

Legal obligations when recruiting an employee

Legal information for community organisations

This fact sheet covers:

- ▶ an overview of the recruitment process
- ▶ anti-discrimination and consumer law considerations in recruitment
- ▶ screening checks, and
- ▶ privacy considerations



This fact sheet provides information for your not-for-profit community organisation about your legal rights and obligations throughout the recruitment process.

Your organisation's legal obligations come from a variety of sources including:

- Commonwealth and state and territory equal opportunity and anti-discrimination laws
- the Australian Consumer Law
- laws about screening checks for potential candidates, and
- privacy laws

Failure to meet your legal obligations could result in fines, the requirement to pay compensation to affected parties, reputational damage and possible criminal action.



Disclaimer

This fact sheet provides information on legal obligations when recruiting an employee. This information is intended as a guide only and is not legal advice. If you or your organisation has a specific legal issue, you should seek legal advice before deciding what to do.

Please refer to [the full disclaimer](#) that applies to this fact sheet.

Overview of the recruitment process

The recruitment of an employee to a community organisation usually involves:

- writing and placing a job advertisement to attract the best candidates
- screening applicants
- interviewing applicants
- conducting referee checks
- selecting the best applicant for the job, and



- informing candidates whether they have been successful (and informing unsuccessful candidates they have not been successful)

At each stage, organisations should consider their legal obligations and ensure that best practice is followed at all times.



The Fair Work Ombudsman has published templates to assist with recruitment on its [website](#), including templates for:

- a job advertisement
- a job description
- a telephone screening form
- a reference checking form
- a notice to unsuccessful applicants

Anti-discrimination laws

Broadly, discrimination occurs when a person is, or a group of people are, is treated less favourably than another person or group because of personal characteristics (or attributes).

Discrimination can be direct or indirect.

Direct discrimination occurs where a person treats, or proposes to treat a person with a particular attribute less favourably because of that attribute. For example, promoting one candidate over a more qualified candidate because the more qualified candidate has a disability.

Indirect discrimination occurs where an unreasonable condition, requirement or practice is put in place, or is proposed to be put in place, that puts a person (or group of people) with an attribute at a disadvantage. For example, requiring a role to be performed in the office full-time (where there is no reasonable basis for such a requirement), which could have the effect of disadvantaging people with caring responsibilities.

Anti-discrimination laws exist at the Commonwealth (federal) and state and territory level. These laws prohibit discrimination on the basis of a person's features or attributes, including (but not limited to):

- race, including colour, national or ethnic origin or immigrant status
- sex, pregnancy, marital or relationship status, and breastfeeding
- age
- disability, or
- sexual orientation, gender identity and intersex status

This fact sheet focuses on anti-discrimination laws relevant to recruitment at the Commonwealth level. However, organisations should be aware that protections and obligations could apply under anti-discrimination laws at the state and territory level as well as the Commonwealth level. If you are not sure what anti-discrimination laws apply to your organisation, seek legal advice.

Community organisations should be mindful of the protections afforded to employees or candidates and the avenues available to pursue legal action as set out in the following Commonwealth legislation:

- [Racial Discrimination Act 1975 \(Cth\)](#)
- [Sex Discrimination Act 1984 \(Cth\)](#)
- [Disability Discrimination Act 1992 \(Cth\)](#)
- [Age Discrimination Act 2004 \(Cth\)](#)
- [Australian Human Rights Commission Act 1986 \(Cth\)](#)
- [Fair Work Act 2009 \(Cth\)](#)
- [Work Health and Safety Act 2011 \(Cth\)](#)



Generally, an employer bound by anti-discrimination laws 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

To minimise the risk of discrimination in recruitment, your organisation should:

1. Prepare a description of the job position before recruiting employees

- Ensure that any specific requirements for the position relate to the skills, experience and qualifications needed for the role and avoid references to personal attributes that a person may or may not have that are irrelevant to the role.

2. When advertising the job position, only include the requirements that relate to the skills, experience and qualifications needed for the role and not the personal attributes of the candidate.

- Consider differentiating between what is 'essential' and 'desirable' criteria (where applicable)
- Remember – the content of a job advertisement may be critical if there is ever an allegation of discrimination. In addition, discriminatory job advertisements may also be unlawful in some jurisdictions.
- Best practice for job advertisements also includes using clear, easy-to-read language, simplifying requirements to respond to any selection criteria, and not requesting unnecessary or irrelevant information from a job applicant in their application.

3. Prepare a list of standard 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 or questions that intrude into irrelevant details about a candidate's personal life or attributes. For example, a potentially discriminatory question would be asking a female-identifying job applicant if they plan to have a baby in the future or if they are currently pregnant.
- Instead, prospective employees should be asked whether they can fulfil the key requirements of the role, noting the skills and experience the role requires and the duties the candidate would be required to conduct if they were employed.

4. Document the recruitment process.

- Take and keep interview notes.
- Document the reasons for choosing the successful candidate. This will help the organisation to ensure (and to prove, if necessary) that it made the decision to hire that person instead of any other candidates for legitimate, non-discriminatory reasons.

5. Adopt similar procedures (as above) for volunteering roles.

- Anti-discrimination laws may also apply to volunteering roles. Adopting a similar process for recruiting volunteers will help to ensure people aren't discriminated against when seeking to volunteer their time for your community organisation.

In certain circumstances, exceptions and exemptions under anti-discrimination law apply so that discrimination in recruitment may be permitted. For example, discrimination might be permitted if:

- the discrimination is due to a genuine inherent requirement of the position, or
- the community organisation has been granted an exemption through the relevant Commonwealth or state or territory anti-discrimination law, which generally requires an application to be made to the relevant anti-discrimination body or tribunal



Examples of discrimination permitted under an exception or exemption might include advertising a role for only a woman, or requiring a candidate to be of a particular race or ethnicity, if your community organisation provides services specifically targeted towards women or people of a particular race or ethnicity.



Note

This area is complex and it's recommended you obtain legal advice before relying on an exception or applying for an exemption.



You can find more information about Commonwealth, state and territory discrimination laws on our [recruitment webpage](#), including our fact sheet '[Discrimination in recruiting employees](#)'.

For more information on how discrimination laws apply in the workplace, see [our guide to workplace behaviour laws](#), which also covers how sexual harassment, bullying and victimisation laws apply in the workplace.



The [Australian Human Rights Commission](#) has published [resources](#) to help organisations understand and comply with anti-discrimination laws including a '[Step-by-step guide to preventing discrimination in recruitment](#)'.

Australian Consumer Law

To ensure that you don't breach your legal obligations under the Australian Consumer Law, you must be truthful throughout the recruitment process and not mislead or deceive candidates about matters such as:

- the terms and conditions of employment, such as the salary on offer
- the availability of work
- the work conditions and nature of work
- key duties
- future employment prospects
- the recruitment process you will undertake
- any other matter relating to the employment

If you are unclear, untruthful or misleading about matters connected with the employment opportunity during any part of the recruitment process, it could pose significant risks to your organisation, including financial penalties for breaching the Australian Consumer Law.



For more information about the how the Australian Consumer Law might apply to your organisation, see our guide '[The laws of advertising and your community organisation](#)'.



See the Australian Competition and Consumer Commission's [guide 'Misleading job and business opportunity adverts: how to handle them'](#).

The guide aims to stop the publishing of misleading job and business opportunity advertisements and provides examples of advertisements that would be in breach of Australian Consumer Law.

Screening checks for potential candidates

When your organisation is recruiting, you may need to conduct appropriate screening checks for potential candidates. The level of screening required will depend on the role and its context.

You may have legal obligations to conduct certain types of checks before you offer employment. For example:

- **working with children checks** – these are generally required where an employee engages in 'child-related work' (these checks are governed by specific legislation in each state and territory)
- **police checks** – these are generally discretionary but may be required in specific settings or under contractual agreements (for example, under funding contracts) ((noting that, in some states and territories, it is unlawful for an employer to discriminate against a person based on an 'irrelevant criminal record'), and
- **verification of entitlement to work in Australia** - for more information on appropriate pre-employment screening for visa work entitlement verification purposes, see the [Department of Home Affairs webpage 'Hiring someone in Australia'](#)

In some states and territories, employers may be able to request information regarding a prospective employee's fitness for work. This area is complex and it's recommended that you obtain legal advice before requesting this kind of information from a prospective employee.

You may also choose to conduct additional checks, such as reference checks. If you conduct Google searches or social media searches, be careful what you do with the information you obtain and how it may influence your decision.



Caution

There are number of risks raised by using information from personal social media sites. For more information, see our [social media guide](#).



For more information about screening checks, see our [webpage on background checks](#).

Privacy laws

Typically, during the recruitment process, an organisation will gain access to personal information about potential candidates. In this situation, privacy laws might apply and govern the way your organisation should manage that information.

Even if privacy laws don't apply to your organisation, the ways your organisation uses, stores and discloses that information might impact your reputation. It's therefore worth considering the best way to approach information that might be private or sensitive.



If an applicant has applied for a role and is unsuccessful, but you wish to keep their details on file in case an alternate role arises in the future or if you otherwise want to be able to update them about your organisation, you should let the applicant know and seek their consent before you do this.

You should also be careful to only collect personal information about a candidate that is reasonably necessary to evaluate the candidate's suitability for the role as part of the recruitment process.

If an applicant is offered and accepts employment, their employee records will largely be exempt from privacy obligations. However, this information should still be handled with care and sensitivity.

It is important to have a clear and up-to-date privacy policy and privacy notice about the collection and management of personal information. The policy should cover:

- the kinds of personal information your not-for-profit organisation collects and holds
- how the organisation collects and holds personal information
- the purpose for which the organisation collects, holds, uses and discloses personal information
- how an individual may access their personal information held by the organisation and correct that information
- how an individual may complain about a breach of any Australian Privacy Principles, and how a complaint will be dealt with
- whether the organisation is likely to disclose personal information to overseas recipients and if so, the countries in which those recipients are likely to be located
- how the information is kept secure, and
- how the information is corrected or disposed of

If your organisation is covered by the Commonwealth privacy laws, having a privacy policy is mandatory. Organisations not bound by the privacy laws are still encouraged to implement a privacy policy as good practice.

Organisations entering into contracts with state or territory government agencies may also be required to comply with state or territory-based privacy laws.



For more information about privacy laws and how they might apply to your organisation, see our [privacy laws webpage](#). Make sure you have read and understood your privacy obligations before collecting, keeping or deleting any personal information. If you are unsure about your obligations under privacy laws, we recommend seeking legal advice.

Requirement to give information statement

Under the Fair Work Act, an employer must give each new employee a Fair Work Information Statement (and, if applicable, a Casual Employment Information Statement or Fixed Term Contract Information Statement) before or as soon as practicable after the employee starts employment.



For more information, see [our webpage on the fair work system](#) which includes a [fact sheet on employee entitlements and protections](#).