

# Discrimination in recruiting employees

## Legal information for Australian not-for-profit organisations

### This fact sheet covers:

- ▶ what is discrimination?
- ▶ do the anti-discrimination laws apply to your organisation?
- ▶ when is discrimination lawful?
- ▶ best practice tips to avoid complaints of discrimination
- ▶ complaint processes



**Issues of discrimination can arise when recruiting employees. It's important to understand these issues and how to avoid them during the recruitment process.**

The information in this fact sheet will help you understand discrimination law as it applies to community organisations in all Australian states.



### Disclaimer

This fact sheet provides information on discrimination in employment. 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.

## What is discrimination?

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

A person (including an employee or prospective employee) can be discriminated against on the basis that they:

- have a particular attribute
- had at any one time a particular attribute, or
- have a characteristic that a person with that attribute generally has, is imputed to have, or presumed to have had at any time

Discrimination based on an attribute can be direct or indirect.

**Direct discrimination** occurs where a person treats, or proposes to treat a person with a particular attribute unfavourably because of that attribute.



**Indirect discrimination** occurs where an unreasonable condition is imposed, or proposed to be imposed, that places a person or a group with an attribute at a disadvantage.

#### Personal attributes that are grounds for unlawful discrimination include:

- accommodation status (ACT and NT only)
- age
- breastfeeding (in SA this extends to bottle feeding and/or being accompanied by a child)
- disability (physical or mental) – or having a carer, assistant, assistance animal or disability aid
- employment activity (Victoria only)
- employment in sex work or engaging in sex work, including past employment in sex work or engagement in sex work (NT only)
- employment status (ACT and NT only)
- expunged homosexual conviction (Victoria only)
- gender identity (in ACT this includes a record of a person's sex having been altered under the relevant law)
- genetic information (ACT only)
- HIV/hepatitis status (NT only)
- identity of a spouse or domestic partner (SA only)
- intersex status
- immigration status (ACT only)
- industrial activity (ACT, Tasmania and Victoria only)
- irrelevant criminal record
- irrelevant medical records
- language, including sign language (NT only)
- marital or relationship status
- parental status or status as a carer, family or carer responsibilities (and in ACT this is extended to kinship responsibilities)
- physical features (ACT and Victoria only)
- political opinion
- pregnancy or potential pregnancy
- profession, trade or occupation (Victoria and ACT only)
- publication of details under s66M of the *Fines and Penalties (Recovery) Act 2001* (NT only) or the Fines Enforcement Registrar's website (WA only)
- religion (including belief or activity)
- religious appearance or dress (SA only)
- race (including colour, descent, nationality, ethnic or national origin or immigrant status) in some circumstances, including in the area of employment
- sex
- sex characteristics (Victoria and ACT only)
- sexual orientation
- social origin
- spent conviction (Victoria only)
- subjection to family and domestic violence
- trade union activity
- lawful sexual activity (Victoria, Queensland and Tasmania only), or
- personal association with someone who has, or is assumed to have, any of the above attributes



In practice, discrimination in offering employment could occur:

- 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

## Do the anti-discrimination laws apply to your organisation?

Generally, yes. As an employer, anti-discrimination laws will apply to your organisation, but you may need more information about what they mean and how they apply. You may need to seek legal advice.

Anti-discrimination laws exist at both a federal and state/territory level.

### The following federal (Commonwealth) legislation includes anti-discrimination provisions:

- [Racial Discrimination Act 1975 \(Cth\)](#)
- [Sex Discrimination Act 1984 \(Cth\)](#)
- [Disability Discrimination Act 1992 \(Cth\)](#)
- [Age Discrimination Act 2004 \(Cth\)](#)
- [Fair Work Act 2009 \(Cth\)](#)
- [Australian Human Rights Commission Act 1986 \(Cth\)](#) (and the [Australian Human Rights Commission Regulations 2019 \(Cth\)](#) expand the discrimination attributes)

The [Australian Human Rights Commission](#) (established under the [Australian Human Rights Commission Act 1986 \(Cth\)](#)) is an independent third party which investigates complaints about discrimination and human rights breaches.

The Human Rights Commission is able to inquire into any complaints or conciliate complaints where a person alleges that someone has acted in a way that is inconsistent with federal or state discrimination law. There is now a positive duty in relation to preventing sex discrimination at the federal level. The Australian Human Rights Commission has additional powers in relation to this duty, including the power to inquire into an organisation's compliance even if a complaint has not been made.

Potential employees can also make complaints of discrimination to the Fair Work Commission under the [Fair Work Act 2009 \(Cth\)](#).

Each state and territory has its own anti-discrimination laws. All these Acts contain specific provisions relating to discrimination that occurs during employment and the offering of employment. There are also state specific avenues to pursue discrimination claims (see 'Complaints process' below).

State or territory	Relevant laws
New South Wales	<ul style="list-style-type: none"> <li>• <a href="#">Anti-Discrimination Act 1977 (NSW)</a></li> </ul>
Victoria	<ul style="list-style-type: none"> <li>• <a href="#">Equal Opportunity Act 2010 (Vic)</a></li> <li>• <a href="#">Racial and Religious Tolerance Act 2001 (Vic)</a></li> </ul>
South Australia	<ul style="list-style-type: none"> <li>• <a href="#">Equal Opportunity Act 1984 (SA)</a></li> <li>• <a href="#">Racial Vilification Act 1996 (SA)</a></li> <li>• <a href="#">Civil Liability Act 1936 (SA)</a> – certain provisions cover racial victimisation</li> <li>• <a href="#">Public Interest Disclosure Act 2018 (SA)</a></li> </ul>
Queensland	<ul style="list-style-type: none"> <li>• <a href="#">Anti-Discrimination Act 1991 (Qld)</a></li> </ul>



<b>Tasmania</b>	<ul style="list-style-type: none"> <li>• <a href="#"><i>Anti-Discrimination Act 1998 (Tas)</i></a></li> </ul>
<b>Western Australia</b>	<ul style="list-style-type: none"> <li>• <a href="#"><i>Equal Opportunity Act 1984 (WA)</i></a></li> <li>• <a href="#"><i>Spent Convictions Act 1988 (WA)</i></a></li> </ul>
<b>Australian Capital Territory</b>	<ul style="list-style-type: none"> <li>• <a href="#"><i>Discrimination Act 1991 (ACT)</i></a></li> <li>• <a href="#"><i>Human Rights Commission Act 2005 (ACT)</i></a></li> </ul>
<b>Northern Territory</b>	<ul style="list-style-type: none"> <li>• <a href="#"><i>Anti-Discrimination Act 1992 (NT)</i></a></li> </ul>



For further information, go to the [Australian Human Rights Commission's website](#).

The Australian Human Rights Commission has also published '[A quick guide to Australian discrimination laws](#)'

## When is discrimination lawful?

Discrimination in employment can be lawful (depending on the jurisdiction), for example if:

- someone with a disability can't meet the inherent requirements of a particular position, even if reasonable adjustments were made
- the work involves artistic performance, entertainment, photographic or modelling work or any other similar employment, and the employer discriminates on the basis of physical appearance
- the discrimination is reasonably necessary to protect health or safety (for example, hiring people of a particular age to perform a role such as someone over 18 to work in a childcare centre)
- it is a genuine occupational requirement that an employee is of a particular sex (for example, to preserve decency or privacy because the job involves the person entering areas ordinarily used only by people of that sex while those people are undressed), or
- it is positive discrimination based on, among other things, race, disability or age (for example, older people are often more disadvantaged by redundancy, so providing additional notice entitlements for older workers).

Organisations can apply for an **exemption** from discrimination law:

### Jurisdiction – Commonwealth

An organisation can apply to the [Australian Human Rights Commission](#) for an exemption of up to five years under the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth) or the *Sex Discrimination Act 1984* (Cth).

Each Act has its own criteria guidelines, available on the [Australian Human Rights Commission website](#).

### Jurisdiction – New South Wales

An organisation can apply to the [NSW Anti-Discrimination Board](#) for an exemption of no more than 10 years.

The Board will consider:

- whether the exemption is appropriate or reasonable
- whether the exemption is necessary



- whether there are any non-discriminatory ways of achieving the objects or purposes for which the proposed exemption is sought
- whether reasonable steps have been taken to avoid or reduce the adverse effect of a particular act or action before seeking the exemption
- the public, business, social or other community impact of the granting of the proposed exemption
- any conditions or limitations to be contained in the proposed exemption.

### Jurisdiction – Victoria

An organisation can apply to the Victorian Civil and Administrative Tribunal (VCAT) for an exemption of no more than five years.

The applicant must provide a copy of the application the Victorian Equal Opportunity and Human Rights Commission.

In deciding whether to grant, renew or revoke an exemption, VCAT must consider whether the proposed exemption is unnecessary:

- due to an existing exception or exemption
- because the conduct would not be discriminatory
- because the exemption is a reasonable limitation on the rights set out in the Charter of Human Rights and Responsibilities, and
- all other circumstances of the case

See VCAT's website for more information about applying for an exemption.

### Jurisdiction – South Australia

An organisation can apply to the South Australian Civil and Administrative Tribunal for an exemption of not more than three years.

The Tribunal may consider allowing certain discriminatory conduct on the basis of redressing the effects of past discrimination, and other factors.

### Jurisdiction – Queensland

An organisation can apply to the:

- Queensland Industrial Relations Commission for work-related exemption, and
- Queensland Civil and Administrative Tribunal for all other exemptions,

for an exemption of not more than five years.

The *Anti-Discrimination Act 1991* (Qld) doesn't specify particular matters the Tribunal or Commission must consider. The Anti-Discrimination Commissioner must be provided with a copy of the application and is entitled to make submissions on the application. The Tribunal must have regard to any submission made by the Commissioner.

### Jurisdiction – Tasmania

An organisation can apply to Equal Opportunity Tasmania (the office of the Anti-Discrimination Commissioner) for an exemption of not more than three years.

The Commissioner may have regard to allowing certain discriminatory conduct on the basis of redressing the effects of past discrimination, and other factors.

### Jurisdiction – Western Australia



An organisation can apply to the [State Administrative Tribunal](#) for an exemption of not more than five years. The *Equal Opportunity Act 1984* (WA) doesn't specify particular matters the Tribunal may consider.

### Jurisdiction – Australian Capital Territory

An organisation can apply to the [ACT Human Rights Commission](#) for an exemption of not more than three years.

The Commission must have regard to the need to promote an acceptance and compliance with the *Anti-Discrimination Act 1992*, and allowing certain discriminatory conduct on the basis of redressing the effects of past discrimination.

### Jurisdiction – Northern Territory

An organisation can apply to the [Northern Territory Anti-Discrimination Commissioner](#) for an exemption of not more than three years.

The Commissioner may have regard to the desirability of certain discriminatory conduct being permitted to redress the effect of past discrimination, and any other relevant factors.



### Example

An Aboriginal theatre company in Victoria would like to advertise the position of its Artistic Director as only available to people with an Indigenous background. The 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 theatre company should highlight the aspects of the role that will necessitate applicants with Indigenous backgrounds. This is because 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 for an exemption under the *Equal Opportunity Act 2010* (Vic). For any other type of role (unless it is also necessary for authenticity or credibility), or just to be certain, the organisation may wish to apply for an exemption under the *Equal Opportunity Act*.



### Example

Women's Aid in Victoria is an organisation that provides assistance to homeless women. It wishes to recruit only female employees. It may be able to do this if the positions it is recruiting for have a genuine occupational requirement for the role 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's necessary for the advancement of the women receiving care.

To be certain, the organisation may also wish to apply for an exemption under the *Equal Opportunity Act 2010* (Vic).



# Best practice tips – avoid complaints of discrimination in employment or offering employment

## Minimise the risk of complaints of discrimination

- **Accurate position descriptions** – Before recruiting employees, ensure the position description focuses on the specific requirements for the position.
- **Accurate advertising** – When advertising a position, ensure the advertisement focuses on the skills and qualifications needed for a role and not the personal attributes of the candidate.
- **Accurate questioning** – When interviewing candidates, don't ask questions of a personal nature that are unrelated to the skills needed to perform the role. For example, a potentially discriminatory question would be to ask a woman if she planned to have a baby in the future.
- **Document the recruitment process** – Take and keep interview notes, and document the reasons for choosing the successful candidate. This will help the organisation prove, if necessary, that it made the decision for a non-discriminatory reason.

## The importance of workplace policies and procedures

At a Federal level, employers have a positive duty to take 'reasonable and proportionate' measures to eliminate sex discrimination, sexual harassment, a hostile workplace environment and victimisation.

In Victoria, an employer has an obligation to take 'reasonable and proportionate' measures to eliminate all types of discrimination (not just sex discrimination), as well as sexual harassment and victimisation, as far as possible. This is the same in the Northern Territory, although that obligation is 'to the greatest extent possible'. The remaining state laws don't have a positive obligation in their Acts, however, it's recommended you take measures to avoid your organisation finding itself with a complaint.

'Reasonable and proportionate' measures to eliminate discrimination include (but are not limited to):

- introducing policies aimed at preventing discrimination and harassment, and
- creating a discrimination complaint procedure and addressing, in a timely manner, any complaints made

These policies should be reviewed regularly, with workers trained in the requirements of the policy and how it applies to them.

Whether an employer has taken 'reasonable and proportionate' measures to eliminate discrimination will be assessed, based on a number of factors including:

- the size, nature and circumstances of the organisation or business
- their resources, financial or otherwise
- the nature of the business and its operational priorities, and
- the practicality and costs of the measures in question



See the [Victorian Equal Opportunity and Human Rights Commission website](#), which sets out that these four factors must be considered to determine whether measures taken to eliminate discrimination, sexual harassment or victimisation as far as possible are reasonable and proportionate. This website also contains guidance on how employers can meet the positive duty.

See also the [Australian Human Rights Commission website](#) for further guidance on how to comply with the positive duty under federal law.



## Example

An example is provided in the Victorian legislation – a small, not-for-profit community organisation takes steps to ensure 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.

# Complaint process

## Internal complaints process

If the complainant is an employee or potential employee, 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.

It's advisable to include potential employees in your complaints policy, so that you can deal with complaints internally – allowing you to reflect on and improve your processes while minimising the risk of an external complaint (and the associated costs and consequences for the organisation). A policy outlining this process is a good idea, and should be made available to all workers (and any potential employees who make a complaint).

## External complaints process

Most states and territories require that a complaint go through the relevant commission or board first, where conciliation will be facilitated.

The avenues for making a complaint in each jurisdiction are set out in the table below. Time limitations for lodging complaints depend on the jurisdiction.

### Jurisdiction – Commonwealth

**First instance** – If a potential employee has a complaint about discrimination based on age, sex, disability or race they can make a complaint to the [Australian Human Rights Commission](#). The Commission may investigate the complaint, direct the parties to take part in conciliation or terminate the complaint.

The same first instance process applies for complaints about discrimination in employment based on certain other attributes such as religion, irrelevant criminal record, trade union activity, political opinion and social origin.

The Fair Work Commission can also receive claims about discrimination due to various attributes.

**Taking it further** – If the complaint about discrimination based on age, sex, disability or race is not resolved through conciliation (or is terminated before conciliation), the employee can make an application to the Federal Court of Australia or the Federal Circuit and Family Court of Australia.

If the complaint is about discrimination in employment based on other reasons and is not resolved through conciliation, the President of the Commission will decide if discrimination has occurred and may report the matter to the federal Attorney-General who can make recommendations for compensation.

### Jurisdiction – New South Wales

**First instance** – [Anti-Discrimination New South Wales](#) (the **Board**) provides a free service to help people resolve complaints of discrimination. Those involved in the alleged discrimination are able to discuss the issues with the Board who will investigate complaints and attempt to resolve the dispute among the parties, including by conciliation. The Board may decline the complaint in certain circumstances.

**Taking it further** – If a complaint can't be resolved by the Board (or is declined), the Board may transfer the complaint to the [New South Wales Civil and Administrative Tribunal](#) to have the matter listed for hearing.



Individual people can't bring complaints directly to the Tribunal. However, where the Tribunal refuses to investigate a person's complaint, the person may require the Board to escalate their complaint to the Tribunal.

If a settlement agreement has been reached at the Board level and is registered with the Tribunal, the matter can't be reopened by making an application to the Tribunal.

### Jurisdiction – Victoria

**First instance** – The [Victorian Equal Opportunity and Human Rights 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 among the parties. The conciliation process is voluntary. The Commission may decline to provide dispute resolution in certain circumstances. The Commission may conduct an investigation if the complaint raises a serious issue and relates to a class or group of people.

A complainant can also make an application at first instance to the Victorian Civil and Administrative Tribunal (**VCAT**). There is no need to first go through the Commission process.

**Taking it further** – If a complaint first brings the matter to the Commission and it can't be resolved at conciliation, the complainant may make an application to VCAT to have the matter listed for hearing.

### Jurisdiction – South Australia

**First instance** – A complaint may be made to the [Equal Opportunity Commission \(SA\)](#) about discrimination or harassment. The Commission may investigate the complaint, direct the parties to take part in conciliation, or both. The Commission can also dismiss the complaint.

If you have experienced racial vilification that is unlawful under the *Racial Vilification Act 1996 (SA)*, you can report it to the police or sue for damages under the *Civil Liability Act 1936 (SA)*.

The *Public Interest Disclosure Act 2018 (SA)* protects people who reveal information that is important for the public to know. If you have been discriminated against or victimised due to sharing information with the public, you can lodge a complaint with the Commission.

**Taking it further** – If the Commission believes the complaint (of discrimination or harassment) can't be resolved by conciliation, or there has been an unsuccessful conciliation attempt, or they otherwise have the opinion that the matter should be transferred, they may refer the complaint to the [South Australian Civil and Administrative Tribunal](#).

**Note** – while most matters will be referred to the South Australian Civil and Administrative Tribunal, matters may also be referred to the [South Australian Employment Tribunal](#) if the Commissioner deems this tribunal more appropriate.

Complaints must go through the Commission first. If the Commission dismisses a complaint because it is frivolous, vexatious, misconceived or lacking in substance, the complainant can request that it be taken to the Civil and Administrative Tribunal.

### Jurisdiction – Queensland

**First instance** – The [Queensland Human Rights 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 among the parties, including through investigation or conciliation. The Commission can direct parties to attend conciliation, and can dismiss complaints.

**Taking it further** – If the complaint can't be resolved through the Commission's conciliation process, the complainant may require the Commission to refer the complaint to the [Queensland Industrial Relations Commission](#) (work related complaints) or the [Queensland Civil and Administrative Tribunal](#) (all other complaints) to have the matter listed for hearing.

Individual people can't bring complaints directly to either tribunal.



### Jurisdiction – Tasmania

**First instance** – A complaint may be made to [Equal Opportunity Tasmania](#) about discrimination or prohibited conduct.

The Commissioner may investigate the complaint, or direct the parties to take part in conciliation. The Commissioner may also reject the complaint.

**Taking it further** – If the Commissioner believes the complaint can't be resolved by conciliation, or there has been an unsuccessful conciliation attempt, or they otherwise believe that it should be referred for inquiry, they may refer the complaint to the [Tasmanian Civil & Administrative Tribunal](#) for it to hold an inquiry.

A complainant whose complaint is dismissed by the Commissioner may apply to the Tribunal for the dismissal to be reviewed.

### Jurisdiction – Western Australia

**First instance** – A complaint may be made to the [Commissioner for Equal Opportunity](#) about discrimination or prohibited conduct.

The Commissioner shall investigate the complaint. As part of the investigation, they may direct the parties to take part in conciliation. The Commissioner may dismiss a complaint at any stage of an investigation.

**Taking it further** – If the Commissioner believes the complaint can't be resolved by conciliation, or there has been an unsuccessful conciliation attempt, or they otherwise believe that it should be referred, they may refer the complaint to the [State Administrative Tribunal](#) for it to hold an inquiry.

The complainant can require the Commissioner to refer a complaint to the Tribunal if the Commissioner dismisses the complaint.

### Jurisdiction – Australian Capital Territory

**First instance** – A complaint may be made to the [Human Rights Commissioner](#) about discrimination or prohibited conduct.

The Commissioner may consider the complaint (including by requiring people to produce documents, information etc.), direct the parties to take part in conciliation, or both.

**Taking it further** – If the complaint can't be resolved by conciliation or the Commissioner decides not to refer the complaint for conciliation, the complainant can require the matter be referred by the Commissioner to the [ACT Civil and Administrative Tribunal](#).

Individual people can't bring complaints directly to the Tribunal.

### Jurisdiction – Northern Territory

**First instance** – A complaint may be made to the [Northern Territory Anti-Discrimination Commission](#) about discrimination or prohibited conduct.

The Commissioner may accept or decline the complaint. If accepted, the Commissioner may direct the parties to complete compulsory conciliation.

**Taking it further** – If the matter is not resolved by conciliation, the complainant can elect to continue to the next stage, the evaluation process. The Commissioner will decide if there is merit to the case, and if so, will refer the matter to the [Northern Territory Civil and Administrative Tribunal](#).

If the Commissioner declines to refer the matter, the complainant can apply directly to the Tribunal.