

What are your 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:

- state and federal 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 can 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

Bradly, discrimination occurs when a person, or a group of people, is treated less favourably than another person or group because of their background or certain personal characteristics (or attributes).

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 or marital status and breastfeeding
- age
- disability, or
- sexual orientation, gender identity and intersex status

This fact sheet focuses on anti-discrimination laws at the Commonwealth level.

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:

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



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



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](#)'.



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 and experience needed for the role and avoid references to personal attributes that a person may or may not have.
2. 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. In addition, discriminatory job applications are also unlawful in some jurisdictions.
3. 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 or questions that intrude into irrelevant details about a candidate's personal life. For example, a potentially discriminatory question would be asking a woman if she planned to have a baby in the future.
 - 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, 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.
5. Adopt similar procedures for volunteering roles.
 - Adopting a similar process for volunteers ensures people aren't discriminated against when seeking to volunteer their time for your community organisation.

Discrimination in recruitment (for example, advertising a role for only a woman, or requiring a candidate to be of a particular race or ethnicity), may be permitted in certain circumstances, for example, if:

- this is due to an inherent requirement of the position, or
- the community organisation has an exemption through the relevant Commonwealth or state anti-discrimination law

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



For more information about discrimination and recruitment, see our fact sheet '[Discrimination in recruiting employees](#)'.



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:

- 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
- other important details relating to the employment opportunity; or
- the recruitment process you will undertake

If you are unclear, untruthful or misleading about any of these matters during any part of the recruitment process, this could pose significant risks to your organisation, including facing financial penalties by 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)
- **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.

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 influences 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.

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's important to have a privacy policy that covers:

- the types of information your not-for-profit organisation collects about job applicants and employees
- how this information is used or disclosed, including any third parties it may be shared with
- 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. If you are not bound by the privacy laws, having a policy is good practice. If your organisation enters into contracts with State or Territory government agencies, you 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 webpage](#).