

Issues paper – Should the definition of ‘employees’ include unpaid or volunteer workers?

The Act does not cover unpaid or volunteer workers in the definition of employees. Consequently, they are not covered by any of the prohibitions against discrimination and harassment in the Act.

Unpaid or volunteer workers are protected from sexual harassment under the NSW and Victorian Acts (as unpaid or volunteer workers) and under the ACT, Queensland and South Australian Acts (as employees),

They are also included within the scope of the recent *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (Cth).

Unpaid or volunteer work is not recognised as a type of employment in the Act. Consequently, unpaid or volunteer workers are not protected by the relevant Grounds in the area of work under the Act. By contrast, this type of work is recognised as a type of employment in the ACT, Queensland and South Australian Acts.

An argument in favour of extending the definition is that the relationship between unpaid or volunteer workers and the person in charge of them is, in substance, an employment relationship. This has become increasingly apparent as employers have taken the advantage of unemployment rates to engage people as unpaid interns in jobs that could be performed by employees. The extension would also recognise that a person can experience discrimination or sexual harassment in the workplace, regardless of whether or not they receive a wage.

The Equal Opportunity Commission (EOC) in its 2007 Review recommended that the definition of employment be amended to include unpaid and voluntary workers, and people doing work under an education, vocational or training arrangement. The EOC reasoned that the arrangement under which these people work for others is, in all important respects, the same as any employment relationship.

Against this position is the argument that the protections are afforded under the Act in acknowledgement of the power imbalance between an employer and their employee. By contrast, an employer may have less power or control over an unpaid volunteer worker, because the latter may be in the position to leave their work with little to no notice and would not suffer financial detriment as a result.

The Commonwealth Parliament has recently sought to expand the protections against sexual harassment to include interns and volunteers to 'reflec[t] the evolving world of work'.

Should the definition of employment in the Act be extended to include unpaid and voluntary workers?

In the event the definition of employment in the Act is not extended, should the sexual harassment provisions extend to apply in relation to unpaid or volunteer workers?

A full discussion of these issues is in the Discussion Paper at pages **142 and 148-49**.