

# **EQUAL OPPORTUNITY**

## ***ARE YOU GETTING IT RIGHT?***

**A guide for employers  
and the  
recruitment industry**



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## ARE YOU GETTING IT RIGHT? A CHECKLIST

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# 1. ABOUT THIS GUIDE

This is a guide for people who hire people. Today's job market is competitive, hiring employees is costly, and not hiring the right person is more costly.

This Guide aims to help ensure you get the right person for the job by following best practice, avoiding some of the common pitfalls and complying with Equal Opportunity law.

Job seekers also have the right to have a fair go. They are entitled:

- to have access to information about what jobs are available
- to be able to apply for these jobs
- to undergo a fair selection process; and
- to know that common prejudices and assumptions are set aside in the process.

Do this, and you the employer, will get the widest field of candidates from whom to make the best choice.

This guide will help you to plan ahead, to prevent discrimination and harassment from occurring in your workplace and in your recruitment practices.

Good policy and practice can protect your business from a potential complaint of discrimination in the future.

This guide also provides information about what will happen if you do receive a complaint.

## **Who can use this guide?**

- small and large businesses
- recruitment agencies
- labour hire firms
- companies that hire out contract workers
- non-government organisations
- HR professionals
- online recruitment companies; and
- community-based organisations

## **In summary, this Guide is for people who hire people:**

- who are involved in any aspect of the recruitment process
- who are committed to a fair and open recruitment process
- who want to make sure they comply with Western Australian Equal Opportunity laws; and
- who want to exercise best practice and do better than the minimum requirements.

The information in this guide will help you understand what you need to do and how to go about developing appropriate policies and systems to prevent discrimination and harassment from occurring in your business.

## 2. BEST PRACTICE AND YOUR BUSINESS

### What is best practice recruiting?

#### Best practice means

- Complying with and exceeding the minimum requirements of Equal Opportunity law.
- Adopting the process and attitude that aims for the best in merit and fairness in the complete process; and
- Individuals encouraging others to do likewise.

### What are the benefits of best practice recruitment?

Best practice brings multiple benefits for employers and recruiting agents:

#### Employers

- Will attract the best applicants  
*In a tight labour market you want to be able to choose the best*
- Will improve productivity and staff morale by using the skills of a diverse workforce  
*Attracting and retaining good staff will ensure the best level of productivity for your business. Staff commitment and support are essential.*  
*A diverse workforce will also enable businesses to draw on a range of experiences and expertise to take their business to a more diverse range of clients.*
- Develop a reputation as a fair employer  
*If you are known to be a good employer then you will attract better, more committed staff who stay longer.*

#### Did you know?

In a diverse and booming economy, competition has never been fiercer. Make the most of the diversity of the available workforce to maximise your profit. You can benefit from language skills, or knowledge of different cultures that could enhance your business.

- Reduce time in dealing with complaints  
*Good policies and good staff training will prevent complaints from having to be dealt with externally and avoid costly legal actions.*  
*Lost time, legal costs and business disruption can be expensive and damaging to business.*

- Avoid costly rehiring and retraining

*Losing staff is costly. In 2000 an Australian study estimated the cost of replacing a manager was \$48,000 and other staff members \$12,000.*

### Recruitment agents

- Access to a wider pool of talented and appropriate applicants

*It makes good business sense to ensure, by compliance with Equal Opportunity laws, that you attract and retain the best staff. It ensures all employees are confident they will be treated fairly and will receive access to opportunities within the company.*

- Will attract clients who want a diverse pool of talent

*Increasingly business is seeking to employ more women and more people from diverse social and ethnic backgrounds. This ensures their workforce reflects the broader community and they can pick the best person for the job, from all those who are available.*

### Case study

Ansett Airlines refused to employ women as pilots on the assumption that they might have children. This policy was challenged when Susan Wardley applied for, and was denied, a job as a pilot.

By directly discriminating against women, the company denied itself the opportunity to employ the best candidate for the job.

The subsequent court case, which the company lost, cost it many thousands of dollars as well as considerable adverse publicity.

*Wardley v Ansett Transport Industries (Operations) Pty Ltd (1984)*

- Will be competitive by providing a better service

*The more choice you have the more chance you have of matching the right person to the right job.*

- Develop a better public image

*Complaints can cost not only money but reputations, the essence of business success.*

**REMEMBER:** Recruitment agents are also employers and must comply with Equal Opportunity law as it relates to their own recruitment and selection practices, and employees.

### 3. AN OVERVIEW OF THE LAW IN WESTERN AUSTRALIA

The Western Australian *Equal Opportunity Act 1984* obliges employers to ensure their employment practices do not discriminate against people because of commonly held assumptions relating to certain characteristics, and that employees are appointed solely on merit, by fair processes.

This includes every step of the recruitment process and everyone involved. It applies to all employers - government, non-government, private, big business and small.

Applicants and employees are included - full time, part time, permanent and casual; commission agents; contract workers; partnerships; professional or trade organisations; qualifying bodies and employment agencies.

#### Did you know?

The law in Western Australia requires employers to 'take all reasonable steps' to prevent discrimination.

'All reasonable steps' is not defined, and is determined on a case-by-case basis. For example what is reasonable for a large organisation may not be reasonable for a smaller organisation.

As an employer or owner of a company you are responsible for the behaviour of your employees, even if you were not directly involved in any discriminatory act.

#### Grounds of discrimination

In Western Australia it is unlawful to discriminate because of a person's:

- **Age**

Treating a person less favourably because of their actual or assumed age, or the age of a relative or associate.

*Anna was asked at interview whether, at her age (she was 57) she would be retiring in the near future. This may show an intention to discriminate against her because of her age.*

- **Family responsibility**

Treating someone less favourably because they have the responsibility for the care of another person, whether or not that person is a dependant, other than in the course of paid employment.

*Karen applied for her children to attend a course. She was told as a single mother she would not be able to afford it and must provide evidence of a male partner.*

- **Family status**

Treating a person less favourably because he or she has the status of being a particular relative, or has the status of being a relative of a particular person.

*A woman was refused employment because her husband worked for a rival company. This is direct family status discrimination.*

- **Gender history**

This applies to someone who has undergone a gender reassignment procedure and has the relevant certificate.

*Joanne, formerly known as John, underwent a gender reassignment and had obtained the appropriate certification but was refused entry to a sporting club. After lodging a complaint with the EOC the club accepted her enrolment.*

- **Impairment**

Treating a person less favourably because of a physical, intellectual, or mental illness or condition, either current, past or assumed.

*Mark was born with only two fingers on his left hand and applied for a job as a bus driver and passed the company's driving test, but was refused employment when the company became aware of his impairment. The company assumed he could not do the job, although he had spent his entire working life driving trucks long distance.*

- **Marital status**

Treating a person less favourably because they are married, not married, separated, divorced, widowed or living in a de facto relationship. These partners may be of either sex.

- **Political conviction**

Treating a person less favourably because of their political conviction, or lack of political conviction.

*Gary was refused employment when the company became aware he was a member of a particular political party.*

### **Did you know?**

Under the *WA Equal Opportunity Act 1984* it may be unlawful to refuse someone the opportunity to apply for employment because of their disability, when that disability will not impact upon their ability to undertake that employment.

- **Pregnancy**

Treating a person less favourably because they are pregnant and that treatment is unreasonable.

*Joanne applied for a job with a small veterinary practice and was asked questions about her marital status and whether she intended to become pregnant.*

*They indicated they did not want to employ someone who might become pregnant. This is direct discrimination based on marital status and pregnancy. Joanne withdrew her application saying she did not want to work for such an employer. In a tight job market, she found another position immediately.*

- **Race**

Treating someone less favourably because of their race - including their colour, descent, ethnic or national origin or nationality, or assumed characteristics of any race, or the race of a relative or associate.

*An Aboriginal woman was not employed because the employer said his clients would not accept her.*

- **Religious conviction**

Treating a person unfairly because of their religious belief, or lack of belief.

*A public transport worker who was a Seventh Day Adventist was rostered to work on Saturdays, his Sabbath.*

### **Case study**

In a complaint made to the WA Equal Opportunity Commission, a young man, whose wife was pregnant, was interviewed for a job located in a city away from his normal place of residence.

During the interview the man was told about the difficulties of relocating a wife and baby to a new city when the support of family and friends was elsewhere.

The man did not get the job, and was allegedly told that the successful applicant was a local person who could offer greater stability, and that his family responsibility obligations influenced the decision not to employ him. The complaint was conciliated and the man paid \$6,000. *(Complaint conciliated, details confidential)*

- **Sex**

Treating a person less favourably because of their sex, whether they are male or female.

*John was refused work in a child care centre because he was male.*

- **Sexual orientation**

Treating someone less favourably because of their actual or assumed heterosexuality, homosexuality, lesbianism or bisexuality, or that of a relative or associate.

*Dave was rejected for a position, which advertised for a couple, when the employer found out his partner was a man. This could be direct discrimination on the ground of sexual orientation, unless the employer could show that being a heterosexual couple was a genuine occupational qualification.*

The *Equal Opportunity Act 1984* also makes sexual and racial harassment in employment unlawful.

- **Sexual harassment**

Unwelcome sexual advances, requests, or any behaviour that is unwelcome and of a sexual nature.

This can involve only one incident, which the person believes may have a detrimental impact on their employment or possible employment.

### **Did you know?**

Court action for unlawful discrimination could damage your reputation and involve legal costs to defend a claim. Significant time is spent preparing for and attending conciliation and or court hearings and can result in lower morale of existing workers.

- **Racial harassment**

Racial harassment includes any racially based threats, insults or taunts which the person believes could be detrimental to their employment or possible employment.

**NOTE:** The Western Australian Parliament is currently considering amendments to the *Equal Opportunity Act 1984* to make racially offensive behaviour unlawful. For definitions and date of operation check the Commission's website at [www.eoc.wa.gov.au](http://www.eoc.wa.gov.au).

## **What is discrimination?**

Discrimination can be either direct or indirect.

### **Direct discrimination**

Direct Discrimination is when a person is treated less favourably than another person, in the same or similar circumstances, on one or more of the grounds and in one of the areas of public life covered by the Act.

### **Case study**

In a complaint brought to the WA Equal Opportunity Commission a man was asked questions about his disability, which were not asked of other candidates for the position. This is direct discrimination.  
*(Complaint conciliated, details confidential)*

### **Indirect discrimination**

Indirect discrimination occurs when an apparently neutral rule, policy, practice or procedure has a negative effect on a substantially higher proportion of people with a particular attribute or characteristic, compared to people without that attribute or characteristic, and the rule is unreasonable in the circumstances.

## Who is responsible?

Liability for unlawful discrimination can arise in a number of ways. Any party involved in the process may be affected.

Complaints of unlawful discrimination can be made against anyone or any organisation involved in the recruitment process.

### Employers

The employer is liable for the unlawful acts of employees, contractors and agents.

In certain circumstances employees or company officers may also be liable for such acts.

### Individuals assisting or authorising

A person who causes, instructs, induces, aids or permits another person to do something that is unlawful under the Act may be seen as having also performed the act and may be liable.

### Case Study

Virgin Blue Airlines requested their employment agency to test applicants for 'Virgin flair', an attribute which was found by the Queensland Anti-Discrimination Tribunal to indirectly discriminate on the ground of age.

Both the employment agency and the company were found to be liable.

*Hopper & Ors v Virgin Blue Airlines Pty Ltd (2005)*

### Vicarious liability - the buck stops here

Most employers would know that they are responsible for their own actions in relation to Equal Opportunity law.

They may not be aware that in most circumstances they are responsible under the *Equal Opportunity Act 1984* for the actions of their employees as well.

This means there is individual as well as corporate liability.

### Did you know?

The employer could be liable for sexual harassment committed between employees if:

- The employer or their representative knew it was occurring (or should have known about it); and
- The employer did nothing to stop it or prevent it from happening again.

If an employee, acting with the authority of the employer, behaves in a discriminatory matter, the employer will usually be responsible for the discrimination.

In addition the employer may be legally responsible when any employee, even without explicit authority, behaves in a discriminatory matter unless they can show they they have taken all reasonable steps to prevent discrimination.

If an employment agency discriminates against a potential employee of their client, that client is also responsible for that discrimination. This could impact on future business undertaken by the employment agency for that particular client and on the agency's broader business reputation.

The employer may argue they are not vicariously liable if they can demonstrate they took all reasonable steps to prevent the unlawful behaviour.

### **Did you know?**

Reasonable steps can include having in place good Equal Opportunity policies, providing adequate training for all employees who are involved in the recruitment process and informing a recruitment agency of your Equal Opportunity policy. Check:

- Do staff know your expectations?
- Are staff treated fairly in relation to hiring, access to training and promotion and requests for changes to working conditions?
- Do you have a system for dealing with problems when they arise?

## **Discrimination can be lawful**

The Act provides a number of exceptions in employment, in relation to each ground, where discrimination may not be unlawful. The list below shows some of these. Refer to the Act for details.

These exceptions usually allow for the use of measures intended to achieve equality, or to allow discrimination in special circumstances where employment of people with certain characteristics is either desirable, or conversely, not appropriate.

- Measures intended to achieve equality such as training courses for Indigenous young people.
- Domestic workers in private households.
- Partnerships of less than six partners.
- Offer to an employee, commission agent, contract worker or partner, to participate in a voluntary retirement scheme or retirement incentive scheme; and

- Genuine occupational qualification such as acting, modelling and providing services to people of a particular group which are best supplied by people with similar characteristics or of a similar age.

### **Did you know?**

It is not unlawful to employ, for example, older people, if you are providing a specific service to overcome existing or past discrimination. There are employment agencies that aim to find jobs for people over the age of 50 and for people with disabilities.

## **Exceptions relating to specific grounds**

- **Age**

Employment of people of a particular age where an award or industrial agreement provides for a ratio of employees of different ages.

Where particular terms and conditions are imposed to comply with health and safety considerations which are reasonable in the circumstances.
- **Impairment**

Where the person with an impairment cannot carry out the work reasonably required to be performed, or the provision of special services or facilities for an employee with an impairment would impose an unjustifiable hardship on the employer.
- **Religious conviction**

Employment by a religious educational authority that discriminates in good faith in order to adhere to its religious teachings.

Employment in a medical or health service run by a religious body where the duties involve a religious observance or practice.
- **Family status**

Privileges or benefits in employment provided because of family responsibility or family status.

Employees who are related to a person where there is a likelihood that collusion would result in business disadvantage.
- **Pregnancy**

Where a man is discriminated against because a pregnant woman receives rights or privileges in connection with her pregnancy or childbirth.

It is not unlawful to perform an act that ensures pregnant women have equal opportunities under the Act, or ensure that pregnant women have access to facilities, services or opportunities to meet their special needs in relation to employment.

- **Marital status**

Employment when the job is one of two to be held by a married couple, or partners in a de facto relationship of different sexes or the same sex.

Employing a person to care for children in the place where they reside.

- **Sex**

Where a job applicant was required to live on the premises and those premises were not equipped with separate sleeping accommodation and sanitary facilities for people of either sex, and it would be unreasonable to expect the employer to provide such facilities.

Employing people to care for a child or children in the place where that child or children reside.

### **Case Study**

An exemption was sought by the Minister for Justice to allow some Senior Prison Officer positions to be filled only by women.

The Department argued that women prisoners are especially disadvantaged and have special needs that can best be met by an increased number of female Senior Prison Officers.

The WA State Administrative Tribunal was satisfied that an exemption would promote the objects of the Act and granted the exemption.

*(2006) WA SAT 127*

### **Exemptions**

Exemptions allowing an employer to lawfully discriminate, can be granted by the State Administrative Tribunal.

An exemption is only likely to be successful if its aims are to further the objects of the Act. These are to promote Equal Opportunity and to provide remedies in respect of discrimination.

Hearings for exemptions are held in public and the Commissioner for Equal Opportunity is automatically a party to the proceedings.

Exemptions can be granted for a maximum of five years and the Tribunal may attach conditions.

## Other unlawful acts

### Advertisements

It is unlawful to publish or display an advertisement that shows an intention to unlawfully discriminate. This includes television, newspaper, radio and internet advertisements as well as circulars, catalogues and price lists.

### Victimisation

Victimisation is also against the law. Victimisation includes threatening, harassing or punishing a person in any way because they have objected about the discriminatory manner in which they have been treated.

It also applies to anyone who has made a complaint, or intends making a complaint, under the Act.

Victimisation also applies to anyone giving evidence about a complaint.

### Case Study

A man was unable to obtain work from his previous employer when attempting to return to work after a period of workers' compensation.

The Federal Court found he was not discriminated against on the ground of disability. However it did find the employer's failure to offer the man re-employment, on the basis of the past history of disputes, did constitute victimisation.

The court awarded him general damages of \$5000.

*Drury v Andreco Hurl Refractory Services Pty Ltd (No 4) (2005)*

## Other laws

### Spent convictions

Under the *Spent Convictions Act 1988* it is unlawful to discriminate against a person whose conviction has become spent under the Act in the following types of employment or work:

- applicants and employees - full time, part time, contract and casual
- commission agents
- contract workers
- professional or trade organisations
- qualifying bodies; and
- employment agencies

The Commission investigates complaints of spent conviction discrimination under the *Equal Opportunity Act 1984*, as it does for any other complaint of discrimination under the Act.

There are numerous exceptions, based on either the type of offence, or the nature of the work.

## Federal Laws

A number of Federal anti-discrimination laws also apply in Western Australia. These are:

- *Sex Discrimination Act 1984*
  - prohibits discrimination on the grounds of sex, marital status, pregnancy and or potential pregnancy and family responsibility. Sexual harassment in employment is also unlawful.
- *Disability Discrimination Act 1992*
  - prohibits discrimination on the ground of a past, present or future disability or assumed disability.
- *Age Discrimination Act 2004*
  - prohibits discrimination on the ground of age.
- *Racial Discrimination Act 1975*
  - prohibits discrimination on the ground of race and also outlaws racial vilification.
- *Human Rights and Equal Opportunity Commission Act (1986)*

There are many overlaps between Western Australian and Federal law, however there are also differences.

In particular there are some personal characteristics which are covered by Commonwealth laws

- medical records
- irrelevant criminal record; and
- trade union activity

To find out more about these laws contact the Human Rights and Equal Opportunity Commission on 1300 369 711 or check their website at: [www.hreoc.gov.au](http://www.hreoc.gov.au).

### Case study

A woman claimed marital status discrimination when she was refused employment because her partner worked for a business in a similar field. She claimed there was no likelihood of collusion between herself and her partner and there was no risk to her prospective employer. The complaint was conciliated when she accepted a \$10,500 payment. (*Complaint conciliated, details confidential*)

## Overlap with other laws

Some Equal Opportunity matters are included in laws such as the Commonwealth *Workplace Relations Act 1996* and the *Industrial Relations Act 1979 (WA)*.

Western Australian's *Minimum Conditions of Employment Act 1993* covers some related matters such as maternity leave and return to part-time work following the birth of a child.

*The Occupational Safety, Health and Welfare Act 1986* is another example.

WorkSafe has recently updated its *Code of Practice* on workplace violence and bullying.

In Western Australia the *Criminal Code* contains provisions relating to racial vilification.

### For more information contact

- Department of Consumer and Employment Protection:  
[www.docep.wa.gov.au](http://www.docep.wa.gov.au)
- WorkSafe: [www.safetyline.wa.gov.au](http://www.safetyline.wa.gov.au)
- State Law Publisher for copies of legislation:  
[www.slp.wa.gov.au](http://www.slp.wa.gov.au).

### Did you know?

A person being bullied at work because of their race, sex, sexual orientation or political belief by another person, could lodge a complaint with the Equal Opportunity Commission.

Bullying behaviour can include threats and intimidation, exclusion from allocation of tasks and offensive remarks. In some serious cases, such as violence or sexual assault, individuals may pursue criminal proceedings.

### What do I do if a complaint is lodged against me?

One way to ensure you can show that you comply with Equal Opportunity law is to develop an appropriate complaint handling system and ensure that all of your staff are aware of and understand your policy.

The first step is to attempt to resolve any complaints within your workplace.

Your policy should include information about their rights and how to lodge a complaint with the Equal Opportunity Commission.

### Conciliation

In Western Australia the Commissioner for Equal Opportunity will investigate and attempt to conciliate any complaint received which is covered by the grounds and areas of the Act. The complainant should provide details of the alleged link between the discriminatory behaviour and the personal characteristic, for example sex or race.

If a complaint is not conciliated it may be referred to the WA State Administrative Tribunal for determination.

For more details see the Commission's website at: [www.eoc.wa.gov.au](http://www.eoc.wa.gov.au) and follow the links to Discrimination and harassment - conciliation process.

## 4. TEN STEPS TO BEST PRACTICE RECRUITING

Getting the right person on board means making sure you have in place a fair, consistent process of appointment based on merit.

### 1. Starting out

#### The employer

Employers must have clear policies and systems for the recruitment, selection and hiring of staff which have been communicated to staff.

All staff, whether involved in the recruitment process or not, should also be aware of company policies that relate to Equal Opportunity.

These policies should also be communicated to anyone contracted to undertake recruitment on your behalf, such as HR professionals or employment agencies.

#### What should be in a policy?

Your policy should aim to eliminate discrimination in the work environment and promote Equal Opportunity for all employees.

It should reinforce basic principles of access. That is people receive, without discrimination, the same rights, entitlements and benefits as others and have equality of opportunity to apply for the same services, entitlements and benefits.

Not only will your policy help you find the best person for the job, it will also allow applicants to seek out the best employer.

#### Did you know?

Having a policy in place, which is readily available to all employees, can be a defence if a complaint of discrimination or harassment is lodged with the Commission, naming you or your organisation as a respondent.

You are trying to win the best staff. You want to attract the widest pool of suitably qualified applicants from which to choose. Your reputation is on the line.

For a sample Equal Opportunity policy see:

[www.eoc.sa.gov.au/site/eo\\_for\\_business/getting\\_started/creating\\_policies\\_and\\_procedures.jsp](http://www.eoc.sa.gov.au/site/eo_for_business/getting_started/creating_policies_and_procedures.jsp)

#### Elements of a recruitment policy

Some things you should make clear when developing a policy or developing a brief for a recruitment agency.

- Comply with Equal Opportunity practices and laws. If you choose a recruitment agency or use HR professionals, ensure they are familiar with and use best practice recruitment policies in accord with your own.
- Use selection methods that are relevant to the position and your organisation.
- Attract the widest pool of suitably qualified applicants.

### **Did you know?**

Good written policies on employment and recruitment processes are not enough to protect an employer or agent from vicarious liability. The employer must be able to show that they have ensured their employees who undertake responsibilities in the recruitment of staff are aware of and understand these policies.

- Base selection decisions on the available relevant evidence from application forms, interviews and reference checks.
- Treat all applicants with dignity and respect.
- Maintain the confidentiality of the information; and
- Provide feedback to applicants who request it.

### **The recruitment agency**

#### **Receiving the brief**

- Focus on the genuine job requirements.  
These should not include reference to any of the grounds or characteristics in the Act unless they are covered by exceptions. That is they can be shown to be genuine qualifications for the position or are measures which are intended to redress past discrimination.
- The brief should list the skills, abilities and experience the employer is looking for, rather than a type of person.

### **Did you know?**

A request for minimum height and weight requirements by applicants could be unlawful since this may indirectly discriminate against many women and people of Asian descent.

#### **Achieving a fair brief**

- Discuss discriminatory practices with the employer.
- Ensure they are aware of their lawful obligations.
- If they do not change their attitude then stop working with them. Legal action can be costly, time consuming and damage your reputation.
- Provide employers with information about what can and

cannot be included in a job brief when forwarding details about job seekers.

- If an employer does not appear to understand Equal Opportunity laws, provide them with relevant literature.
- Focus on a fair outcome which may require, depending on candidates, an adjusted selection process to take account of different cultural backgrounds or disability.
- Put forward the best people for the job, even if they do not meet the personal profile requested by employers, and explain why they should be considered; and
- Ensure all of your recruitment consultants are trained in how to deal with unlawful requests for certain types of candidates or information.

### Case study

A young waiter was dismissed for unreliability after missing several shifts because of a bout of glandular fever.

The employer paid \$3000 in compensation and agreed to implement Equal Opportunity training for all its employees. *(Complaint conciliated, details confidential)*

## 2. The job

The first step is to review the job, and write the job description. Some issues to consider:

- Review the job to assess if it needs to be done in the same way.
- Could other positions take over some of the tasks?
- Consider whether the job be done on a part-time basis or job share basis to give parents opportunities to re-enter the workforce.
- Will technology affect the way the job can or should be performed?
- You may decide to re-organise work or the allocation of work and alter the Job Description accordingly; and
- If the position is a new one:
  - Clarify what its main purpose or function is to be; and
  - Assess how it fits in with other positions in the work area.

### Did you know?

Use 'experience required' rather than 'three years experience' - you may be discriminating against younger people.

Consider whether experience really is required to perform the job or whether you are prepared to train an appropriate applicant.

Determine the main functions for the position. What are the inherent requirements of the job:

- skills
- knowledge
- experience; and
- what tasks will be required.

The more specific you can be about these requirements, the better applicants can assess whether or not they will be a competitive candidate for the job.

### Select the interview panel

The interview panel should include people who have a good knowledge of Equal Opportunity principles and who understand that only questions relating to the selection criteria can be used in the interview:

- Include someone with a close knowledge of the job.
- Include someone with a knowledge of selection procedures.
- Include people from diverse backgrounds.
- Ensure that all panel members receive information about the business selection and recruitment policy and documentation regarding the job; and
- Include people of both sexes on the panel.

## 3. The advertisement

To attract the best candidates possible for any job vacancy you need to cast the net as widely as possible.

Advertisements and those publishing them are covered by the *Equal Opportunity Act 1984*.

### Did you know?

If you advertise in a range of media you can get the message about your job to a wider audience. Have you tried the ethnic press? You could also provide a sound file on the internet for people with a visual impairment.

It is unlawful to include in any advertisement anything which shows an intention to unlawfully discriminate on any of the grounds in the Act.

This includes television, newspaper and radio advertisements. It also includes in-house publications and any other advertising media.

### Avenues of advertising to maximise responses could include:

- Advertising within your own organisation as well as externally
- Multiple print and internet sites
- Ethnic and Indigenous media
- In-house email lists
- Professional and trade publications; and
- Community newspapers.

### Case study

An employer advertised for a clerical assistant in a newspaper and specified that married women should not apply.

A married woman lodged a complaint of discrimination on the ground of marital status against both the employer and the newspaper which published the advertisement. *(Complaint conciliated, details confidential)*

### Factors to consider

- If you use the internet to advertise interstate and overseas be aware of different laws that could apply.
- The advertisement should specify clearly the skills, experience and knowledge required to perform the job - not characteristics relating to the potential applicant.  
For example use 'seeking experience' rather than 'junior' or 'personal office assistant' rather than 'Girl Friday'.
- Arrange translations if necessary.
- Ensure the language is not restrictive or discriminatory.
- Include an Equal Opportunity statement.
- Avoid any reference to personal characteristics such as age or marital status; and
- Include specific instructions to candidates that they must address the selection criteria.

### Did you know?

Sexual harassment is another form of unlawful discrimination, and may occur during the recruitment of employees.

## 4. The application form

A company may specially design application forms that vary from job to job. These forms are a compact way of obtaining a lot of information.

The *WA Equal Opportunity Act 1984* also applies to application forms. Some issues to consider include:

- If you use 'experience required' or 'three years' experience', you may be discriminating against younger people. Consider whether experience really is required to perform the job or whether you are prepared to train an appropriate applicant.
- Asking personal questions or questions which are irrelevant to the skills and experience required for the job could be unlawful.
- If the request or requirement is in connection with, or for the purpose of committing an unlawful act of discrimination on the grounds identified, it may be unlawful.
- Application forms should only include information about age, race and marital status if they are inherent requirements for the job, otherwise questions of this nature should not be asked.

### Did you know?

Asking for photographs could be a request for discriminatory information.

A photograph could provide the person making the decision with information about age, race, sex or disability, which has no bearing on a person's ability to do the job.

While exceptions do exist, such as for models and actors, the responsibility is on the employer to show that any request for photographs is reasonable and will neither involve nor lead to discrimination.

- Direct discrimination may occur if people of the opposite sex, a different marital status, race or religious or political conviction, or persons who are not pregnant or physically or intellectually impaired, would not be asked to provide information in similar circumstances; and
- Acknowledge all applicants. Apart from this being a basic courtesy, in a tight job market you may need to contact them again.

## 5. The short list

This is the initial assessment of the applications. In order to develop a short list of applicants for interview ensure you:

- Keep an open mind to find the best person for the job.
- Test all applicants against the selection criteria only. Make sure you choose people on the basis of what you actually need them to do in the job and not on irrelevant personal characteristics such as age, race, sex, sexuality, disability, pregnancy and marital status.
- Set aside commonly held assumptions based on impairment, sex, race, age or marital status. These should not be considered unless they are inherent requirements of the job.
- Consider candidates who may bring new experiences and knowledge to your organisation because of their ethnicity or age for example; and
- Advise selected applicants of the interview time, venue and determine any special needs, such as disabled access.

### Case study

A woman of Aboriginal descent, applied for a position as a bakery worker. The woman was interviewed by the manager of the bakery. The interview lasted only a minute or two. The manager made no attempt to ascertain her suitability for the position. She was not given the opportunity to present her references and was not informed about the outcome of her application.

The Western Australian Equal Opportunity Tribunal was satisfied on the balance of probabilities that the decision not to employ the woman was made on the dominant ground of her Aboriginality and that she was treated less favourably than a non-Aboriginal applicant would have been treated in similar circumstances.

Compensation was awarded to the complainant.

*Slater v Brookton Farmers Co-operative Company Ltd (1990)*

### Employment agents

Employment agencies can play a key role in supporting Equal Employment Opportunity practices by:

- Meeting job applicants personally before referring them to positions.
- Only forwarding to the employer details about the applicants which are relevant to the genuine job requirements.
- Treating everyone with the same respect and courtesy, regardless of their personal characteristics.
- Not steering people away from jobs on the basis of their personal characteristics. Don't presume a woman will fail to secure a position in a male-dominated workplace.

- If job seekers have a disability discuss how the disability affects them and what strategies they have in place to deal with the consequences of the disability.
- Always discuss the skills they have to offer; and
- Ensure job seekers are aware of their rights and responsibilities in relation to employment.

## 6. The interview

Interviews are difficult and stressful for applicants. Ensuring that all short-listed candidates can perform at their best will provide the best opportunity to find the right person.

Before you start interviewing:

- Prepare physical setting -check to see if any candidates require assistance or special measures, such as disabled access to your premises.
- Prepare the questions which should be relevant to the needs of the job. Provide candidates with a copy of the questions before the interview to give them time to prepare.
- Don't ask about previous workers compensation claims, rather whether the applicant is able to undertake the physical requirements of the job; and
- If you require someone for fixed and regular hours, don't ask how they will care for sick children, rather whether they can perform during the hours required.

### Case study

In two cases brought under the Commonwealth *Sex Discrimination Act 1984*, personal questions were found by the Federal Court to be 'unwelcome conduct of a sexual nature'.

The judge found that questions on matters which were irrelevant to the prospective employment and which constituted an unwelcome intrusion on the privacy of the interviewee could amount to sexual harassment in the sense of unwelcome sexual conduct.

These included questions about the candidate's sexual life, boyfriends and the candidate's intention to marry.

*Hall & Ors v A & A Sheiban Pty Ltd & Ors (1989) and Bennett & Anor v Everitt & Anor (1988)*

### The Golden Rule

Do not ask for information you do not require and which could indicate an intention to discriminate. Do not ask:

- applicant's future intentions in relation to becoming pregnant
- about child care arrangements
- details of irrelevant medical history; and
- details of previous worker's compensation claims.

## 7. The test

Often a pre-employment test, whether medical or otherwise, is a useful tool to help assess suitability of candidates. These tests are also covered by the *Equal Opportunity Act 1984* and should not include any requirements which are not relevant to the job. This includes pre-medical, psychological and aptitude tests.

A test may be discriminatory if a disproportionate number of a particular group of people, for example women, are rejected for employment because of their test scores. The test scores must relate to job performance.

For example if a written test is required for a job that mainly requires outdoor manual labour, a high literacy level may not be needed, and the test may discriminate against people who could otherwise undertake the job.

### Did you know?

Even if a person discloses personal information that is not specifically asked for, it should not be used in the assessment process unless it is relevant to the performance of the job.

This could include such things as age, prior criminal convictions, marital status and so on.

Pre-employment tests should only:

- Test skills relevant to the job.
- Be assessed in conjunction with information obtained from applications, interview and reference checks.
- Be used only where necessary for the job. For example a driving job may require a driver's licence but declining to employ someone solely on the basis of an eyesight test could be discrimination on the ground of impairment; and
- Identify the physical requirements of the job and they must be reasonable in the circumstances.

### Case study

A man who went for a job interview was unsuccessful.

He alleged impairment discrimination in the area of employment as he was asked questions relating to his quadriplegia that were not asked of other applicants, and despite being told 'it was a very close race' between himself and the successful applicant his referees were not consulted.

The respondent apologised and gave him an ex-gratia payment of \$1,500 for pain and suffering, and said they would amend their interview processes and procedures to take account of Equal Opportunity principles. (*Complaint conciliated, details confidential*)

## 8. The reference checks

Reference checks are an important phase of the selection process and can provide valuable information about candidates' suitability.

It is unlawful to discriminate on any of the grounds in the Act in the course of reference checks.

To ensure a fair, non-discriminatory process:

- Only contact referees when you have completed interviews and formed an opinion.
- Questioning of referees should only relate to the selection criteria.
- Questions should be the same for each referee.
- Record information collected in a consistent format; and
- Permission should be sought from the candidate if you wish to contact referees not nominated in their application.

### Did you know?

A recent Australian study found that businesses that were non-discriminatory and established a family-friendly workplace performed better.

They were found to have lower staff turnover, lower absenteeism, higher employee satisfaction and higher productivity than other organisations.

The study also found that an effective work/life balance performance extends to employees having a positive view of the organisation's performance as a corporate citizen, acting ethically and contributing to society, not just taking profits.

*(The Eighth Annual Work/Life Balance Benchmarking Study, 2005 Managing Work/Life Balance International in conjunction with CCH Australia).*

## 9. The selection

Awarding the job to the right person is putting the selection process into action without prejudice and unfairness.

Make sure that you:

- Follow a consistent approach.
- Discuss all of the information collected with selection panel.
- Discuss only the information collected from the applicant and referees that is relevant to the job; and
- Document all steps in your decision making.

## 10. The job offer

Once the selection has been made best practice recruitment requires that:

- The offer be made in writing to the successful applicant advising all relevant information, including:
  - starting date
  - type and conditions of employment, including any probationary period
  - hours of work
  - leave entitlements; and
  - policies on Equal Opportunity.
- All unsuccessful applicants should be advised, with thanks, for their application.
- All applicants should be offered feedback. This should be available from a named and easily accessible person. It should focus on performance criteria and advice on improving performance.

### Did you know?

A survey by the Australian Computer Association found that one in five Information Technology professionals alleged they had been discriminated against on the basis of age.

Thirty seven (37%) of women reported being discriminated against on the ground of sex and a high level of discrimination on the grounds of race and ethnicity was also reported.

The majority of women working in the industry were contract workers or seeking full time work.

*[Australian Computer Annual Survey, 2006]*

### Case study

A New South Wales fire fighter who had lost one eye in 1971 was informed by his employer that he was unfit to undertake fire fighting duties or to participate in training offered to other employees of his rank.

He was kept in a 'non-operational' role for 28 years, without any promotion and without access to training opportunities available to other fire fighters of the same rank, that could lead to promotion.

When he lodged a claim of discrimination in employment on the ground of disability in 1999, the New South Wales Administrative Decisions Tribunal held that discrimination on the ground of disability had occurred.

An appeal by the employer to the Supreme Court was unsuccessful. The man was awarded nearly \$30,000 for economic loss and general damages.

*Lavery v Commissioner of Fire Brigades (2003)*

## 5. ADDITIONAL INFORMATION

### WANT TO KNOW MORE?

- A wide range of brochures about various aspects of the Act are available from the Commission. PDFs and text documents on each ground of the Act can be downloaded from the Commission's website at: [www.eoc.wa.gov.au](http://www.eoc.wa.gov.au).
- Commission officers provide training sessions on the Act and other related Equal Opportunity issues, which can be individually tailored to meet the specific needs of your organisation and workplace. A current training program is available and can be downloaded from the Commission's website.

### OUR THANKS TO

- The Queensland Anti-Discrimination Commission's informative website: [www.adcq.qld.gov.au](http://www.adcq.qld.gov.au) - for background information on some issues addressed in this booklet.
- The South Australian Equal Opportunity website: [www.sa.gov.au](http://www.sa.gov.au) has extensive information on recruiting, and the Victorian Equal Opportunity website also contains a booklet on recruitment.
- Office of Equal Employment Opportunity: [www.oeeo.wa.gov.au](http://www.oeeo.wa.gov.au) - for detailed information on fair and lawful recruiting practices.

## 6. HOW TO CONTACT THE EQUAL OPPORTUNITY COMMISSION

### By telephone

General enquiries	08 9216 3900
Training Courses	08 9216 3927
Facsimile	08 9216 3960
Country callers	1800 198 149
TTY	08 9216 3936
Interpreter can be arranged on request	

### By email

[eoc@eoc.wa.gov.au](mailto:eoc@eoc.wa.gov.au)

### By visiting the Commission's website

[www.eoc.wa.gov.au](http://www.eoc.wa.gov.au)

### By visiting the Commission's office

Level 2  
Westralia Square  
141 St Georges Terrace  
Perth WA 6000

### By post

PO Box 7370  
Cloisters Square  
Perth WA 6850

### Disclaimer:

*The material in this publication is intended as a general guide only and is not intended as a substitute for independent legal advice.*

*Always consider seeking appropriate professional advice on your particular circumstances.*

*The Commissioner expressly disclaims any liability to anything done or not done to any person in reliance upon any of the contents of this publication.*

February 2007.

# Notes

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# Notes

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# ARE YOU GETTING IT RIGHT? A CHECKLIST

Your best practice recruitment checklist.

Ensure your recruitment and selection process is best practice, that it is fair and free from discrimination.

## Have you?

- reviewed the position
  - selected the interview panel
  - advertised widely in appropriate media, specifying skills, knowledge and experience required for the job
  - provided a job application form free from assumptions and stereotypes
  - interviewed all short listed candidates
  - checked references and collected only information on selection criteria
  - awarded the job by assessing candidates against selection criteria
  - made the job offer to successful candidate; and
  - advised other applicants and offered feedback.
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