



# Guideline for the recruitment industry and employers

> Complying with the Equal Opportunity Act 2010 in recruitment



## Victorian Equal Opportunity & Human Rights Commission

Published by the Victorian Equal Opportunity and Human Rights Commission  
Level 3, 204 Lygon Street, Carlton, Victoria 3053. July 2014.

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### Guideline for the recruitment industry and employers: Complying with the Equal Opportunity Act 2010 in recruitment

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### Acknowledgements

The Commission would like to thank everyone who gave generously of their time during consultations, interviews and research to develop this guideline.

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ISBN 978-0-9871041-8-2  
Second edition, September 2014

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# About the guideline

Access to employment is an essential opportunity which everybody should be able to enjoy. However, discrimination based on attributes such as age, race, disability, and parental or carer status can prevent some people from gaining employment, even if they are the best person for the job.

Discrimination can happen at different stages of the recruitment process, such as during advertising, short-listing or interviewing – importantly, it is sometimes not intentional.

This practice guideline, developed by the Victorian Equal Opportunity and Human Rights Commission (the Commission), is all about making sure everyone gives and gets a fair go in the recruitment process.

Under section 148 of the *Equal Opportunity Act 2010* (Vic) the Commission may issue practice guidelines on any matter relating to the Act.

As required under the Equal Opportunity Act, the Commission consulted widely to make sure that this guideline is relevant and useful for you. Job services peak bodies, employer peak bodies and recruitment agencies assisted the Commission by highlighting the issues and challenges in meeting legal obligations when recruiting new employees.

## Who is this guideline for?

This guideline is for employers and recruitment agencies. It applies to organisations and individuals involved in all aspects of recruitment, including:

- directors and managers
- human resource professionals
- recruitment consultants
- employment services agencies
- industry and employment peak bodies
- anyone with responsibilities for interviewing or recruiting new employees.

## Why do I need to follow this guideline?

There are a number of important reasons for applying this guideline when you are recruiting:

- You have legal responsibilities under Victoria's anti-discrimination law – the Equal Opportunity Act. That means you are acting against the law if you treat job applicants unfavourably because of personal attributes such as their age, race, sex, disability, pregnancy or carer responsibilities. You can read about these responsibilities in detail in Part 1 (page 4) of this guideline.
- You are missing out on an important opportunity to grow and improve your business if you do not realise the value of diversity in your workforce – having a range of staff with different backgrounds, ideas and perspectives. You should consider these benefits at the very start of the recruitment process. See Part 3 (page 13) for more information.
- While this guideline is not legally binding, a court or tribunal may consider whether a person has complied with it when hearing a complaint of discrimination or any other unlawful conduct under the Equal Opportunity Act.
- It is important to be aware that other state and federal laws will also be relevant to how you treat people in recruitment and employment. For example, federal anti-discrimination Acts, occupational health and safety laws and fair work legislation (more information about this can be found on page 10).

## What does the guideline contain?

This guideline is in three parts:

- **Part 1: Understanding the law – the *Equal Opportunity Act 2010*** identifies key components of the law under the Equal Opportunity Act that relate to recruitment.
- **Part 2: Eliminating discrimination in recruitment – your ‘positive duty’** outlines your obligation to prevent discrimination from occurring in your systems of work, including your policies, procedures and processes.
- **Part 3: Preventing discrimination in recruitment – a step-by-step guide to recruiting** takes you through the process of how to prevent discrimination – from when you prepare to recruit, to when you award the job.

## Where can I get more advice or information?

- While this guideline may be used in a formal capacity by a court or tribunal, the Commission has sought to simplify the language of the law to make it as easy as possible for you to put into practice.
- This guideline does not cover every possible situation and circumstance you may encounter. You can also call the Commission’s Enquiry Line on 1300 292 153 or (03) 9032 3583, or download the Equal Opportunity Act and find information on the Commission’s website at [humanrightscommission.vic.gov.au](http://humanrightscommission.vic.gov.au).
- If you have a matter you need to clarify, you may consider seeking legal advice.

## Right Smart Employers Toolkits

The Commission has created a suite of free online tools to help you understand and comply with the Equal Opportunity Act.

Simply complete the confidential self-audit tool to assess your equal opportunity compliance and find out where you need to do more. You can also download templates and checklists to help manage specific employment issues, including equal opportunity in recruitment.

Visit [humanrightscommission.vic.gov.au/employerstoolkits](http://humanrightscommission.vic.gov.au/employerstoolkits) to find out more and access the toolkits.

## Training and consultancy

Our education, training and consultancy services will help you understand workplace rights and responsibilities, meet your legal obligations, and appreciate the benefits of promoting a culture of equal opportunity and human rights in the workplace.

For more information and to register online, visit [humanrightscommission.vic.gov.au/training](http://humanrightscommission.vic.gov.au/training) or call (03) 9032 3415.

## Compliance review

The Commission has the ability, on request, to conduct compliance reviews of an employer’s programs and practices to determine and give advice about their compliance with the Equal Opportunity Act. This is another tool that the Commission can use to help you meet your obligations in relation to sexual harassment, discrimination and victimisation.

For more information call the Commission’s Enquiry Line on 1300 292 153 or email [legal@veohrc.vic.gov.au](mailto:legal@veohrc.vic.gov.au).

# Part 1: Understanding the law – the Equal Opportunity Act 2010

## 1.1 What is discrimination?

The *Equal Opportunity Act 2010 (Vic)* protects people from discrimination based on a number of personal attributes.

Discrimination is treating, or proposing to treat, someone unfavourably because of a personal attribute that is protected by law. It also covers unreasonable measures that have, or are likely to have, the effect of disadvantaging persons with a protected attribute. In determining whether or not a person has discriminated against someone else, the person's motive is irrelevant.

The 17 personal attributes that are protected under the Act are:

- age
- breastfeeding
- disability
- employment activity
- gender identity
- industrial activity
- lawful sexual activity
- marital status
- parental or carer status
- physical features
- political belief or activity
- pregnancy
- race (including colour, nationality, ethnicity and ethnic origin)
- religious belief or activity
- sex
- sexual orientation
- personal association with someone who has, or is assumed to have, any of these personal attributes.

Discrimination can be either *direct* or *indirect*.

### 1.1.1 Direct discrimination

Direct discrimination is when you treat or propose to treat a person unfavourably because of an actual or assumed protected attribute.

For example, denying an older person a position because you think they might be too set in their ways and will not work well with younger staff, may be direct discrimination on the basis of age.

Under the Equal Opportunity Act, a person no longer has to compare how they are treated to how others are treated to establish direct discrimination. They only need to show that they were treated unfavourably because of a protected attribute.

### 1.1.2 Indirect discrimination

Indirect discrimination happens when you impose, or propose to implement a requirement, condition or practice that has or is likely to disadvantage a person with an attribute and is not reasonable.

Recruitment practices should focus on finding the candidate best qualified to perform the genuine requirements of the job. Recruitment should not impose unreasonable conditions on candidates.

For example, requiring all applicants to undergo a physical test not directly relevant to the requirements of the job could disadvantage some older people or people with disability, and may be indirect discrimination on the basis of age or disability.

Other recruitment practices that may indirectly discriminate against job applicants include providing information about the job in a format that people with vision impairment cannot access, or a written English test where limited English writing skills would not prevent someone from doing the job.

### Example of indirect discrimination

An advertisement for a job as a cleaner requiring an applicant to speak and read English fluently may disadvantage a person on the basis of their race. The requirement may not be reasonable if speaking and reading English fluently is not necessary to perform the job.

## 1.2 Victimisation

A person victimises another person by subjecting them to detriment (or threatening to do so) because the person or someone associated with them has made a complaint about discrimination or sexual harassment, brought a complaint to the Commission, helped someone else to, or otherwise done anything in accordance with the Equal Opportunity Act.

For example, if a recruitment agent knows an applicant has made a complaint about race discrimination in the past, and refuses to give them any further interviews because they make complaints, the recruitment agent could be liable for victimising the person.

## 1.3 Sexual harassment

Employers and recruitment agencies also need to consider their obligations under the Equal Opportunity Act regarding sexual harassment when recruiting.

Sexual harassment is unwelcome sexual behaviour, which could be expected to make a person feel offended, humiliated or intimidated. Sexual harassment can be physical, verbal or written. It may include a range of behaviours including comments about a person's private life or the way they look, subjecting a person to acts of physical intimacy, sexual advances, requests for sexual favours, sexually suggestive behaviour such as leering or staring, or sexually suggestive comments, notes, text messages, or emails.

Sexual harassment can occur both during recruitment, such as at an interview, as well as at work and at work-related events. It can occur between colleagues, or between managers, employers, and their employees, and people seeking employment. It can occur between recruitment agents and people using their services.

You can read more about the law relating to sexual harassment in the Commission's guideline *Sexual Harassment: Complying with the Equal Opportunity Act 2010*.

## 1.4 Who is liable and what are they liable for?

### 1.4.1 Individuals and organisations

The law applies not just to organisations, but to individuals as well. When it comes to recruitment, this includes:

- directors and managers
- human resource professionals
- recruitment consultants
- employment services agencies
- industry and employment peak bodies
- anyone with responsibilities for interviewing or recruiting employees.

### 1.4.2 Authorising or assisting discrimination

It is against the law for you to request, instruct, induce, encourage, authorise or assist another person to discriminate, sexually harass or victimise a person.

For example, this can happen if a recruitment agency discriminates based on an employer's instructions. It is against the law for an employer to provide a discriminatory brief, and for the recruitment agency to follow that brief. It is also against the law for the recruitment agency to promote a discriminatory recruitment process.

A recruitment agent could also be found to be authorising and assisting sexual harassment if they send someone to an employer, despite knowing complaints of sexual harassment have been made against the employer by previous employees.

### Example of authorising and assisting discrimination

An employer engages a recruitment agency to employ a secretary. The employer tells the recruitment agency that it is seeking a 'young woman with flair.' The recruitment agency follows the instructions and does not consider male applicants or people over 30. The employer and the recruitment agency could both be liable for discrimination. For a case with similar facts where discrimination was found see *Hopper and Others v Virgin Blue Airlines Pty Ltd* [2006] QADT 9.



### 1.4.3 Vicarious liability

Employers and principals (principals who instruct agents to act on their behalf), can be vicariously liable (legally responsible) for acts of discrimination, sexual harassment, and victimisation by employees or agents if this occurs in the course of employment or while acting as an agent. For employers, this means you could be liable for actions carried out by your employees and your recruitment agency; for recruitment agencies, it applies to your staff.

To avoid vicarious liability, you must be able to show that you took reasonable precautions to prevent someone else acting in a discriminatory way, sexually harassing, or victimising another person. These precautions include making sure that you have policies dealing with equal opportunity and anti-discrimination laws so that you clearly tell staff and agents that discrimination, sexual harassment and victimisation are not permitted. You also need to familiarise your staff with those policies so that they understand their obligations and that the policies are put into practice. The size of your organisation will be taken into account when considering whether your practices and policies are sufficient to demonstrate that you have taken reasonable precautions. It is likely that larger organisations will be expected to implement more comprehensive equal opportunity training programs.

#### Example of vicarious liability

A manager at an IT company is responsible for recruiting a web coordinator. In the course of recruiting, the manager screens out some of the best applicants based on their age.

The IT company is responsible for the actions of the manager unless it can prove that it took reasonable precautions to prevent the manager from discriminating. That is, does the company have equal opportunity policies and procedures in place that make it clear that age discrimination is not permitted? Was the manager familiar with them? Did the company provide the manager with equal opportunity training?

## 1.5 What parts of the law relate to the recruitment process?

While the Act covers all aspects of employment and other areas of life, you need to be aware of the following matters when it comes to recruitment.

### 1.5.1 Advertising

It is against the law for you to publish or display (or for you to authorise someone else to publish or display) an advertisement that indicates (or could reasonably be understood as indicating), that a person intends to engage in discrimination, sexual harassment or victimisation. Again, you could be liable for other people's behaviour if you cannot show that you took reasonable precautions that should have prevented a discriminatory advertisement from being published.

Discriminatory advertisements can discourage some people from applying and can result in someone making a complaint to the Commission.

If discriminatory advertising is proven, fines can range from up to \$43,308 for an organisation, to \$8,661.60 for an individual.<sup>1</sup>

You'll find specific advice on how to avoid discriminating when you advertise in section 3.5: *Advertising the job* (page 16).

### 1.5.2 Seeking information from applicants

It is also against the law for you to request information from applicants that could be used to discriminate against them, unless you can show that you need that information for a non-discriminatory purpose. This includes verbal or written requests, interview questions, and application forms whether printed or online.

In practice, you may have a work-related reason to request information about an applicant's health, any disabilities they may have, or other sensitive, personal information. Only ask for this information if you need it to assess whether the applicant will be able to meet the genuine job requirements, or to assess the health and safety risks for the potential employee or others, when the applicant is pregnant, has a disability or physical features that will affect the health and safety of themselves or others in the workplace.

Part 3 of this guideline gives you advice on seeking information at different stages of the recruitment process.

<sup>1</sup> *Equal Opportunity Act 2010* (Vic) s 182.



### 1.5.3 Making reasonable adjustments

#### Accommodating disability

The law requires you to accommodate people with disability by making reasonable adjustments for them. You have a duty to provide reasonable adjustments for job applicants during recruitment and for those offered a job.

To make reasonable adjustments when **recruiting**, you should consider matters including:

- reviewing and making any necessary changes to the position description so that all applicants can access and understand it
- making materials such as position descriptions, selection criteria and application forms available in other formats if an applicant requests it
- arranging for interpreters or other supports during interviews if requested by an applicant
- making the assessment process accessible, e.g. if the assessment process involves reading and commenting on a document, you may need to make adjustments for a person with a vision impairment to participate.

It's also important to note that an employer must also make reasonable adjustments for a person offered employment and an employee.

#### 1.5.4 Considering if reasonable adjustments are required for the applicant to perform the role

When considering applicants, you may need to think about any reasonable adjustments they may need to perform the role if appointed.

As the term implies, the adjustments you need to make should be 'reasonable'. This means you have an obligation to consider any adjustments an applicant may need. The law requires you to balance the need for change with the expense, effort and impact of making the change. The factors to consider include:

- the person's circumstances, including the nature of their disability
- the nature of the job
- the type of adjustment that is needed
- the employer's financial circumstances
- the size and nature of the business and the workplace
- the effect on the business and the workplace of making the adjustments
- the consequences for the employer if the adjustments are made
- any relevant action plan that has been made under the Commonwealth *Disability Discrimination Act 1992*
- any relevant disability standards made under the Disability Discrimination Act.

#### A recent Victorian Civil and Administrative Tribunal decision of reasonable adjustments

In the case of *Muller v Toll*<sup>2</sup> the Victorian Civil and Administrative Appeals Tribunal (VCAT) considered a case involving reasonable adjustments. While this case related to a person who was an existing employee, the Tribunal Member who heard the case made some helpful comments about reasonable adjustments more broadly. In this case, the applicant Mr Muller drove delivery trucks for the respondent company Toll Transport. He claimed that he had a disability which meant that he required consistent access to restroom facilities whilst on route. He claimed that this was not possible after the respondents changed his normal transport service delivery route to a new delivery route. The company argued that they had changed the applicant's delivery route because of performance issues. In addition to this, his former route had been assigned to other drivers and so was no longer available. Because of this, they argued it was impossible to accommodate his request and thus the adjustment was unreasonable.

In this case VCAT found that the respondent company had not failed in their duty to make reasonable adjustments. In finding this, she focused on the lack of medical evidence provided by the applicant. She noted that a proper medical opinion would have allowed the respondents to properly assess the severity of the applicant's disability and the nature of reasonable adjustments that he required to perform the genuine requirements of the job. She also noted that the company had made some adjustments by allowing for longer delivery times on the applicant's new route so that the applicant could regularly access restrooms; the only proviso being that he kept the company informed if there was to be a likely delay. The Tribunal Member commented that the first thing in any case such as this is the requirement that an employee articulate what he or she requires to help them properly perform the genuine requirements of the job. The Member also emphasised the need for proper consultation and meaningful negotiations to occur once an employer has been advised that an employee requires reasonable adjustments to be made. She said reasonable adjustments should not be the product of unilateral decision-making on the part of either party.

<sup>2</sup> *Muller v Toll Transport Pty Ltd (2) (Human Rights)* [2014] VCAT 472 (24 April 2014).

### Kassir v State of Victoria – Another VCAT decision

In this case, the applicant Mr Kassir was unsuccessful in his application to join Victoria Police. He had disclosed a history of mental health issues including post traumatic stress disorder, depression and anxiety. He claimed that he had been discriminated against in the recruitment process because of his disabilities. The respondents relied on the opinion of the Assistant Police Medical Officer and the Police Psychologist who both formed the view that Mr Kassir would be unsuitable for the role. In this case the respondents conceded that Mr Kassir had been treated unfavourably because of his disability but that the treatment was not unlawful because he was unable to perform the genuine and reasonable requirements of the job. VCAT agreed; however, this case was ultimately determined on the specific medical evidence and the opinions of various expert witnesses led during the hearing. The case emphasises the need for employers to carefully consider an applicant's ability to perform the reasonable requirements of a job in light of any available (and sometimes conflicting) medical advice. This will rarely be a straightforward task and will need to be determined on a case-by-case basis.

Part 3 of this guideline provides information on how you can make reasonable adjustments throughout the recruitment process.

## 1.6 Meeting your positive duty

The law requires you to *act*, not just to *react*. That is, you must take active steps to eliminate discrimination, not just respond to complaints that may arise. You must examine your organisation and identify (and put into place) measures that will prevent discrimination from becoming part of your systems of work, including your recruitment process. This requirement is called your 'positive duty' under the Act. Taking these proactive steps will also help you to address any claims of vicarious liability made against you.

Part 2 of this guideline gives you detailed advice on how you can meet your positive duty.

## 1.7 Is discrimination always against the law?

No. Under the Act, it is not against the law to:

- take *special measures* to promote equality for groups of people who have one or more of the 17 protected attributes
- make *exceptions* in the specific circumstances where Parliament has decided that treating people differently is lawful. These exceptions are contained in the Equal Opportunity Act
- apply for *exemptions* from the law for a set period of time.

### 1.7.1 Take special measures

In this case, you may be able to limit a job offer to people with a particular attribute. That is, at some time you may want to target applicants with certain personal attributes because you have identified an opportunity to actively address discrimination or disadvantage.

#### Example

An employer notes that people with disabilities have been traditionally discriminated against and are underrepresented in employment. They decide to specifically advertise for and recruit a person with disability to help people with disabilities realise substantive equality. They are allowed to discriminate against people without a disability in this recruitment action because they are taking a special measure.

If you want to create a position for people with a particular attribute, you need to determine whether the action you take is a special measure. You need to ask yourself whether the measure is necessary, genuine and justifiable given the needs of the group who will benefit. The essential characteristics of a special measure include that the measure is:

- undertaken in good faith
- to help promote or achieve substantive equality for members of the group
- reasonably likely to achieve this purpose
- a proportionate (appropriate and balanced) way of achieving this purpose
- justified because the members of the group have a particular need for advancement or assistance.

## 1.7.2 Make exceptions

You may find that, given the type of position you are offering, one of the exceptions under the Equal Opportunity Act applies. These include:

- **Discriminating based on certain attributes and genuine job requirements:** employers may discriminate based on attributes including sex, physical features, disability, age or race by limiting employment in relation to a dramatic or an artistic performance for reasons of authenticity or credibility. Employers may also recruit people of a particular sex to preserve decency or privacy in work such as helping customers in fitting rooms or body-searching.
- **Domestic or personal services and care of children:** recruiting people with particular attributes if they will be providing domestic or personal services in the home. This includes caring for, instructing and supervising children.
- **Political belief or activity:** not appointing a person with a particular political belief to a position as a ministerial adviser, member of staff of a political party or electoral staff.
- **Health, safety or property:** not appointing someone because of disability, pregnancy or physical features will not be unlawful where it is necessary to protect the health and safety of the person being discriminated against or others. This exception also applies to discrimination because of disability or physical features where it is necessary to protect property. For example, the exception might apply if it is likely that a machine would be significantly damaged if it were operated by an employee with a particular disability.
- **Welfare service positions:** offering a position in welfare or special needs services to a person who shares a particular attribute with the people they will be assisting and having that attribute means they could provide the most effective services. For example, an organisation providing in-home support for people with mental illness may require that a person who applies for a job as a support worker has previously used mental health services.
- **Religious exceptions:** in some circumstances, recruiting people with particular religious beliefs if you are a religious organisation.

**Religious exceptions** apply to discrimination on the basis of a person's religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status or gender identity.

Discrimination by a religious body based on these attributes may not be against the law if it is necessary to conform to the doctrines of its religion or is reasonably required to avoid injury to the beliefs of followers of the religion. 'Injury' means causing real and significant harm to the sensitivities common to adherents of the religion.

A religious body is an organisation established for a religious purpose. It is an entity that establishes, controls or administers an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles. If an organisation is not a religious body, it cannot claim these exceptions. The Victorian Court of Appeal recently found that a Christian Youth Camp was not a body established for religious purposes. The Court held that making campsite accommodation available for public hire was secular and not a religious activity. This case is subject to appeal at the time of writing.<sup>3</sup>

Religious schools can also lawfully discriminate in employing people, directing and controlling the school based on these attributes if such discrimination is necessary to comply with the doctrines, beliefs or principles of the religion or is reasonably necessary to avoid injury to the religious sensitivities of adherents of the religion.

For example, a religious school can advertise for a pastoral care co-ordinator and specify that the successful applicant must be of the same faith as that held and taught by the school.

Whether the religious exceptions may apply will depend on the particular facts and circumstances, including the nature of your organisation and the services it delivers.

It is important to remember that the religious exceptions do not apply to other attributes protected by the Equal Opportunity Act. Only the attributes of religious belief or activity, sex, sexual orientation, lawful sexual activity, marital status, parental status and gender identity are covered by these provisions.

<sup>3</sup> *Christian Youth Camps Limited & Ors v Cobaw Community Health Service Limited & Ors* [2014] VSCA 75 (16 April 2014).

### 1.7.3 Apply for exemptions

Unlike *special measures* and *exceptions*, you need to apply to VCAT if you want to be exempted from particular parts of the Act. You will only need to seek an exemption if the action you are taking is not a special measure, or is not covered by one of the exceptions in the Act. VCAT will consider whether the proposed exemption is a reasonable limitation on the right to equality and other relevant circumstances.

#### Example of exemptions

A women's domestic violence refuge seeks to employ only women. Because some members of staff, including accounts and admin staff, are not covered by the welfare services exception – it needs to apply for an exemption for those other positions: see *Georgina Martina Inc – Exemption Application* (A64/2012)

## 1.8 Other legislation

Other state and federal laws require employers and recruitment agencies not to unlawfully discriminate in recruitment and during employment. Although this guideline focuses on recruitment, it is also important to be aware that bullying and harassment are prohibited by occupational health and safety laws, federal anti-discrimination Acts and fair work legislation.

### 1.8.1 Federal laws

Discrimination in recruitment is also against the law under these federal acts:

- *Age Discrimination Act 2004* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth).

You can find out more about these federal laws on the Australian Human Rights Commission website at [humanrights.gov.au](http://humanrights.gov.au).

The *Fair Work Act 2009* makes discrimination based on a range of attributes against the law. This includes refusing to hire a person because of an attribute, offering different and unfair terms for the job compared with other candidates or discriminating against a person in their employment. You can find out more about the Fair Work Act on the Fair Work Ombudsman's website at [fairwork.gov.au/contact-us/email-us/pages/default.aspx](http://fairwork.gov.au/contact-us/email-us/pages/default.aspx).



# Part 2: Eliminating discrimination in recruitment – your ‘positive duty’

## 2.1 What is the positive duty?

Under section 15 of the *Equal Opportunity Act 2010* (Vic), employers and the recruitment industry have a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation.

The positive duty is about being proactive. It means eliminating causes of discrimination that may be part of your systems of work, not just responding to complaints that arise. In the same way occupational health and safety laws require you to take steps to improve your procedures, policies and practices to avoid workplace injuries occurring, the positive duty requires you to do the same to prevent discrimination from occurring.

Addressing the positive duty will also help you to respond to any claims of vicarious liability against you.

## 2.2 Who does the positive duty apply to?

All duty holders under the Equal Opportunity Act must comply with the positive duty. So, when it comes to recruitment, this means employers and their service providers – the recruitment industry.

## 2.3 How can I meet the positive duty?

Here is a useful process that will help you to meet your positive duty.

### 2.3.1 Scan

- Familiarise yourself with your obligations under the law.
- Look around your organisation. Are your premises accessible to people with a range of disabilities?

- Examine materials such as job descriptions and application forms. Do they contain any discriminatory information that may exclude some people from applying? Do they request potentially discriminatory information that is not related to the genuine requirements of the job?
- Look at your recruitment policies, programs, practices and procedures (written or unwritten).
- Ask yourself: how diverse is my workforce? Are women, Aboriginal and Torres Strait Islander peoples, people with disability and people from different cultures employed in my business?
- Consult with internal and external stakeholders to gain feedback on your recruitment process.

### 2.3.2 Plan

- Analyse information such as data on take-up of positions to understand the attributes of the people who are offered jobs.
- Determine strategies for reaching the widest possible pool of applicants, such as using specialist media for specific cultural groups, Indigenous media, social media, information networks, community groups and organisations, industry groups and trade unions.
- Identify how you can improve the way you conduct your interviews so that all candidates can fully discuss why they are suited to the role. Can you frame interview questions better so that they avoid asking for personal or sensitive information that does not relate to the job requirements?
- Set out an action plan. Take an approach that is relevant to your organisation’s size, resources and functions. Where needed, develop new policies and procedures, and change practices. Outline the objectives you think you should achieve in the future to eliminate discrimination.

### 2.3.3 Act

- Implement your action plan.
- If you are a business owner or manager, lead your employees by modelling equal opportunity practice at all times.
- Familiarise your staff with equal opportunity policies and provide them with training.
- If you do not have an equal opportunity policy then develop one. You can download template policies from the Right Smart Employers Toolkits on the Commission's website at [humanrightscommission.vic.gov.au/employerstoolkits](http://humanrightscommission.vic.gov.au/employerstoolkits).
- Make sure that recruitment consultants are fully briefed on the requirements of positions, and that they have a clear understanding of equal opportunity and anti-discrimination principles.

### 2.3.4 Review

- Monitor what happens and revisit your approach where necessary. For larger organisations this should be part of the normal business planning cycle.
- Review your recruitment policies, practices and procedures regularly. Make sure they are up-to-date and meet the needs of all potential candidates, whatever their personal attributes may be.

## 2.4 What are reasonable and proportionate measures?

All businesses and organisations are different. As such, the measures you take to eliminate discrimination will depend on factors such as:

- the size of the business operations
- the resources of the business
- the nature of the business
- the business and operational priorities
- the practicability and cost of the measures.

### Examples of the positive duty in practice

A small, not-for-profit community organisation drafts an action plan for meeting its positive duty obligations under the Act. A key part of the action plan is a recruitment strategy for attracting people from diverse backgrounds. In developing the strategy, members of staff liaise with people from culturally and linguistically diverse communities and external organisations to seek their input. The strategy includes methods for reaching a wider range of potential applicants using targeted online portals and media channels.

A large corporation conducts a comprehensive assessment of its recruitment processes to see how it is meeting its positive duty. As part of the assessment, all frontline staff fill in a survey about their understanding of equal opportunity laws and any challenges they face in meeting their obligations. Key areas of uncertainty emerge, so the company develops a thorough compliance strategy to deal with these issues. All equal opportunity policies and procedures around recruitment are redrafted, and more frequent, up-to-date training is scheduled. The strategy also includes reviewing and monitoring policies more regularly, and clarifying procedures for staff to seek advice.

Staff are reminded about the business's policy at induction, and then on an annual basis, and undertake face-to-face training every two years.



# Part 3: Preventing discrimination in recruitment – a step-by-step approach

## 3.1 Considering diversity

If you have a position to fill at your organisation make sure you take advantage of the opportunity to find the best person for the job by casting your net wide to attract a diverse range of candidates.

### 3.1.1 Benefits of a diverse workforce

If you encourage diversity, you broaden your pool of potential employees and you are more likely to find the best person for the job. You can also become an employer of choice and be rewarded with loyal staff that are productive, motivated and less likely to move on. Not only does this boost your organisation's reputation for fairness, it can also increase your competitiveness. With a diverse workforce, your organisation is well placed to meet the needs of a diverse community.

### 3.1.2 Employing people with disability

Over two million working-age Australians – or almost one in six – have some form of disability. Despite having a wide range of valuable skills and qualifications, people with disability experience significantly higher levels of unemployment than the general community.

It is against the law to discriminate against someone because of a past or present disability, whether it is actual or assumed. This includes:

- total or partial loss of bodily function
- the presence in the body of organisms that may cause disease, including conditions such as HIV or hepatitis C

- total or partial loss of a part of the body
- malfunction of a part of the body, including a mental or psychological disorder or learning difficulty
- malformation or disfigurement of a part of the body
- the definition of disability also includes a disability that may exist in the future (for example due to genetic predisposition) and behaviour that is a symptom or manifestation of a disability.

It is also unlawful to discriminate against a person based on them having an assistance aid, for example, an assistance dog.

Unfortunately, people with disability continue to experience discrimination when looking for work. Often this is because of misconceived notions that people with disability will:

- take more sick leave than others
- make other people uncomfortable in the workplace
- be costly to the company because the types of adjustments they need in the workplace are always expensive.

Do not let these attitudes cause you to miss out on a potentially valuable employee. Employers commonly report that the benefits of employing a person with disability outweigh any costs. Also, research indicates that people with disability are equally (or more) productive than other employees. Their rate of absenteeism is also lower, and their retention rate is higher.<sup>4</sup>

<sup>4</sup> Disability WORKS Australia Ltd, *Advantages for employers* <http://www.dwa.org.au/advantages.htm> at 31 October 2012.

### 3.1.3 Making reasonable adjustments for people with disability

The law requires employers to make reasonable adjustments for employees and potential employees (see section 1.5.3: *Making reasonable adjustments*). You can accommodate employees with disability in your workplace by making different kinds of adjustments that include:

- reviewing and, if necessary, adjusting the performance requirements of the job
- approving flexible work arrangements, such as varying work hours<sup>5</sup>
- providing telephone typewriter (TTY) phone access for employees with hearing or speech impairments
- purchasing screen-reading software for employees with vision impairment
- buying desks with adjustable heights for people using wheelchairs.

It is useful to encourage open communication with all staff about their needs, ensuring that they are given opportunities to discuss temporary or ongoing adjustments they may require to accommodate their disabilities.

#### Example of reasonable adjustments for an applicant with disability

John has a visual disability that prevents him from reading and typing quickly. He applies for a position as an administrative assistant. Among the key skills and duties required are business communication skills, including the ability to produce a range of written documents such as agendas and minutes. John could use voice input and output equipment and software to dictate, review and correct these documents through his computer. John can still perform the requirements of the job.

## 3.2 Deciding on the recruitment process

Employers go about recruiting in different ways. Some may use in-house human resources personnel; others may hire a recruitment agent to short-list the applicants and help select the successful candidate.

### 3.2.1 In-house recruitment

If you are an employer using your own staff to recruit to a position, you must make sure they are aware of their obligations under the law and are dedicated to a fair process.

If you do not take reasonable measures to prevent your staff from acting in a discriminatory way, you may be held responsible for their actions (see section 1.4.3: *Vicarious liability*).

### 3.2.2 Recruitment agents

An employer that hires a recruitment agent to short-list applicants must make sure the agent is aware of their legal obligations when it comes to discrimination.

The same applies if you are a recruitment agent. While many employers are aware of their obligations, some may not be. As such, they may be at risk of unintentionally discriminating in the recruitment process. Because of this, recruitment agents have an important role in educating and reminding employers about their legal obligations.

Recruitment agents must not follow through with discriminatory requests from an employer that relate to a person's age, sex, race, disability or any other protected attribute (unless they relate to an action that is a special measure or falls under an exception or exemption). If you are a recruitment agent and you receive a discriminatory request from a client, you must inform them that they are acting against the law. Let them know that they are putting themselves and you at risk of receiving complaints of discrimination. Stress to the employer that they are unnecessarily limiting their options in the job market by not seeking a wider range of applicants.

To achieve a fair brief, discuss the key job requirements with the employer, not irrelevant personal attributes. Giving the employer information about what can and cannot be included in a job brief is important – providing the employer with a copy of this guideline may be useful.

As a recruitment agent, you too can be held responsible for the actions of your staff and consultants, so make sure you provide them all with information and training on equal opportunity. You also

<sup>5</sup> Download template policies from the Right Smart Employers Toolkits on the Commission's website at [humanrightscommission.vic.gov.au/employerstoolkits](http://humanrightscommission.vic.gov.au/employerstoolkits).

need to give training to your consultants about how to deal with discriminatory requests for certain types of applicants and the consequences of carrying out discriminatory instructions from employers.

#### Consider the scenario below:

A recruitment consultant puts forward their suggestion for the best applicant, but the employer is reluctant to accept their recommendation. The conversation could go something like this:

**Employer:** ‘...but I don’t want any silly young girls’

**Recruitment consultant:** ‘The person I’ve suggested is the best applicant. Her skills and abilities look really impressive. I think she’s very well suited to the role.’

**Employer:** ‘But I’ve had problems in the past with people like this.’

**Recruitment consultant:** ‘You’ve hired us to give you advice on this. I can assure you this candidate is the most suitable among the range of people who applied. I’m concerned you’d be limiting your options if you make your decision based on a previous bad experience. Besides, you also need to remember that choosing an applicant based on their age is against the law and we could both be liable for discrimination.’

### 3.3 Creating the job description

When you create a job description, you need to carefully consider the specific requirements of the job so that all potential applicants can clearly understand the skills and duties they need to have.

When you are clear about the genuine requirements of the job, you can identify *what* specific information you need from the job applicants and *why* you need it. This is important because it helps you to avoid seeking unnecessary, potentially discriminatory information from applicants when you design selection criteria or develop interview questions.

You must avoid discriminatory language in the job description, which may discourage some people from applying. Write it in a clear and accessible format, and make sure it:

- avoids references to individual attributes that are not relevant to the position
- clearly outlines the duties and skills required
- differentiates between ‘essential’ and ‘desirable’ criteria
- ranks criteria in order of importance to help you to objectively identify the best applicants.

Consider including a diversity statement in the job description that encourages people from different backgrounds to apply, including Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse backgrounds and people with disability.

If The Victorian Civil and Administrative Tribunal (VCAT) has granted an exemption for the job, give information about the exemption and provide the VCAT reference number in the job description (see section 1.7.3: *Apply for exemptions*).

### 3.4 Deciding on the application procedures

Be aware of how some methods of applying may disadvantage some people – focus on a fair outcome for all applicants.

Think about whether you need to adjust the process to accommodate the specific needs of applicants from different cultural backgrounds or people with disability. Some strategies you can use to remove barriers for applicants include:

- simplifying requirements to respond to any selection criteria
- ensuring any online job portals are easy to navigate
- simplifying application procedures
- not requesting unnecessary information
- making sure that the process is confidential and secure.

#### Examples of discriminatory application processes

Asking applicants to submit a comprehensive written statement on why they want the job might not be necessary for a cleaning position. It could also discourage people with limited English language skills from applying for the job.

Using only an online portal for applications could deter applicants with certain forms of disability from applying, as they may have difficulty navigating their way through the process. Consider offering an alternative means of applying for these applicants.

### 3.5 Advertising the job

Discriminatory advertising is against the law, and fines apply to organisations and individuals (see section 1.5.1: *Advertising*).

A discriminatory advertisement can also limit the range of applicants you attract to a position. It is in your best interests to cast the net as widely as possible to attract a diverse range of applicants.

A good advertisement will focus exclusively on the skills and abilities needed to perform the job. You may only mention personal attributes such as age, sex or race if they are part of the genuine requirements of the job (see section 1.7.1: *Take special measures*, and section 1.7.2: *Make exceptions*).

If VCAT has granted an exemption for the job to be offered only to people with a certain attribute, you need to give information about the exemption and provide the VCAT reference number in the advertisement (see section 1.7.3: *Apply for exemptions*).

Your job advertisements should be written in a way that does not discourage some people from applying or imply that only certain applicants will be considered. For example, using phrases like 'join a young, dynamic team' or 'seeking mature, experienced professional' suggest that you will only consider applicants of a certain age. So, check your advertisements to make sure they do not contain words or phrases that could be seen as restrictive or discriminatory, and avoid euphemisms for discrimination that are unrelated to the skills and abilities applicants need for the position.

Encourage as many suitable people as possible to apply. Depending on your organisation and the type of position, you may consider advertising internally and externally. Try using specialist as well as mainstream media, local newspapers, journals, informal networks, community groups, industry groups and other forums.

Just as with job descriptions, consider including a diversity statement in the advertisement that encourages people from different backgrounds to apply, including Aboriginal and Torres Strait Islander peoples, people from culturally and linguistically diverse backgrounds and people with disability.

#### Example of discrimination in job advertisements

A job advertisement contains a requirement that the applicants must be over 180 centimetres tall, which may exclude numerous applicants, including many women and members of particular racial groups. If there is no reasonable explanation why applicants have to be so tall, the height requirement may be against the law: see *Australian Catholic University Ltd T/A Australian Catholic University* [2011] FWA 3693 at [12].

### 3.6 Short-listing applicants

Employers and recruitment professionals must have a clear understanding of the job requirements, and look for the same type of information from all applicants about their capacity to perform the job based on their skills and experience.

Short-list applicants according to the requirements of the job – do not allow personal bias, myths or stereotypes to influence your decision. Some examples of this follow. Remember that organisations and individuals are liable for discrimination under the law (see section 1.4: Who is liable and what are they liable for?).

#### Example of discrimination when short-listing

The manager of a textiles business is responsible for recruiting a designer, and engages a recruitment agency to short-list applicants. The manager tells the recruitment consultant that they don't want anyone over 45 for the role because they will not fit in with the culture of the organisation and will affect its competitive image.

The recruitment agency complies with the request and does not forward the details of 55-year-old Aruna, even though they consider him to be a very good candidate for the role. Aruna is a qualified designer with many years of experience.

Aruna has been discriminated against because of his age.

The recruitment agency is liable because it assisted the textiles business to discriminate. The textiles business is liable because it requested the discrimination.



To short-list effectively and to avoid claims of discrimination, make sure you:

- evaluate applicants using the selection criteria, matching skills, ability, and experience with the job requirements
- be consistent with your decision making
- clearly document your reasons for making decisions to help you to provide feedback to applicants later
- seek further information from applicants if necessary.

### 3.7 Interviewing applicants

The interview is an important opportunity for applicants to talk about their suitability for the position and what they have to offer. Employers and recruitment professionals should carefully review and plan their interview process. Make sure all applicants have an equal opportunity to participate in their interview and explain why they are the best person for the job regardless of their background or circumstances.

#### 3.7.1 Preparing for the interview

The interview should be conducted at an accessible venue.

Always ask the interview candidate if they need any special assistance to participate. For example, a person who has a hearing impairment may need an Auslan interpreter or some other kind of adjustment to the interview process. Ask these questions as part of the overall process of informing the candidate about what will happen at the interview. This will mean the candidate and the interviewer or the panel are fully prepared.

You should also develop a set of base interview questions that you will ask *all* the candidates, which focus on the skills and abilities they will need to do the job.

#### Example of discrimination at an interview

Richard is invited to attend an interview for a position working on a ship – a position for which he already has employment experience. On the phone, he asks if there are many stairs at the interview premises as he has slight mobility problems due to a muscular disorder. The person on the phone advises there are 'a few' and then goes on to say that there is 'probably no point' interviewing him. Richard says he will be fine if there are only a few steps.

Richard arrives at his interview the next day and has trouble entering the venue. Arrangements are made for him to attend the interview the next day at a different venue.

At the interview, the person who is interviewing Richard doesn't bring any notes with them and speaks on their mobile phone. Richard feels they are simply going through the motions of conducting the interview. Richard makes a complaint of disability discrimination. For a case with similar facts in which discrimination was found, see *W v P Pty Ltd* [1997] HREOCA 24.

#### Informal discussion at an interview

It is against the law to request information from applicants that could be used to discriminate against them, unless you can show the information is needed for a non-discriminatory purpose. This includes informal discussion and general chit chat.

A Tribunal found that a small business made discriminatory requests for information of an applicant seeking a job as a store person. During the interview, managers asked him about his age and whether he had children. They said that they asked about his age 'for administrative reasons' and about his children 'to encourage him to relax'. The Tribunal did not find that the business discriminated by not hiring him but reminded employers about being aware of their legal duties: *Blair v Goldpath Pty Ltd & Callinan* [2010] QCAT 483.

### 3.7.2 Myths and stereotypes

You should not allow myths and stereotypes to influence your decisions when selecting applicants, as doing so may cause you to miss out on a potentially valuable employee. Unfortunately, some employers stereotype potential employees based on falsely held beliefs or assumptions about other personal attributes. Care should be taken to focus on the individual's ability to do the job, not on stereotypes about how their 'type' will behave.

**Pregnancy:** Despite the progress that has been made with regard to sex and pregnancy discrimination, negative assumptions about employing women clearly persist, including that women workers who become pregnant are a burden or are unreliable. See page 29 of this guideline for tips on how to avoid pregnancy discrimination.

**Age:** Mature-age workers can be subjected to a range of stereotypes when they are working or looking for work. These may include that they will be slow to learn about new skills or technology, will have trouble fitting in with a younger team, or will retire soon. Younger workers can be discriminated against based on assumptions that they 'won't stick around' or that they have attitude problems.

**Race:** Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds can face stereotyping and discrimination at work, and may be disadvantaged in a recruitment process where incorrect assumptions are made about their behaviour based on perceptions of cultural differences. All staff involved in recruitment should receive cultural awareness training and education to avoid making false assumptions based on cultural differences.

### 3.7.3 Conducting the interview

When you are speaking with the interview candidate, do not make assumptions based on their behaviour or body language that may be the result of disability or a different cultural background. For example, a person who does not shake hands may be showing the appropriate level of respect or courtesy within their culture.

Ask all candidates the set of base questions you developed when you were preparing for the interview. These will help you to ensure you only seek relevant information from candidates about their skills and abilities, and how these relate to the genuine requirements of the job. When seeking further information or asking supplementary questions to particular applicants, be mindful of questions that may be invasive or potentially discriminatory.

#### Example of discriminatory interview questions

Cheryl attends an interview for a position in fashion retail. The interview panel engages in small talk with Cheryl at the start of the interview, and one panel member asks Cheryl if she has any children. Cheryl says that she has two young children. If the employer relies on this information in deciding not to offer her the job, Cheryl could make a complaint of discrimination based on her parental status.

Peter responds to a job advertisement at a local café that reads: 'Chef required for day work, classy restaurant/coffee, young team.' The manager of the café interviews Peter. She asks him how old he is and tells her he is 46 years old. If Peter is the best person for the job but the café manager does not offer it to him because of his age, Peter could make a complaint of discrimination. For a case with similar facts in which discrimination was found, see *Gardener v Norcott* [2004] QADT 39.

#### Example of seeking relevant information in a non-discriminatory way

You are interviewing candidates for a position that will require interstate travel. In this situation, you can ask applicants whether they will be able to perform the genuine job requirements – including interstate travel – without asking them potentially discriminatory questions about their family responsibilities or childcare arrangements that may or may not affect their ability to travel.

Be mindful of the following types of information that a candidate may provide at the interview – whether it is in response to a question, or if they raise it themselves:

- disability (including mental health)
- injuries and previous workers' compensation claims.

**Disability:** You may, in certain circumstances, have to ask the person for information about their disability so that you can determine whether they will be able to perform the requirements of the job, or assess any health and safety risks for the candidate or others in your workplace. You might also need this information to identify any adjustments you could make in the workplace for the candidate (see section 1.5.3: *Making reasonable adjustments*).

In the interview, do not focus on the condition or diagnosis itself. Rather, focus on how the disability might affect the candidate's ability to meet the job



requirements, what strategies they have to manage this and what adjustments they might need in the workplace. At the same time, always discuss the skills they have to offer.

Avoid unnecessary or offensive questioning about the disability. Do not ask questions about the precise nature of the disability, how they acquired it, or anything else that does not have a bearing on whether they can do the job.

Mental and psychological diseases or disorders are also disabilities under the Equal Opportunity Act, and are therefore protected by the Act. Work-related injuries are also protected as a disability under the Act. So follow the same principles that apply to other disabilities when interviewing candidates with these attributes.

#### **Example of discrimination because of mental health**

Sarah attends a job interview for a position as an accountant. At the interview, Sarah is told that the workload will be high and that the job can be stressful at times. When the interviewer asks Sarah whether she is confident she can handle stress, Sarah mentions that she had suffered from anxiety in the past. She goes on to say how she has spent time getting her condition under control, has learnt specific strategies to deal with stress, and has performed well in high volume jobs with tight deadlines. A week later, Sarah is told she has been unsuccessful in getting the role. When she asks why, she is told 'we do not think you can handle the pressure'. Sarah could make a complaint of disability discrimination.

#### **Injuries and previous workers' compensation**

**claims:** It may be against the law to ask job applicants whether they have ever made a workers' compensation claim, how much sick leave they took in the previous year or other questions about health conditions that do not relate to their ability to perform the job. These can be requests for discriminatory information.

Just as with disability and mental health, you may need to know about a candidate's existing illness or injury so that you can determine whether they will be able to perform the requirements of the job, or assess any health and safety risks for the candidate or others in your workplace. You might also need this information to identify any adjustments you could make in the workplace for the candidate (see section 1.5.3: *Making reasonable adjustments*). You will need to be able to justify this in the context of the job you are advertising.

Do not allow the following kinds of myths and stereotypes to influence your decisions:

- that a workplace injury that resulted in a workers' compensation claim will affect the candidate's capacity to perform the job you are offering
- that the candidate will be too much of a risk based on their previous workers' compensation claim.

#### **Example of discrimination because of a previous workers' compensation claim**

A factory refuses to employ Bill because he has previously made a WorkCover claim. The employer could be directly discriminating against Bill by either assuming that he still has the disability or that he is more likely to be injured at work than other applicants are. If the employer cannot show that the decision not to employ Bill was because he is unable to perform the job requirements due to his previous injury, or because Bill could jeopardise his own health and safety or that of others, then this discrimination is against the law.

#### **Pregnancy discrimination**

A job applicant should be assessed on her ability to do the job, irrespective of whether or not she is pregnant or may become pregnant in future.

You may, in certain circumstances, have to ask the person for information about their pregnancy to determine whether they will be able to perform the requirements of the job, or to assess any health and safety risks for the candidate in your workplace. These risks may only exist if there is a real likelihood that the work will pose a risk to her health and safety.

Tips to avoid pregnancy discrimination in recruitment:

- Identify the essential requirements of the job and ask all applicants about their capacity to fulfil these. Consider whether any reasonable workplace adjustments can be made so an applicant can meet the requirements.
- Ask applicants about their skills and abilities. Avoid assumptions about what pregnant women can and cannot do – or their ongoing commitment to the job.
- Do not ask an applicant questions about pregnancy unless there is a clear non-discriminatory reason to do so.
- Select the person best suited to the job.

## 3.8 Gathering information after the interview

After you have conducted the job interviews, you may be gathering a variety of other information about the candidates on which you will make your decision. You must make sure when using this information that you do not discriminate against any of the candidates.

The different information you may use to select the successful candidate can come from:

- referees
- medical tests
- psychological and aptitude tests
- criminal records checks.

### 3.8.1 Referees

It is best to use referees when you have already formed an opinion about the applicant after the interview. You should use referees to confirm what you already know about the candidate from the interview and to enquire about their suitability for the job based on the selection criteria.

Apply the same principles you used when you developed the position description and the interview questions. That is, do not ask questions of a personal nature that do not relate directly to the job requirements.

### 3.8.2 Medical tests

You might find it necessary for candidates to undergo medical testing to examine potential health risks. These risks could be high for employees with particular health problems given the nature of the job – for example jobs involving heavy lifting for people with a spinal injury or disease.

It is against the law for you to refuse to employ a person based on the information resulting from a medical examination that discloses a health problem or disability if the information is not related to how adequately the person could perform the job.

If you require medical testing as part of the selection process, you should:

- inform those conducting medical examinations of precisely what type of work the candidate will have to do
- avoid invading the candidate's privacy by enquiring into areas of the candidate's health that are not related to potential health risks associated with the job requirements
- ensure test results remain strictly confidential
- advise the candidate of the results.

### Example of discriminatory medical testing

Lenka applies for a position as an ambulance officer. She is denied the position because a pre-employment test indicates she has diabetes. The employer claims that Lenka's medical condition puts her at risk of low blood sugar levels, which could cause a risk for patients and colleagues. However, Lenka's condition could be easily managed by taking regular meal breaks. The risks associated with the condition are also so low that they do not pose a real risk to the safety or health of Lenka herself or of others. Lenka could make a disability discrimination complaint. For a case with similar facts in which discrimination was found, see *Vickers v The Ambulance Service of NSW* [2006] FMCA 1232.

Jacob applies to be a fire fighter. He is interviewed for the job and is successful to the last stage of the recruitment process, which is a pre-employment medical assessment. Jacob undertakes the medical assessment and is told that he is colour blind and therefore cannot be offered that job. In this case, Jacob has not been unlawfully discriminated against because being able to see colour is critical to the job of being a firefighter. See *Van Der Jooij and Fire Emergency Services Authority of Western Australia* [2009] WASAT 221.

### 3.8.3 Psychological and aptitude tests

Only use these kinds of tests if you reasonably require them to determine whether a person will be able to perform the specific requirements of the job. You should only use them to assess a candidate's suitability for a position based on the selection criteria. Do not use them to seek irrelevant information about a person's private life or personality. These tests should also be adjusted to accommodate the needs of people with disability or those from different cultural backgrounds.

### Example of psychological testing that is not discriminatory

A person applying for a job as a police officer may be required to undertake a psychological assessment seeking information about personal attributes such as self-control and ability to deal with confrontation. This kind of information is necessary to determine whether they can meet the genuine requirements of the job.

### 3.8.4 Criminal records checks

Criminal records checks can be a significant cause of disadvantage for many jobseekers. In some circumstances employers may be legally required to conduct a criminal records check, such as a Working with Children Check.

While Victoria's Equal Opportunity Act does not state that discrimination on the basis of criminal record is against the law, employers should still carefully consider when and how they use criminal records checks.

Protection against discrimination on the basis of criminal record is provided for on a federal level under the Australian Human Rights Commission Regulations.<sup>6</sup> The Australian Human Rights Commission can investigate and attempt to conciliate complaints. For further information, go to [humanrights.gov.au](http://humanrights.gov.au).

### 3.9 Offering the job

You have now reached the last step in the process – selecting your candidate and offering them the position.

To make sure your selection is fair and non-discriminatory, you should:

- focus on the selection criteria, and how the candidates' skills and abilities match these
- check that your decision is not influenced by personal bias, myths or stereotypes
- use all information at hand, including the application, information gathered at the interview and reference checks to make your final decision
- record your decisions and your reasons for them.

Employers and recruitment agents should give clear reasons to the unsuccessful candidates as to why they were not chosen. Offer constructive feedback on how they fared against the selection criteria or their performance at the interview.

You can use the following checklist to help guide your decisions and to ensure you have considered your obligations under the Equal Opportunity Act in recruitment.

### 3.10 Checklist – Preventing discrimination in recruitment

- Plan your approach for meeting your positive duty to eliminate discrimination in your systems of work and recruitment processes.
- Educate others about their obligations under the Equal Opportunity Act.
- Cast the net as widely as possible to attract a diverse pool of applicants.
- Be consistent and fair in the way you treat candidates.
- Accommodate people who require adjustments.
- Do not seek irrelevant personal information from applicants.
- Focus on the genuine and essential requirements of the job.
- Set aside personal bias, myths and stereotypes.
- Keep records of your decisions.
- Select the best person suited to the job.

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<sup>6</sup> Australian Human Rights Commission Regulations 1989 (Cth) reg 4.



**Victorian Equal Opportunity  
& Human Rights Commission**

## Contact us

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