

26 July 2021

Ministerial Taskforce on Workplace Sexual Harassment
Department of Justice and Community Safety

(Submitted via the Engage Victoria website)

Addressing sexual harassment in Victorian workplaces

Justice Connect welcomes the Victorian Government's commitment to develop reforms that will prevent and better respond to sexual harassment in workplaces, and the opportunity to respond to the consultation paper 'Addressing Sexual Harassment in Victorian Workplaces'.

Our submission focuses on the consultation paper's pillars of 'Enforcement' and 'Raising Awareness', highlighting the inconsistent treatment of paid and unpaid workers under Victorian workplace safety laws. We make recommendations to ensure that all workers – paid or unpaid – enjoy equal protection under Victorian laws.

About Justice Connect

In the face of huge unmet legal need, Justice Connect designs and delivers high-impact interventions to increase access to legal support and achieve social justice. We help those who would otherwise miss out on assistance, focusing on people disproportionately impacted by the law and the organisations that make our community thrive.

We have been serving the community for more than 25 years. We are a registered charity, operating nationally.

Our expertise – our Not-for-profit Law program

This submission draws on the experience of our specialist Not-for-profit Law program which has, since 2007, provided free and low-cost legal assistance to volunteer involving not-for-profit community organisations, charities and social enterprises. In the 2020/21 financial year alone, we provided more than 1,600 instances of assistance to not-for-profit organisations.

In 2018 we developed Australia's first ever comprehensive National Volunteer Guide, with a section on sexual harassment including Victorian-specific information. Since its development, our National Volunteer Guide has been downloaded over 9,000 times.

We have trained thousands of people across Australia on the legal issues associated with managing volunteers, including 650 participants who attended training sessions on volunteer related issues in the 2020/21 financial year alone.



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We also advocate for better regulation for the volunteer involving sector. We advocate for regulation that is as simple and clear as possible to support understanding and compliance, cognisant of so many groups being volunteer run with limited resources. And for regulation that is fair and respectful of the volunteers, particularly their safety.¹ In February 2019 we made a joint submission with Volunteering Australia regarding the protection for volunteers under the current national legal framework for protections against sexual harassment.²

Our recommendations

Recommendation 1: that the rights and duties for employees under the *Occupational Health and Safety Act 2004* (Vic) should be extended to volunteers and other unpaid workers.

Recommendation 2: that the Victorian Government provide and promote plain language educational materials and training to support volunteer-involving organisations to understand their obligations and help equip them to comply with legislative amendments.

Our reasoning

Volunteer contribution to Victoria

Volunteers are vital to the operation of our communities, with 24.4% of Victorians over the age of 15 years participating in voluntary work through an organisation in 2020 and contributing on average 224 hours per year.³ In 2019, the value of volunteering to the Victorian economy was estimated at \$58.1 billion.⁴

¹ Justice Connect and Volunteering Australia, 'Joint Policy Statement: Addressing the Pandemic Insurance Gap for Volunteers', (19 August 2020), available at: https://www.nfplaw.org.au/sites/default/files/media/COVID-19_Volunteer_Protection_Joint_Policy_Statement_final_19Aug2020.pdf.

² Justice Connect and Volunteering Australia, 'Everyone's Business – whether they're paid or unpaid: Protections for Volunteers and Unpaid Workers from Workplace Sexual Harassment', Joint Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces, (28 February 2019), available at: https://nfplaw.org.au/sites/default/files/media/JC_and_VA_Joint_Submission_to_National_Inquiry_into_Workplace_Sexual_Harassment.pdf.

³ Australian Bureau of Statistics, 'General Social Survey: Summary Results, Australia – Voluntary Work and Unpaid Work/Support', available at: <https://www.abs.gov.au/statistics/people/people-and-communities/general-social-survey-summary-results-australia/latest-release#voluntary-work-and-unpaid-work-support>.

⁴ Volunteering Victoria, 'State of Volunteering in Victoria 2020', (2020), available at: <https://stateofvolunteering.org.au>.

Volunteers and sexual harassment

While there is a paucity of officially collected data, Justice Connect and Volunteering Australia have conducted a national survey (2018),⁵ asking volunteers to report on any experience of sexual harassment in the workplace.⁶ The results of this survey indicated that sexual harassment is a live issue in the not-for-profit sector. Throughout the 323 responses we received was a resounding call for equality in sexual harassment rights, protections and complaint mechanisms for volunteers and unpaid workers.

Current laws

Sexual harassment is a significant workplace safety issue as well as an equal opportunity issue.

Equal Opportunity Act 2010 (Vic)

Justice Connect recognises the strengths of the *Equal Opportunity Act 2010* (Vic) ('**Equal Opportunity Act**') relative to its equivalents in other jurisdictions. Work on a voluntary or unpaid basis is explicitly included in the definition of 'employment' for the purposes of sexual harassment.⁷ This means all volunteer involving organisations and their workers, whether paid or unpaid, are captured by the sexual harassment provisions in the Equal Opportunity Act. We would be supportive of this definition being expanded to also give volunteers and unpaid workers protection from discrimination and victimisation under the Equal Opportunity Act.

We support the retention of the positive duty on organisations under the Equal Opportunity Act to 'take **reasonable and proportionate** measures,⁸ to eliminate [...] sexual harassment [...] as far as possible'.⁹

⁵ Justice Connect and Volunteering Australia, 'Everyone's Business – whether they're paid or unpaid: Protections for Volunteers and Unpaid Workers from Workplace Sexual Harassment', Joint Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces, (28 February 2019), available at:

https://nfplaw.org.au/sites/default/files/media/JC_and_VA_Joint_Submission_to_National_Inquiry_into_Workplace_Sexual_Harassment.pdf.

⁶ Ibid Appendix B.

⁷ *Equal Opportunity Act 2010* (Vic) s 4(1).

⁸ Ibid s 15: There is guidance in Example 1 stating that 'A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.'

⁹ Ibid.

Occupational Health and Safety Act (Vic)

Justice Connect agrees that sexual harassment is a workplace safety issue, and we are generally supportive of the Victorian Government's plan to strengthen enforcement of sexual harassment protections under the *Occupational Health and Safety Act 2004 (Vic)* ('**OHS Act**'). However, we are concerned that any benefits of this strengthened enforcement will not flow to volunteers and other unpaid workers,¹⁰ who do not have the same rights and duties as employees under the OHS Act. The OHS Act applies principally to employers.¹¹ This means that volunteer involving organisations who do not employ any paid staff (employees) are not covered by the main provisions of the OHS Act. This is a natural limitation of laws designed to define the specific duty of care owed by employers to their workers, and volunteer involving organisations not captured by the laws still owe a duty of care to their volunteers under general negligence laws and the *Wrongs Act 1958 (Vic)* ('**Wrongs Act**'). We support the retention of this threshold requirement.

Where a volunteer involving organisation does have paid staff, the broader OHS Act provisions apply. However, most of the key duties owed by an employer are for its 'employees', and the definition of 'employee',¹² does not include volunteers and unpaid workers. For instance, the duty to 'provide and maintain for employees of the employer a working environment that is safe and without risks to health',¹³ excludes volunteers and unpaid workers. This means that under the OHS Act, the protections available to volunteers (even in volunteer involving organisations who have paid staff and so are 'employers' under the OHS Act) are only those owed to a client or ordinary member of the public.¹⁴

Specifically, volunteers and unpaid workers do not have the same formal avenues to represent their safety concerns under the OHS Act – for example through consultation with the employer,¹⁵ or as an elected health and safety representative¹⁶. Neither are volunteers and unpaid workers required to meet the same duties as employees under the OHS Act – for

¹⁰ In this submission we use 'unpaid workers' as a broad term that captures volunteers as well as other types of unpaid workers, such as people undertaking: activities under fine repayment schemes and 'mutual obligation' activities created by various government initiatives; court-ordered community work; unpaid internships; vocational placements; privately arranged work experience; and unpaid work trials.

¹¹ *Occupational Health and Safety Act 2004 (Vic)* s 26: An organisation that is not an employer but that manages or controls a workplace, also has a specific duty to ensure that workplace is safe and without risks to health.

¹² *Ibid* s 5(1): Employee is defined as 'a person employed under a contract of employment or contract of training.

¹³ *Ibid* s 21(1).

¹⁴ *Ibid* s 23: '[a]n employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer'.

¹⁵ *Ibid* s 35: An employer has a duty to consult with employees (paid workers only) about risks to health and safety and measures to control them.

¹⁶ *Ibid* s 54: Only an employee is eligible to be a work group member and therefore elected as a health and safety representative.

example the duty to 'take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace'.¹⁷

These omissions could have an important impact on the ability of volunteers and unpaid workers to represent their concerns and take responsibility for their own actions when it comes to sexual harassment in the workplace. The omissions could also lead to unintended failures to adequately protect volunteers and unpaid workers if/when the Victorian Government strengthens protections against sexual harassment under the OHS Act.

The failure to include volunteers and unpaid workers in the employer's duty to provide and maintain a safe working environment under the Victorian OHS Act is out of step with modern standards for workplaces.

It is also inconsistent with all other jurisdictions across Australia, which have adopted the national uniform Work Health and Safety legislation. The uniform Work Health and Safety legislation defines 'worker' to explicitly include volunteers and some other types of unpaid workers – placing those workers on equal footing when it comes to workplace safety, regardless of whether they are paid or unpaid for their work.

Recommendation 1: that the rights and duties for employees under the *Occupational Health and Safety Act 2004* (Vic) should be extended to volunteers and other unpaid workers.

Raising awareness through education and support

Volunteer involving organisations and leaders of volunteers grapple with many legal issues. Often there is greater complexity than for businesses especially when they have many volunteers but few paid staff and even fewer resources (such as HR expertise).

A range of educative measures should be made available to ensure that all organisations are aware of their current obligations (under the Equal Opportunity Act, the OHS Act and the Wrongs Act) as well as the implications for them of any changes to the law.

Training and education should be supplemented by plain language and accessible resources to ensure that organisations and individuals have reference materials to assist them with compliance.

Recommendation 2: that the Victorian Government provide and promote plain language educational materials and training to support volunteer involving organisations to understand their obligations and help equip them to comply with legislative amendments.

¹⁷ Ibid s 25.

This submission supported by Volunteering Victoria

Our submission is supported by Volunteering Victoria who we have worked with and consulted on this issue over several years.

We would be happy to discuss or expand on any of our comments. We agree to this submission being made public (with signature redacted).

Yours sincerely

A handwritten signature in black ink, appearing to read "Chris Povey".

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