

Volunteer recruitment: discrimination, induction and spontaneous volunteers

Legal information for New South Wales community organisations

This fact sheet covers:

- ▶ discrimination in the recruitment process
- ▶ induction and training of volunteers, and
- ▶ spontaneous volunteers.

It is important to make sure that the recruitment, induction and training of volunteers is thorough and consistent.

Volunteers are essential to the success of community organisations. Your organisation should recruit its volunteers in a fair and non-discriminatory way and implement a well planned and relevant induction and training plan, so that your volunteers can perform the role expected of them competently and safely.

1. Recruitment of volunteers and discrimination

Discrimination may occur in the recruitment process and the law protects workers, which may include volunteers, in a number of ways. We recommend that your organisation has a policy against discrimination across the whole organisation, in both an employment and volunteering context.

Not only is it favourable to those working in your organisation, it will also help prevent bad publicity and reputational damage that may arise from a complaint of discrimination.

Your organisation should proactively work to prevent discrimination by taking steps such as:

- having an anti-discrimination policy, with a section on discrimination in recruitment of both employees and volunteers
- conducting regular training for both volunteers and employees in relation to this policy so that people recognise discriminatory practices
- turning your mind to the language you use in the volunteer recruitment process
- preparing a volunteer description that focuses on the skills required for the role rather than the personal attributes that may be desirable, and
- using the same language in the role description across advertisements and in the interview process (see the Sample Volunteer Role Description on Not-for-profit Law's Information Hub at www.nfplaw.org.au/volunteers).

TIP

Ask all volunteer candidates the same questions and record their responses in writing. This will not only be helpful to compare candidates but also to refer back to in the event of an allegation of discrimination.

✗ Avoid focusing on personal attributes	✓ Focus on the skills and requirements of the role
Do you have kids? We really need someone reliable.	Are you able to commit to volunteering regularly between 9am and 3pm on Tuesdays?
You look a bit old – are you really going to be able to lift boxes of donated goods?	This job requires lifting. Is there anything that will prevent you from being able to perform such duties?
Do you have a disability?	Would you require any support that would assist in performing this role?
We weren't expecting a female volunteer to apply for the driving role. How many crashes have you had?	Are you able to provide evidence of a safe driving history?

EXAMPLE



In the case of *Smith v Commonwealth of Australia* (2000) EOC 93-077, Ms Smith lodged a complaint with the Human Rights and Equal Opportunity Commission (**Commission**) alleging she had been discriminated against on the grounds of her sex, marital status and pregnancy. Ms Smith had applied for a position as a part-time director on the board of the Red Meat Producer Corporation.

During the interview process, Ms Smith made the shortlist out of 30 applicants, but her application was ultimately unsuccessful. She claimed that interview panel members asked her if she was married and if she had children. When she stated that she was married with children, the interviewing panel suggested to her that the role may conflict with her family commitments as it involved a lot of travel.

Ms Smith claimed the personal and family life questions caused her to feel uncomfortable, affected her confidence and made it hard for her stay focussed on industry issues. At the time of the interview, Ms Smith was seven months pregnant, however she did not mention this in the interview.

The Red Meat Producer Corporation claimed that Ms Smith's application was unsuccessful because there were already five people on the board from NSW, Ms Smith was less experienced than other applicants and her reference checks had not turned out well. Witnesses acknowledged that Ms Smith had been asked questions about marriage and children during the interview and that she appeared uncomfortable with these questions. However, the interview panel agreed to not take them into account.

The Commissioner found that Ms Smith had not been treated less favourably on the grounds of her sex or marital status. In fact, Ms Smith had been able to move up into the top group of applicants following the interview. However, the Commissioner found that the asking of the interview questions was, in itself, a breach of section 14(1)(b) of the *Sex Discrimination Act 1984* (Cth) as it constituted less favourable treatment of Ms Smith, placed her under greater stress and made her feel uncomfortable. The complainant was awarded \$2500 in damages.

When might discrimination be lawful in recruitment?

Generally, discriminatory conduct will not be against the law if:

- it is necessary to protect the health and safety of any person, including the person being discriminated against (where discrimination is on the basis of disability, pregnancy or physical features)
- it is necessary to protect property (where discrimination is on the basis of disability or physical feature)
- the person is unable to carry out the 'inherent requirements' (essential duties) of the role (and taking steps to accommodate the person would cause 'unjustifiable hardship' on the organisation)

- the role or service is targeted towards people of one sex only, towards a particular age group or towards a particular race or ethnic group, where being that particular sex, within that particular age group or of the race or ethnic group is a 'genuine occupational qualification' essential for doing the role
- the role or service is targeted towards all people with disabilities, all people who are transgender and all gay men and lesbians – it is not against the law to discriminate against people who don't have disabilities, are not transgender and not homosexual (only those that are)
- the role or service is targeted towards people who are married if you would like the role to be done by a married couple
- it is a special (or positive) measure being taken to promote substantive equality for a group of people who have one or more of the protected attributes
- a religious body or organisation discriminates in:
 - ordaining or appointing priests, ministers of religion or members of a religious order (or training or educating those people seeking appointment), or
 - selecting or appointing people to perform functions relating to, or participating in, any religious observance or practice, or
- your organisation has obtained an exemption from the President of the NSW Anti-Discrimination Board to allow discrimination on any ground and in any area covered by NSW anti-discrimination laws.

TIP

In the case of a 'genuine occupational requirement', the NSW Anti-Discrimination Commissioner states your advertisement should say:
"The organisation considers being a woman/man is a genuine occupational qualification for this position under s 31 of the Anti-Discrimination Act 1977 (NSW)"

You may adapt this statement for race or age, but only if it genuinely applies.

EXAMPLES

Protecting health & safety

An elderly person applies for a position in an organisation. The role requires some lifting of heavy items and packing of shelves. The organisation is not comfortable with hiring this person as she is clearly frail and unstable on her feet and it believes she will likely be injured performing the duties. This discriminatory conduct appears to be necessary to protect the health and safety of the elderly person, other workers and potential visitors and therefore would not be against the law. If the person objects, your organisation could ask the person to provide an independent medical report or other evidence that the person is in fact fit to undertake the role.

Increasing employment opportunities for Indigenous Australians

An organisation chooses to target Indigenous people in their recruitment strategy and encourage them to apply for roles within the organisation, as a part of its broader Reconciliation Action Plan – a policy document that outlines practical action that an organisation can take to build strong relationships and enhance respect between Aboriginal and Torres Strait Islander peoples and other Australians. The organisation is hoping to assist in reducing unemployment amongst this racial group. This could be considered a special measure that is lawful under anti-discrimination laws.

NOTE



The list of lawful discrimination above is not exhaustive, and there may be other situations in which discrimination is lawful under specific Federal legislation. Organisations should be careful relying on exceptions and may need to seek legal advice. For more information, see the Australian Human Rights Commission website at www.humanrights.gov.au or the NSW Ant-Discrimination Board at www.antidiscrimination.justice.nsw.gov.au.

FURTHER READING



For more information about discrimination, read Not-for-profit Law's fact sheet on Volunteers and unlawful workplace behaviour on the Information Hub at www.nfplaw.org.au/volunteers.

Volunteer screening

Before engaging a volunteer it is important to undertake the background checks required by law, as well as to consider other appropriate background screening checks to manage risk and ensure the safety of people working at and engaging with your organisation, such as:

- Working with Children Checks (**WWC Check**) – mandatory under legislation for all workers of New South Wales organisations, including volunteers, who undertake 'child-related' work to have a WWC Check (unless an 'exemption' applies)
- Police Checks – generally not mandatory for workers, including volunteers, in your organisation but may be required under legislation applying to specific sectors and professions or under a contractual agreement with another entity (ie. funding agreement), and
- other qualification, reference checks, ID checks and Google searches – generally not mandatory, however may be required under legislation applying to specific sectors and professions or again, under a contractual agreement.

CAUTION



If you decide that applicants are required to undergo a police check prior to recruitment, you must not refuse an applicant simply because he or she has a prior conviction revealed for an offence that has no relevance to the available position. There are legal protections against discrimination on the basis of criminal record.

However, your organisation has obligations to create a safe and effective environment, and you can refuse an applicant on the basis of a criminal past when you believe that the prior offence prevents the applicant from performing the inherent requirements of the position (as discussed above). So a person with reckless driving offences may not be appropriate to undertake a volunteer role that involves driving clients, and a person with a history of petty theft may not be an appropriate person to volunteer in a role handling cash. But that does not mean that people with criminal offences cannot volunteer at all – the role should be appropriate based on their background.

The Australian Human Rights Commission has published detailed [Guidelines for the prevention of discrimination in employment on the basis of criminal record](#). The Guidelines provide information and practical guidance about how to avoid criminal record discrimination that we consider, as a matter of best practice, ought to be applied to both your employees and volunteers.

CASE EXAMPLE 1 – Mr Hall & NSW Thoroughbred Racing Board



For several years, Mark Hall had been employed as a stablehand for Gai Waterhouse Racing Stables in NSW. Mr Hall's employment was conditional upon being granted a stablehand licence by the NSW Thoroughbred Racing Board (**the Board**).

Mr Hall lodged a complaint with the Human Rights and Equal Opportunity Commission (**Commission**) (under the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)* (**HREOC Act**)) alleging discrimination in his employment and occupation on the ground of his criminal record.

Mr Hall alleged that the Board had prevented him from working with Gai Waterhouse Racing Stables and had refused to issue him with a stablehand licence due to his criminal record. Mr Hall's convictions included low range PCA (drink driving), a cancelled driver's licence and wilful and obscene exposure. The Board questioned Mr Hall about his criminal record, the circumstances in which the offences were committed and why he had not informed Mrs Waterhouse of his record. It also sought further information from the NSW Police relating to the wilful and indecent exposure offence.

The Board claimed that its decision was not on the basis of Mr Hall's criminal record, but on other grounds, in particular Mr Hall's failure to disclose his criminal record. In the alternative, the Board argued an exception applied (the discrimination was necessary as Mr Hall was unable to carry out the 'inherent requirements' of the job).

The Commission found that Mr Hall had been discriminated against on the ground of his criminal record and that the inherent requirements exception did not apply. The Board was ordered to pay Mr Hall \$33,303.05 (plus interest) and to conduct a review of its processes regarding the use of criminal records, including the development of clear written guidelines regarding the procedures of the Board for the use of criminal records, which reflect the definition of discrimination under the HREOC Act.

CASE EXAMPLE 2 – Mr KL & State of NSW (Department of Education)

In 1983, when he was 21 years old, MR KL was convicted of the offence of smoking Indian hemp. In 1986, he was convicted of a number of offences including the possession of illegal drugs (marijuana and amphetamines), illegal use of a motor vehicle, attempting to break, enter and steal, driving in a dangerous manner and resisting arrest.

In 1991, Mr KL was convicted of larceny (shoplifting) and failing to appear. In 1992, Mr KL was convicted of further offences involving taking a prohibited drug, dishonesty and stealing. He had no convictions recorded after 31 March 1992.

In 2003, Mr KL completed a Bachelor of Music Education, and in 2006 completed a Graduate Diploma in Education. Later that year he applied for a position as a secondary teacher with the NSW Department of Education.

The Department conducted a criminal check of Mr KL which revealed his criminal record. The Department advised Mr KL that he would not be offered a position as a teacher based on a review of his application and his record of convictions. The Department argued that it was the inherent requirement of the job of a teacher that the person espouse the highest standards of conduct and integrity, demonstrate a commitment to upholding the standards expected by the community of teachers, and enhance and protect the reputation of the Department as an employer.

The Commission found in favour of Mr KL. It held that the circumstances which had led to Mr KL's past offending no longer existed, he had made changes to his life since then, and had taken steps to become an effective member of the community. It noted that it had been approximately 15 years since Mr KL had offended and it did not accept that Mr KL's criminal record had rendered him incapable forever of fulfilling the inherent requirements of the job of teacher. The Department was ordered to pay Mr KL \$38,500.

If a volunteer has a WWC Check from another state or territory and wants to volunteer in New South Wales, they may also need to obtain a New South Wales WWC Check, depending on the circumstances.

Interstate visitors can engage in child-related work in New South Wales, without a New South Wales WWC Check, for a period of up to 30 days in the same calendar year if one of the following applies:

- if they will volunteer at several events or occasions – they may do so if they have a WWC Check from their state or territory (or are exempt in that jurisdiction), and
- if they will volunteer at only one event or occasion – without a WWC Check from their state or territory.

If members of your organisation are travelling to another state or territory outside of New South Wales and will engage in child-related work, you need to ensure that you comply with the laws of the particular state they visit – which may mean they need to have a valid WWC Check for that state.

Generally, most states will recognise the WWC Check of a worker from another state, if their state or territory is part of the national scheme and they are visiting and working on a short-term basis. However, if your organisation’s employees or volunteers work in multiple jurisdictions on a regular basis, it is likely that they will need a WWC Check for each of those jurisdictions. It is also worth pointing out that the offences considered relevant for the purposes of a WWC Check differ across states and territories. For more information about the schemes in other states and territories, see the NSW Office of the Children’s Guardian website at www.kidsguardian.nsw.gov.au.

RELATED RESOURCES

For more information about volunteer screening, see Not-for-profit Law’s Volunteer screening fact sheet on the Information Hub at www.nfplaw.org.au/volunteers.

Even if not required under legislation or a contract, if volunteers are likely to have contact with children, we strongly recommend that your organisation undertake thorough screening checks.

NOTE

A NSW community organisation may owe its clients or the public a duty of care under the common law (judge made law) of negligence, or under the negligence provisions in the *Civil Liability Act 2002* (NSW). Your community organisation will need to consider your duty of care, and the standard of care you need to meet, when providing services to your clients or the public. In certain circumstances, this may mean ensuring all workers, including volunteers are adequately screened despite there being no requirement under legislation or contract for screening.

For more information on negligence, see Not-for-profit Law’s Negligence fact sheet on the Information Hub at www.nfplaw.org.au/negligence.



2. Induction and training of volunteers

In line with best risk management practices, a volunteer should be inducted into an organisation and provided with copies of all relevant policies and key documents, and other relevant guidance or training in relation to the position.

We suggest completing an induction checklist for each new volunteer. We have included an example below. This is not exhaustive and should be tailored to your particular organisation.

Item	Completed	Follow up required? By when?
Screening (where necessary)	<input type="checkbox"/>	
<ul style="list-style-type: none"> Working with Children Check 	<input type="checkbox"/>	
<ul style="list-style-type: none"> Police Check 	<input type="checkbox"/>	
<ul style="list-style-type: none"> Other vocational checks (amend to reflect position) Check references Google check 	<input type="checkbox"/>	
Volunteer Agreement signed	<input type="checkbox"/>	
Provided background about organisation and the role	<input type="checkbox"/>	
Welcomed and introduced to staff and volunteers	<input type="checkbox"/>	
Work station prepared	<input type="checkbox"/>	
Office facilities tour	<input type="checkbox"/>	
Discussed work premises, facilities and work health and safety (emergency procedures, first aid, safety considerations in the role, reporting health and safety concerns, critical incident policies)	<input type="checkbox"/>	
Provided copy of detailed role description	<input type="checkbox"/>	
Discussed role description, expectations and reporting structure	<input type="checkbox"/>	
Key contact person allocated (to go to with any concerns, feedback or queries about role and duties)	<input type="checkbox"/>	
Policies read, returned and signed by volunteer:	<input type="checkbox"/>	
<ul style="list-style-type: none"> Privacy Policy 	<input type="checkbox"/>	
<ul style="list-style-type: none"> Workplace behaviour policies 	<input type="checkbox"/>	
<ul style="list-style-type: none"> Conflict of Interest Policy 	<input type="checkbox"/>	

Item	Completed	Follow up required? By when?
<ul style="list-style-type: none"> Photo use consent and release form 	<input type="checkbox"/>	
<ul style="list-style-type: none"> Volunteer complaints policy and process 	<input type="checkbox"/>	
<ul style="list-style-type: none"> <i>[Add other key documents, policies and procedures]</i> 	<input type="checkbox"/>	
Conducted training in relation to the role including machinery and equipment use	<input type="checkbox"/>	
Conducted/scheduled training in relation to workplace behaviour policies and risk management	<input type="checkbox"/>	
Discussed insurance coverage as a volunteer (what cover is available under the organisation's insurance)	<input type="checkbox"/>	
Signature of volunteer <hr/>		
Date:		
Signature of volunteer manager <hr/>		
Date:		

RELATED RESOURCES

A Volunteer Agreement can outline the process of screening and induction in further detail. It may also be useful to obtain consent from the volunteer to release to your organisation any photos or footage they take while performing their volunteering role.

Not-for-profit Law has published a Sample Volunteer Agreement and Sample Consent and Release Form on its Information Hub at www.nfplaw.org.au/volunteers.



3. The spontaneous volunteer

Spontaneous offers of assistance and volunteering may arise following an emergency, crisis or an issue receiving significant media coverage. The community response may include donations of goods or money, or offers of assistance through volunteering. Individuals may also offer to volunteer on a one-off basis at an event or for a short period of time when the needs of the organisation are high.

Spontaneous volunteers may create challenges for organisations, especially where organisations are already managing significant workloads due to an emergency or other incident, for example:

- managing the scale of volunteers at any given time and their respective roles
- performing appropriate screening and other background checks in a short time frame

- ensuring volunteers have the skills, training or experience to perform the role, and
- difficulty in administering adequate training, safety procedures, guidance and supervision to manage workplace risks.

TIPS

We recommend that your organisation reviews its insurance policies to ensure that coverage extends to its spontaneous volunteers. For more information about risk management and insurance considerations go to Not-for-profit Law's fact sheet on Safety, risk management and volunteers on the Information Hub at www.nfplaw.org.au/volunteers.

We also recommend that your organisation develop a specific policy on whether or not it will use spontaneous volunteers, and if it is open to using spontaneous volunteers, the policy should cover:

- the circumstances where using spontaneous volunteers would be appropriate
- the minimum induction required for spontaneous volunteers, and
- any special risk management protocols to be followed (for example, ensuring that spontaneous volunteers wear identifying information that distinguishes them from fully inducted regular volunteers, and requiring the spontaneous volunteer to sign a declaration about their fitness to volunteer, and a waiver of liability)

Resources

Related Not-for-profit Law Resources

- ✔ Recruitment www.nfplaw.org.au/recruitment

For more information about discrimination in recruitment, go to our guide on Discrimination in recruitment of volunteers and employees.

- ✔ Volunteers www.nfplaw.org.au/volunteers

The Volunteers page on the Information Hub features further information on specific issues covered in this fact sheet and the laws as they relate to volunteers, including resources on:

- Safety, risk management and volunteers (due to be published in November 2016)
- Volunteer screening
- Engaging and working with youth volunteers (due to be published in November 2016)
- Volunteers and unlawful workplace behaviour (due to be published in November 2016)
- Sample Volunteer Agreement
- Sample Volunteer Consent and Release Form

Legislation

- ✔ [Anti-Discrimination Act 1977 \(NSW\)](#)
- ✔ [Australian Human Rights Commission Act 1986 \(Cth\)](#)
- ✔ [Disability Discrimination Act 1992 \(Cth\)](#)
- ✔ [Racial Discrimination Act 1975 \(Cth\)](#)
- ✔ [Sex Discrimination Act 1984 \(Cth\)](#)
- ✔ [Child Protection \(Working with Children\) Act 2012 \(NSW\)](#)
- ✔ [Child Protection \(Working with Children\) Regulation 2013 \(NSW\)](#)

Cases

- ✔ [Smith v Commonwealth of Australia \(2000\) EOC 93-077](#) (available by subscription on [CCH IntelliConnect](#))
- ✔ [Mr Mark Hall v NSW Thoroughbred Racing Board](#), HREOC Report No. 19
- ✔ [Mr KL v State of NSW \(Department of Education\) \[2010\] AusHRC 42](#)

Other Related Resources

- ✔ NSW Volunteering www.volunteering.nsw.gov.au

NSW Volunteering is part of the NSW Government's Family and Community Services. The website features resources for volunteers, organisations and businesses and information on the NSW Volunteering Strategy.

- ✔ Volunteering Australia www.volunteeringaustralia.org

Volunteering Australia has a resource which provides an overview of background check requirements and the associated costs across the various states and territories.

➤ The Centre for Volunteering www.volunteering.com.au

The state peak body for volunteering provides information on volunteering and volunteer management.

➤ NSW Commission for Children & Young People, Office of the Children's Guardian – Working with Children Checks, www.kidsguardian.nsw.gov.au/working-with-children/working-with-children-check

The Office of the Children's Guardian has published a number of fact sheets and other resources about the NSW WWC Check scheme.

➤ New South Wales Police www.police.nsw.gov.au

NSW Police has published a [step-by-step guide](#) on how to apply for a Police Check and an Information Sheet addressing Frequently Asked Questions in relation to the Police Check process [here](#)

➤ Australian Human Rights Commission (AHRC) www.humanrights.gov.au

The AHRC website features further information on issues relating to discrimination.

A NFP Law Information Hub resource. Access more resources at www.nfplaw.org.au

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