

Discrimination in recruiting employees and volunteers

Information for Victorian not-for-profit organisations

This information sheet covers:

- ▶ What is discrimination?
- ▶ Do the anti-discrimination laws apply to my organisation?
- ▶ How does this affect the way I recruit employees or volunteers?
- ▶ What happens if discrimination does occur?
- ▶ How can my organisation apply for an exemption from the provisions of the Equal Opportunity Act?

What is discrimination?

Discrimination is treating, or proposing to treat, someone unfavourably because of a personal attribute protected by law.

Discrimination can be direct or indirect. Direct discrimination occurs if a person treats a person with a particular attribute unfavourably because of that attribute. Indirect discrimination occurs where a condition is imposed and a person with an attribute cannot comply with the condition because of their attribute, and where that condition is not reasonable in the circumstances.

Personal attributes that are grounds for unlawful discrimination include:

- ▶ age
- ▶ employment activity
- ▶ gender identity
- ▶ disability
- ▶ industrial activity

- ▶ marital status
- ▶ parental status or status as a carer
- ▶ physical features
- ▶ religious or political belief or activity
- ▶ pregnancy/breastfeeding
- ▶ race (including colour, nationality, ethnic or national origin)
- ▶ sex
- ▶ sexual orientation
- ▶ lawful sexual activity, or
- ▶ personal association with persons having any of the above attributes.

Do the anti-discrimination laws apply to my organisation?

Yes. Anti-discrimination laws will apply to your organisation, but you may need more information about what they mean and how they apply.

Anti-discrimination laws exist at both a Federal and State level. The Commonwealth legislation includes the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth). All of this legislation includes anti-discrimination provisions.

The *Australian Human Rights Commission Act 1986* (Cth) ('AHRC Act') sets out what is unlawful discrimination and establishes a process for making complaints of unlawful discrimination. For further information, go to the [Australian Human Rights Commission's website](#).

The information in this sheet focuses on Victorian anti-discrimination laws because these are most likely to be relevant to your Victorian not-for-profit community organisation in the recruitment of employees. The Victorian anti-discrimination laws are contained in the *Equal Opportunity Act 2010* (Vic) and apply to certain areas of public life, including:

- ▶ employment (and all work-related matters)
- ▶ provision of goods and services (whether paid for or free)
- ▶ education
- ▶ accommodation

- ▶ sport
- ▶ clubs and club membership
- ▶ disposal of land, and
- ▶ local government.

If your organisation operates within these areas of public life the anti-discrimination laws will generally apply. This includes a positive duty to eliminate discrimination as far as possible.

For more information on the positive duty see below: *How does this affect the way I can recruit employees and volunteers?*

Your organisation may however be exempt from the anti-discrimination laws if the discrimination falls under an exception contained in the Equal Opportunity Act.

Discrimination is not unlawful if it:

- ▶ is reasonably necessary to comply with religious beliefs or principles
- ▶ is reasonably necessary to protect health or safety
- ▶ is a genuine occupational requirement that an employee is of a particular sex (i.e. to preserve the decency or privacy because the job involves the person entering areas ordinarily used only by people of that sex while those people are undressed)
- ▶ concerns the provision of welfare services, where those services would be most effectively provided by someone with a particular attribute

Example:

Women's Aid is an organisation that provides assistance to homeless women. It wishes to recruit only female employees. It may be able to do so if the positions it is recruiting for have a genuine occupational requirement to be performed by women.

Alternatively, if the positions are for the provision of welfare services to women the organisation may limit the offering of employment to women if it can be shown that those services can be provided most effectively by women and it is necessary for the advancement of the women receiving care.

For any other type of role, or just to be certain, the organisation may wish to apply to for an exemption from the Equal Opportunity Act.

- ▶ involves deciding who should be employed to provide domestic or personal services within a person's home, as requested by that person
- ▶ concerns the care, instruction or supervision of children and the discrimination is reasonably necessary to protect the physical, psychological or emotional wellbeing of the children;
- ▶ is necessary for authenticity or credibility in relation to dramatic or artistic performance, entertainment, photographic or modelling work or any other employment, that an employee is of a specific age, sex or race, or that the employee has (or does not have) a disability;
- ▶ involves artistic performance, entertainment, photographic or modelling work or any other similar employment, and the employer discriminates on the basis of physical appearance;

Example:

An Aboriginal Theatre Company would like to advertise the position of its Artistic Direction as only available to those of an indigenous background. The Aboriginal Theatre Company may be able to argue that it can limit the offering of employment for reasons of authenticity or credibility in the theatre's performances. From a practical perspective, when advertising the position, the Aboriginal Theatre Company should highlight the aspects of the role that will necessitate applicants with indigenous backgrounds, as the job advertisement will be critical if there is ever an allegation of discrimination by a non-indigenous applicant.

To be certain, the organisation may also wish to apply to for an exemption from the Equal Opportunity Act.

- ▶ would be unreasonable (given all the circumstances) to provide the adjustments that someone with a disability might need in order to perform the genuine and reasonable requirements of a job, or the person could not adequately perform the genuine and reasonable requirements of the job even after the adjustments are made; or
- ▶ is necessary to directly comply with, or is authorised by, another law.

If none of the above exceptions apply, you may still make an application for an exemption from the provisions of the Equal Opportunity Act. See below: *How can my organisation apply for an exemption from the Equal Opportunity Act?*

How does this affect the way I can recruit employees or volunteers?

Positive duty

The Equal Opportunity Act provides that all employers have a positive duty to eliminate discrimination. This means you must take 'reasonable and proportionate measures' to eliminate discrimination as far as possible. The Equal Opportunity Act requires you to be proactive and take steps to prevent discriminatory practices, for example, by making sure your premises and services are accessible to people with a range of disabilities.

What are 'reasonable and proportionate measures'?

The reasonable and proportionate measures needed to satisfy the positive duty will vary depending on the size and resources of the organisation.

Factors that will be considered include:

- ▶ the size of the organisation
- ▶ the resources of the organisation
- ▶ the nature of the organisation
- ▶ the business and operational priorities of the organisation or
- ▶ the practicability and cost of the measures in question.

Complying with the positive duty might include:

- ▶ introducing policies aimed at preventing discrimination and harassment
- ▶ creating a discrimination complaint-handling procedure, or
- ▶ periodically reviewing your organisation's handling of employees and volunteers to ensure they are not discriminatory.

Job applicants

An employer bound by the anti-discrimination laws of the Equal Opportunity Act must not discriminate against a person:

- ▶ in determining who should be offered employment

- ▶ in the terms on which employment is offered
- ▶ by refusing or deliberately omitting to offer employment, or
- ▶ by denying the person access to an occupational training program.

Volunteer applicants

The anti-discrimination laws in the Equal Opportunity Act do not specifically apply to volunteers. However, anti-discrimination laws may still apply where the volunteering situation gives rise to other areas covered by the Equal Opportunity Act. For example, discrimination laws may apply to protect volunteers with respect to **club membership**, **sporting activities** and where **goods or services are being provided**.

Tip:

Regardless of whether or not anti-discrimination laws apply to your organisation, it is best practice to adhere to the Equal Opportunity Act when recruiting volunteers. This can help volunteer recruitment and prevent any bad publicity that may arise from discrimination that will negatively impact upon your organisation's reputation.

Club membership

Clubs that will be covered by the Equal Opportunity Act include associations formed for social, cultural political, sporting or other lawful purposes that:

- ▶ have more than 30 members
- ▶ have a liquor licence, and
- ▶ operate their facilities wholly or partly from their own funds.

It is unlawful for clubs to discriminate against club members (which may include members who volunteer for the club) in the terms of their membership or the membership benefits provided to them.

Example: A golf club advertises free membership positions in exchange for volunteer work around the club but limits those that may apply to Caucasian males above the age of 40. The club has discriminated against applicants for membership by denying persons membership positions on the basis of their race, sex and age.

Exceptions from the anti-discrimination laws are limited to clubs established for specific purposes including where the object of the club is:

- ▶ to preserve a minority culture – they may discriminate on the basis of race
- ▶ for people of a particular age group – they may discriminate on the basis of age
- ▶ for members of a particular sex – they may discriminate on the basis of sex, or
- ▶ for a political purpose – they may discriminate on the basis of political belief or activity.

Sport

It is unlawful to discriminate against someone by excluding them from participating, in a sporting activity, including in a volunteer capacity. This includes coaching, umpiring or refereeing, or administering a sporting activity.

Example:

Zoe applies for a position as a volunteer coach for a girls hockey team. The club members believe that Zoe is in a same-sex relationship and believe that it is not appropriate for Zoe to coach girls. The club has refused to consider her for the role. The club has discriminated against the Zoe by denying her a role as a coach on the basis of her sexual orientation.

Provision of goods and services

It is unlawful to discriminate against another person in the provision of goods and services. An organisation offering a volunteering opportunity may be considered to be providing a good or service where, for example, a volunteer undertakes training or skill development, receives an accreditation, or gains professional experience as part of their volunteering.

Example:

Julie is applying for a volunteer position with a telephone counselling service that requires volunteers to undertake a certificate in telephone counselling. In the interview the manager discovers that Julie is a member of a socialist party. The manager does not offer Julie a position because she is concerned that her political beliefs may be extreme. The manager has discriminated against Julie by denying her the chance to undertake a training program on the basis of her political beliefs.

Tips to help minimise the risk of complaints of discrimination:

- ▶ Draft a description of the job position prior to recruiting employees. Organisations should ensure that any specific requirements for the position relate to the skills and experience needed for the role and avoid references to personal attributes under the Equal Opportunity Act (see above) that a person may or may not have.
- ▶ When advertising the job position, only include the requirements that relate to the skills and experience needed for the role. Remember, the content of a job advertisement is critical if there is ever an allegation of discrimination.
- ▶ Prepare a list of questions for the interview that relate directly to the role requirements. Avoid asking questions that may be presumed to be relevant only to certain people. For example, a potentially discriminatory question would be asking a woman if she planned on getting pregnant in the future. Instead, prospective employees should be asked whether they can fulfil the key requirements of the role.
- ▶ Adopt similar procedures for volunteering roles. Regardless of whether the Equal Opportunity Act applies, it is good practice to have volunteer role descriptions and recruit volunteers based on the requirements of the role and not on the basis of protected personal attributes under the Equal Opportunity Act (see above).

What happens if discrimination is alleged to occur in the recruitment process?

Internal complaints process

As this information sheet is primarily directed toward recruitment, it may be that you cannot deal with a complaint of discrimination within your organisation because the complainant might not have become part of your organisation.

If this is not the case and the complainant is an employee or volunteer, you should make sure they are aware of your complaint-handling procedure and know who they can talk to in the organisation if they feel they have been unfairly treated.

A policy outlining this process is a good idea, and should be made available to all staff and volunteers.

External complaints processes

Victorian Equal Opportunity and Human Rights Commission

The Commission provides a free service to help people resolve complaints, including complaints of discrimination. Those involved in the alleged discrimination are able to discuss the issues with the Commission who will attempt to resolve the dispute amongst the parties (see *Resources* below).

Victorian Civil and Administrative Tribunal (VCAT)

If a complaint cannot 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.

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 and is registered with VCAT, the matter cannot be reopened by making an application to VCAT.

How can my organisation apply for an exemption from the Equal Opportunity Act?

Your organisation can apply to the VCAT Anti-Discrimination List for an exemption from the Equal Opportunity Act. A copy of the exemption application must also be provided to the Equal Opportunity and Human Rights Commission. Exemptions can last up to five years and are renewable.

When assessing applications for exemptions VCAT must consider:

- ▶ whether the proposed exemption is unnecessary because:
 - ▶ an exception or exemption in the Equal Opportunity Act already applies to the conduct sought to be exempted, or
 - ▶ the conduct sought to be exempted would not amount to prohibited discrimination; and
- ▶ whether the proposed exemption is a reasonable limitation on the right to equality set out in the Charter of Human Rights and Responsibilities, and
- ▶ all the relevant circumstances of the case.

Your application should explain why the exemption you are seeking is a reasonable limitation on the right to equality and the right to equal opportunity in employment.

Recent example of an exemption granted by VCAT:

Employment with a government department where applications are limited to indigenous people, with the aim of improving the rate of indigenous people employed in the public sector in Victoria.

Exemption application forms can be found on the VCAT website along with a sample application (see *Resources* below). We recommend that your organisation seek advice on how to proceed with the application.

Resources

PilchConnect resources

Additional information on employees, go to www.pilch.org.au/employees/.

Additional information on volunteers, go to www.pilch.org.au/volunteers/.

Legislation**Victorian Acts**

[*Equal Opportunity Act 2010 \(Vic\)*](#)

Federal Acts

[*Equal Employment Opportunity Act 1987 \(Cth\)*](#)

[*Age Discrimination Act 2004 \(Cth\)*](#)

[*Disability Discrimination Act 1992 \(Cth\)*](#)

[*Racial Discrimination Act 1975 \(Cth\)*](#)

[*Sex Discrimination Act 1984 \(Cth\)*](#)

Other

[Victorian Equal Opportunity and Human Rights Commission](#)

[Australian Human Rights Commission](#)

[VCAT - exemption application form](#)