
- With regard to discrimination in other contexts (such as the 'goods or services' provisions or in relation to membership of licensed club), the Act may apply to a volunteering relationship.

It may be useful to clarify in legal information materials that an organisation has a positive legal duty to take steps to eliminate sexual harassment and victimisation of its volunteers, and it may also be required to take (and should as a matter of best practice take) positive steps to eliminate discrimination against volunteers on the basis of the protected attributes in the Act.

##### **Sexual harassment**

The Issues Paper states that an organisation or employer can be held vicariously liable for actions of their employees or volunteers under the Act. The concept of vicarious liability may be unfamiliar to some NFP organisations, particularly wholly volunteer-run organisations, given that the term is most commonly used in the employment context. The concept of an organisation's liability for the actions of volunteers is included in the volunteer protection provisions of the *Wrongs Act 1958* (Vic) but in our experience many small voluntary NFPs are also unaware of these.

It would assist organisations to understand the laws to have examples of how 'vicarious liability' may work in practice. It would also assist NFP to have a list of actions that might constitute 'reasonable precautions' to help them avoid being vicariously liable for sexual harassment perpetrated by volunteers. For example, would induction training for all volunteers on behaviour constituting sexual harassment be enough? Or providing all volunteers with a copy of a sexual harassment policy? Obviously this may differ depending on the size of the organisation and the nature of its activities.

##### **Discrimination**

While the Issues Paper gives a very broad overview of the Act, it remains ambiguous about the liability of NFP organisations for volunteers in relation to discrimination. As stated above, we understand that Parts 4, 5 and 7 currently do not apply to volunteers in the same way that they do to employees of an

organisation. We recommend that legal information materials for volunteers and NFP organisations be clarified to acknowledge this position. In our experience NFPs display a high level of voluntary compliance with legal obligations, and often what they need is a clear picture of how laws apply to them so that they can ensure they are doing the right thing and feel supported to implement best practice approaches.

The Issues Paper does not answer some of the more specific issues that NFPs ask us about how the law applies to particular (and common) situations, for example:

- Do we have to comply with discrimination laws when we take recruit new volunteers?
- Do we have to take on volunteers even if we think that they are incapable of doing the tasks for fear of discriminating against them? (eg. lifting heavy loads) How do we balance our obligations under equal opportunity legislation (not to discriminate) with our occupational health and safety obligations (to maintain a safe working environment for everyone)?
- What kinds of questions are we allowed to ask volunteers at interviews?
- Do we have to train our volunteers to not discriminate against other volunteers, employees, clients, members?
- Is it discrimination if we do not take on volunteers with a criminal record?
- Our insurance will only cover volunteers of a certain age – is it discriminatory not to take on volunteers outside this age range, and could we be liable for this?
- If we put out a call to fill 3 volunteer positions and we get 6 people apply, do we have to conduct a proper selection process to ensure we are not discriminating? (For example, if we pick a random 3, could an unsuccessful applicant who has a disability claim that we discriminated against them?)
- What about spontaneous volunteers? Sometimes at events we get people who just start helping out – could we be liable for their actions? Or do our obligations under the Act only relate to those volunteers we have ‘engaged’ on a formal basis?
- What kind of reasonable adjustments do we have to make for volunteers, given that we are a struggling organisation with very limited funds?
- Our constitution states that in order to be eligible to serve on the (voluntary) committee of the organisation, the members must identify as having a certain gender / sexual preference / religion / age (etc). Is this unlawful?
- We have both employees and volunteers at our NFP? Could we be liable if one of our volunteers discriminates against one of our employees? Could we be liable if one of our employees discriminates against one of our volunteers?
- If we ‘manage out’ a volunteer, could we be liable for discrimination? (The Issues Paper at page 12 suggests the answer to this question may be yes. It would be useful to clarify this with an example of when it might be so.)

The above is a random sample of the kinds of questions NFPs ask us about on a regular basis. As stated above, we have found that NFPs are generally very concerned to comply with the law, but do not necessarily know how to. Sometimes they understand part of their obligations, but fail to grasp the whole picture. For example, some NFPs we work with are aware that their organisation can be liable

for the way *it* treats volunteers, but struggle with the notion that the organisation can also be liable for the way *its* volunteers treat *others*.

In our training for NFPs, our approach is to note that some laws (including the Act) expressly do not cover 'volunteering' as an area of public life in which discrimination is unlawful, however we note that:

- there are many ways that a volunteer 'may' be covered by anti-discrimination legislation (eg. offering volunteering opportunities could be construed as involving the provision of a service; a volunteer may also be a member or employee and covered in this role); and
- recent changes to the laws indicate that they are moving in the direction of including volunteering as an area in which discrimination is prohibited;

so that best practice is for organisations to act as if all parts of the Act apply to volunteers. In this way, they can be certain they are complying with all relevant contexts covered by the Act.

To emphasise this point we note that:

- many NFPs have a mixture of employees, volunteers and clients in the 'workplace' (some having multiple roles) and it is impractical to try to distinguish between them. For the purposes of both equal opportunity and occupational health and safety laws, a NFP is better off employing a policy of prohibiting all discriminatory behaviour;
- the Act is very easy to comply with;
- the Act does not prevent NFPs from being able to recruit people suitable for the 'inherent requirements' of the volunteer role. We recommend a volunteer role description be drafted prior to recruitment to ensure that any 'inherent requirements' are genuine and questions are tailored to the role not the applicant.

In our view it would be useful to provide examples of the ways in which volunteers might be covered by the discrimination provisions of the Act (eg. if also members of defined clubs, or if volunteer is receiving 'services') and recommend a best practice approach as set out above.

## 5. What are the barriers to volunteering?

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### 5.1 Are there other key issues concerning volunteers' rights and organisations' compliance with the Act that have not been covered?

#### Insurance

We agree with the Commission's observations on the issue of age restrictions in insurance policies and our experience confirms this is a common barrier to volunteering. Most NFPs we work with find it difficult to get coverage for either very young volunteers or those over 70 years of age. As a result they are often prevented from offering volunteer opportunities to people in these age groups, because they are concerned about liability for medical or other expenses in the case of an accident. Many organisations fail to adequately explain the reasons for these policies to volunteer applicants, who feel discriminated against on the basis of age.

We note that there is a lack of understanding about insurance and volunteers generally. Many NFPs do not realise that their public liability insurance will not cover injuries to volunteers – and neither will workers compensation insurance. NFPs need to take out personal accident liability insurance to cover

injuries to volunteers. There is also a lack of clarity as to which insurance (eg. director and officers indemnity, or public liability insurance) might cover an organisation and its governing body should a claim of discrimination or sexual harassment be made by a volunteer.

## 6. How can the Commission help?

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### 6.1 Which of the resources and distribution methods will be most effective? Are there other resources and/or distribution methods that would be useful?

All of the materials mentioned and methods mentioned in the Issues Paper have the potential to be effective to educate NFP community organisations and volunteers about their rights and obligations under the Act.

In our experience providing legal information and education to NFPs, and seeking feedback from them we have found the following:

- NFPs appreciate legal information and educational resources that are tailored to the particular circumstances and issues of NFPs. NFPs are very different from for profit or public sector bodies. The people governing the organisation (and who might be legally responsible – such as the Board or Committee of Management) are often volunteers themselves. Some NFPs have employees; others are completely volunteers-run. Most have members, some of whom are also volunteers. Most lack resources and run on very tight and non-secure funding. NFPs and volunteers need information tailored to their circumstances (not just to be referred to resources developed for business or employees).
- NFPs appreciate simple plain-language training that is practical and not overwhelming. Training that offers solutions or ways to comply that are simple and easy to build into existing practices (ie. volunteer recruitment practices). Checklists, diagrams and flow-charts are always well received and have high impact.
- NFPs and volunteers like case studies and real life scenarios that show how the law will work in practice in their organisation or place of operation.
- Frequently asked question (FAQ) formats are useful, particularly when they are based on inquiries often made by NFPs. For example, a fact sheet that set out the answers to the questions listed above would be useful.
- From our experience and research, face-to-face training is the preferred method of learning about legal changes. We have learnt that an effective practice is also to train those who NFPs and volunteers often speak to (ie. peak bodies, community development workers in local councils, migrant resource centres etc). Other than face-to-face training, and in order to reach the number of NFP organisations across Victoria, we recommend web-based resources (podcasts, webinars, factsheets) tailored to the NFP sector.

Thank you for the opportunity to contribute our comments on the Commission's Issues Paper. Please let us know if you would like further information or wish to discuss any issues raised in this submission. Our contact details are listed on the inside cover of this document.