



TOOLS FOR TAPPING INTO TALENT

A recruitment training resource



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Developed by Top Drawer Consultants in 2002, and updated in January 2006 with assistance from Jacqui Barratt, RCSA.

Cartoon by Bob Kerr

We would like to thank the numerous recruitment consultants who have shared their ideas, experiences and suggestions through our market research and through participating in workshops.

Module Two: Keeping you or your clients on the right side of the law

Objective of this module:

- To familiarise participants with the relevant requirements of the Human Rights Act.
- To reassure participants about the application of the Human Rights Act.

Equipment you will need for this module

- Whiteboard and whiteboard pen
or
a large sheet of paper, marker pens, Blu-tack or masking tape.
- Copies of Exercise 3 for each participant.

Useful background preparation for the facilitator

Familiarise yourself with the sections of the Human Rights Act that are included in the background information section of this module.

Read the questions and answers in the exercise several times to make sure that you understand them.

Useful tips for the facilitator

Your role is to get people to start thinking about the issues. It is not to make everyone think in the same way.

Don't feel that you need to be an expert on the Human Rights Act. If you are not sure of an answer, say so, and together examine the Act to try to find the appropriate response. If it is still not clear, suggest that you or a volunteer find out the answer before the next meeting. You can ring the Human Rights Commission Helpline 0800 496 877 or email infoline@hrc.co.nz for advice.

Time required

Thirty minutes. People may want to take longer discussing the answers if you have more time available.

Facilitator's session guide

Introduction (2 minutes)

- Present the following:
 - Some clients or managers may want to act in a way that discriminates, either intentionally or unintentionally. This puts everyone at risk. If there is a complaint, everyone involved in the recruitment process may be held liable. It is in everyone's best interests to comply with the Human Rights Act.

Grounds of discrimination (3 minutes)

- Present the following:
 - The Human Rights Act includes 13 specific grounds or personal characteristics which cannot be used to discriminate against people.
- Write up the first letter of each of the grounds of discrimination on the whiteboard as below. Alternatively, you could have prepared this earlier on a flip chart.

S	D
M	A
R	P
E	E
C	F
R	S
E	

- Ask the group to identify the prohibited grounds of discrimination. As they are identified, write them on the whiteboard beside the appropriate letter.

S Sex (including pregnancy and childbirth)	D Disability
M Marital status	A Age (from 16)
R Religious belief	P Political opinion
E Ethical belief	E Employment status
C Colour	F Family status
R Race	S Sexual orientation
E Ethnic or national origin	

Applying the Human Rights Act to recruitment (20 minutes)

- Explain that the Human Rights Act also includes a number of exceptions that make it lawful to discriminate in some situations.
 - ▣ Give each participant a copy of Exercise 3.
- Ask people to work in groups of two or three, and take 10 minutes to go through the exercise, completing only the column *What does your common sense tell you?* Encourage them to not worry about the Human Rights Act at this stage.
- With the full group, complete the column *What does the Human Rights Act say?* Ask participants for the answers first. Check for different opinions. If needed, either correct or add to the answers.
- Ask the group:
 - ? How often did your common sense match the legislation?

Areas of risk for us (5 minutes)

- Ask the group:
 - ? What are the areas in which we or our clients could end up unlawfully discriminating?

Encourage them to think about:

- o application forms
- o comments or questions that indicate (or could be seen to indicate) an intention to discriminate
- o references to age, gender, race, etc in advertisements
- o asking questions about health and disabilities.

In addition, if your organisation is in the public sector, local government or a Crown Entity, you may have specific obligations under the State Sector Act, the Local Government Act or the Crown Entities Act.

www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes

Exercise 3

What has the Human Rights Act got to say about recruitment?

Question	What does your common sense tell you?	What does the Human Rights Act require?
1. Can the owner of a tourist souvenir shop ask for a Japanese person to serve in the shop as the majority of the customers are Japanese?		
2. Can a movie director who wants to make a rerun of "Snow White and the Seven Dwarves" advertise for a young, dark-haired woman?		
3. The owner of a 20-person factory wants to employ only Indian workers, as all the other employees are Indian. Can he do this?		
4. The local lingerie shop wants to employ only women. Can it?		
5. The employer says the job involves heavy lifting, so wants only male applicants and no-one in a wheelchair. Can it limit its job search in this way?		
6. The local freezing works requires Muslim workers to kill meat in Halal fashion on the killing chain – is this OK?		
7. A multi-national company wants to employ only male, Muslim, 45 years and older sales agents, as the bulk of its work will be carried out in the Muslim country of Oman. Can it do this?		
8. An accounting firm instructs you to only recruit people with New Zealand accounting experience. Can they do this?		

Question	What does your common sense tell you?	What does the Human Rights Act require?
<p>9. You have a great candidate who happens to be transsexual. You have referred this candidate to your client but they refused to see them as they did not know how to accommodate their needs with regards to male or female toilets and how other staff would feel. Is this OK?</p>		
<p>10. Your potential candidate was convicted of fraud 15 years ago and spent 12 months in jail. She has not repeated her offending and is keen to be put forward for roles. Under the Criminal Records (Clean Slate) Act 2004 is the candidate required to tell you about the conviction if asked?</p>		
<p>11. Your client tells you that they will not employ the person you sent them as she/he is too closely related to the general manager of the company. Can they do this?</p>		
<p>12. The employer wishes to start female employees on \$50 per week more than the male employees, "as they are so much more sensible" than the men. Can they legally do this?</p>		
<p>13. Your client says you are not to send anyone for an interview who is currently unemployed. Is this OK?</p>		
<p>14. An elderly woman wants a reputable, single woman to live in as a nurse aid / housekeeper. Can she advertise this way?</p>		
<p>15. An employer wants a fit, strong person for working on dump trucks. Can they say this in the advertisement?</p>		
<p>16. The employer wishes to pay 19-year-olds "youth rates" which are \$2 an hour less than for workers over the age of 20. Can they do this?</p>		

Question	What does your common sense tell you?	What does the Human Rights Act require?
17. A sexual violence counselling agency wishes to employ a gay, Polynesian, male counsellor, and wants you to advertise for them. Can you accept?		
18. An employer does not want to employ anyone with tattoos, or nose or tongue piercings. Can they refuse to consider them?		
19. The best candidate you are putting forward for a job has a hearing impairment. She could do all aspects of the job, but would require a modified telephone. The employer does not want to consider her. Can they refuse to appoint her on the basis of her hearing impairment?		

Answers to Exercise 3

Question	What does the Human Rights Act say?
1. Can the owner of a tourist souvenir shop ask for a Japanese person to serve in the shop as the majority of the customers are Japanese?	<p>No, discrimination is prohibited on the grounds of race. However, it would be lawful to ask for a Japanese-speaking employee. The exception related to authenticity would not apply in this situation.</p> <p>Relevant section: 21 (1) (f)</p>
2. Can a movie director who wants to make a rerun of "Snow White and the Seven Dwarves" advertise for a young, dark-haired woman?	<p>Yes, she would be allowed to discriminate on the basis of sex and age for reasons of authenticity. Although she could probably get someone to wear a wig, asking for someone with dark hair is not illegal.</p> <p>Relevant section: 27 (1)</p>
3. The owner of a 20-person factory wants to employ only Indian workers, as all the other employees are Indian. Can he do this?	<p>No exemptions or exceptions apply here; the Act prohibits discrimination on the grounds of ethnic or national origin.</p> <p>Relevant section: 21 (1) (g)</p>
4. The local lingerie shop wants to employ only women. Can it?	<p>No problem; the Act allows for sex discrimination to ensure the preservation of reasonable standards of privacy.</p> <p>Relevant section: 27 (3) (a)</p>
5. The employer says the job involves heavy lifting, so wants only male applicants and no-one in a wheelchair. Can it limit its job search in this way?	<p>No. Employers cannot discriminate on the basis of gender. The key issue is whether someone can do the job, not whether they are male or female. Employers may be able to exclude people in wheelchairs if they could demonstrate that being in a wheelchair would make it impossible to do the particular lifting that is required.</p> <p>Relevant sections: 21 (1) (a) and 22 (1)</p>
6. The local freezing works requires Muslim workers to kill meat in Halal fashion on the killing chain. Is this OK?	<p>Yes. This is a bona fide occupational qualification, therefore the prohibition on discrimination regarding religion does not apply.</p> <p>Relevant sections: 22 and 27 (1)</p>

Question	What does the Human Rights Act say?
<p>7. A multi-national company wants to employ only male, Muslim, 45+-year-old sales agents, as the bulk of their work will be carried out in the Muslim country of Oman. Can they do this?</p>	<p>Legally yes. The Act allows for discrimination on the basis of sex, religious or ethical belief, or age if the duties are to be performed outside the country and the laws, customs or practices of that country where they are to be performed are ordinarily carried out only by people of that gender, age or belief. Care is needed, however, to check that the situation really requires it, and that the decision is not based on outdated stereotypes.</p> <p>Relevant section: 26</p>
<p>8. An accounting firm instructs you to only recruit people with New Zealand accounting experience. Can they do this?</p>	<p>Maybe. You should not discount the person because they appear to lack some of the experience you think they need. Don't make assumptions. With very little training the applicant may be able to attain the experience necessary to do the job. It is important to consider the applicant's capacity to perform in this role. Each case needs to be viewed on its merits and no sweeping assumptions should be made.</p>
<p>9. You have a great candidate who happens to be transsexual. You have referred this candidate to your client but they refused to see them as they did not know how to accommodate their needs with regards to male or female toilets and how other staff would feel. Is this OK?</p>	<p>No, it is illegal to discriminate on the grounds of an applicant's sex. Reasonable steps could be taken to accommodate the specific needs of the prospective employee. Consultation often clears up assumptions and lack of understanding between the prospective employers and employee.</p> <p>Relevant section: 27</p>

Question	What does the Human Rights Act say?
<p>10. Your potential candidate was convicted of fraud 15 years ago and spent 12 months in jail. She has not repeated her offending and is keen to be put forward for roles. Under the Criminal Records (Clean Slate) Act 2004 is the candidate required to tell you about the conviction if asked?</p>	<p>Yes, she does because she received a custodial sentence. The criteria under the Criminal Records (Clean Slate) Act means each case needs to be considered carefully. It would be useful to have a copy of the eligibility overview from the legislation and a copy of the Act. Although the rehabilitation period referred to in the Clean Slate legislation is seven years, there are eligibility criteria and specific requirements before the Clean Slate legislation applies. In this case, the fact that the person had a custodial sentence means that the information about her conviction, even though it was 15 years ago, cannot be concealed unless the offence for which she received a custodial sentence had been abolished. As fraud is still an offence this cannot apply to this scenario.</p> <p>In brief, the Clean Slate legislation applies if the candidate has not re-offended in the last seven years, never received a custodial sentence, never had a mental health order made against them, was not convicted of a "specific" offence (such as sexual offences), never been indefinitely disqualified from driving, and has paid in full any fine, reparations or costs ordered in a criminal case.</p> <p>Employers can ask prospective employees to sign a form that allows them to conduct a police reference check. This check will come back clear if the eligibility criteria under the Clean Slate legislation apply. A copy of the Criminal Records (Clean Slate) Act 2004 is available on line at www.legislation.govt.nz. You may also wish to refer to the Ministry of Justice's written pamphlets about this legislation.</p> <p>Also see www.fvm.co.nz/criminalrecords.htm for further reading.</p>
<p>11. Your client tells you that they will not employ the person you sent them as she is too closely related to the general manager of the company. Can they do this?</p>	<p>Possibly. The Act permits discrimination on the grounds of family status where there is:</p> <ul style="list-style-type: none"> o the risk of collusion o a reporting relationship o a situation of commercial sensitivity by employment with another employer. <p>Relevant sections: 32 (a) (i) and 32 (b)</p>
<p>12. The employer wishes to start female employees on \$50 per week more than the male employees, "as they are so much more sensible" than the men. Can they legally do this?</p>	<p>No. The Act makes it unlawful to offer or afford less favourable terms or conditions of employment on the basis of sex.</p> <p>Relevant section: 22 (1) (b)</p>
<p>13. Your client says not to send for an interview anyone who is currently unemployed. Is this OK?</p>	<p>No. The Act prohibits discrimination on the basis of employment status.</p> <p>Relevant section: 21(1)(k)</p>

Question	What does the Human Rights Act say?
14. An elderly woman wants a reputable, single woman to live in as a nurse aid / housekeeper. Can she advertise this way?	<p>Yes. The Act includes an exception for discrimination on the basis of sex and marital status where the position is a live-in one. Where the employment is one of domestic employment in a private household, discrimination is permitted on the basis of sex, religious or ethical belief, disability, age, political opinion or sexual orientation. Relevant sections: 27(5) and 27 (2)</p>
15. An employer wants a fit, strong person for working on dump trucks. Can they say this in the advertisement?	<p>Yes. The only problem would be if the recruitment agent translated that to mean "male".</p>
16. The employer wishes to pay 19-year-olds "youth rates" which are \$2 an hour less than for workers over the age of 20. Can they do this?	<p>No. Youth rates apply to 16 and 17 year olds only. Currently the minimum rate is \$7.60 an hour. The minimum adult rate is \$9.50 per hour. These will change to \$8.20 and \$10.25 respectively in March 2006. Relevant section: 30(2)</p>
17. A sexual violence counselling agency wishes to employ a gay, Polynesian, male counsellor, and wants you to advertise for them. Can you accept?	<p>Yes. The Act allows discrimination on the grounds of sex, race, ethnic or national origins and sexual orientation where the position is a counselling one on personal matters such as sexual matters or the prevention of violence. Relevant section: 27 (4)</p>
18. An employer does not want to employ anyone with tattoos, or nose or tongue piercings. Can they refuse to consider them?	<p>Generally yes. Tattoos and piercings are not included in the Act as one of the grounds of discrimination. There may be some difficulty, however, if the candidate can show a direct link between the tattoo or piercing and their race or ethnicity.</p>
19. The best candidate you are putting forward for a job has a hearing impairment. She could do all aspects of the job, but would require a modified telephone. The employer does not want to consider her. Can they refuse to appoint her on the basis of her hearing impairment?	<p>Generally no. Employers are required to make any reasonable changes that are required to enable the person to do the job. What is reasonable is influenced by:</p> <ul style="list-style-type: none"> o cost o size of the employer o resources of the employer o level of disruption o impact on other employees o health and safety considerations. <p>Relevant section: 29 (1) (a)</p>

Background information for facilitator

Extracts from the Human Rights Act 1993

The following summarises the relevant sections of the Human Rights Act with regard to recruitment for employment. Please refer to the full Act or seek legal advice before taking action.

Section 21: Prohibited Grounds of Discrimination

- (1) For the purposes of this Act, the prohibited grounds of discrimination are –
- (a) sex, which includes pregnancy and childbirth
 - (b) marital status, which means the status of being –
 - (i) single; or
 - (ii) married; or
 - (iii) married but separated; or
 - (iv) a party to a marriage now dissolved; or
 - (v) widowed; or
 - (vi) living in a relationship in the nature of marriage
 - (c) religious belief
 - (d) ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions
 - (e) colour
 - (f) race
 - (g) ethnic or national origins, which includes nationality or citizenship
 - (h) disability, which means –
 - (i) physical disability or impairment
 - (ii) physical illness
 - (iii) psychiatric illness
 - (iv) intellectual or psychological disability or impairment
 - (v) any other loss or abnormality of psychological, physiological or anatomical structure or function
 - (vi) reliance on a guide dog, wheelchair or other remedial means
 - (vii) the presence in the body of organisms capable of causing illness
 - (i) age
 - (j) political opinion, which includes lack of a particular political opinion
 - (k) employment status, which means being unemployed or in receipt of a benefit
 - (l) family status, which means having full or part-time responsibility for the care of children or other dependants; having no responsibility for the care of children or dependants; being married to, or being in a relationship in the nature of marriage with, a particular person; being a relative of a particular person
 - (m) sexual orientation, which means a heterosexual, homosexual, lesbian or bisexual orientation.

Section 22: Employment

- (1) Where an applicant for employment or an employee is qualified for work of any description, it shall be unlawful for an employer, or any person acting or purporting to act on behalf of an employer –
- (a) To refuse or omit to employ the applicant on work of that description which is available; or
 - (b) To offer or afford the applicant or the employee less favourable terms of employment, conditions of work, superannuation or other fringe benefits, and opportunities for training, promotion, and transfer than are made available to applicants or employees of the same or substantially similar circumstances on work of that description;
- (2) It shall be unlawful for any person concerned with procuring employment for other persons or procuring employees for any employer to treat any person seeking employment differently from other persons in the same or substantially similar circumstances by reason of any of the prohibited grounds of discrimination.

Section 23: Particulars of applicants for employment

It shall be unlawful for any person to use or circulate any form of application for employment or to make any inquiry of or about any applicant for employment which indicates, or could reasonably be understood as indicating, an intention to commit a breach of section 22 of this Act.

Section 24: Exception in relation to crews of ships and aircraft

Nothing in section 22 of this Act shall apply to the employment or an application for employment of a person on a ship or aircraft, not being a New Zealand ship or aircraft, if the person employed or seeking employment was engaged or applied for it outside New Zealand.

Section 25: Exception in relation to work involving national security

- (1) Nothing in section 22 of this Act shall apply to any restriction on the employment of any person on work involving the national security of New Zealand –
 - (a) By reference to his or her –
 - i. Religious or ethical belief; or
 - ii. Political opinion; or
 - iii. Disability, within the meaning of section 21 (1) (h) (iii) or section 21 (1) (h) (iv) of this Act; or
 - iv. Family status, within the meaning of section 21 (1) (l) (iv) of this Act; or
 - v. National origin; or
 - (b) By reference to the national origin of any relative of that person.
- (2) It shall not be a breach of section 22 of this Act to decline to employ a person under the age of 20 years on work involving the national security of New Zealand where that work requires a secret or top secret security clearance.

Section 26: Exception in relation to work performed outside of New Zealand

Nothing in section 22 of this Act shall prevent different treatment based on sex, religious or ethical belief, or age if the duties of the position in respect of which that treatment is accorded –

- (a) Are to be performed wholly or mainly outside of New Zealand; and
- (b) Are such that, because of the laws, customs, or practices of the country in which those duties are to be performed, they are ordinarily carried out only by a person who is of a particular sex or religious or ethical belief, or who is in a particular age group.

Section 27: Exceptions in relation to authenticity and privacy

- (1) Nothing in section 22 of this Act shall prevent different treatment based on sex or age where, for reasons of authenticity, being of a particular sex or age is a genuine occupational requirement for the position or employment.
- (2) Nothing in section 22 of this Act shall prevent different treatment based on sex, religious or ethical belief, disability, age, political opinion, or sexual orientation where the position is one of domestic employment in a private household.
- (3) Nothing in section 22 of this Act shall prevent different treatment based on sex where –
 - (a) The position needs to be held by one sex to preserve reasonable standards of privacy; or
 - (b) The nature or location of the employment makes it impracticable for the employee to live elsewhere than in premises provided by the employer, and –
 - (i) The only premises available (being premises in which more than one employee is required to sleep) are not equipped with separate sleeping accommodation for each sex; and
 - (ii) It is not reasonable to expect the employer to equip those premises with separate accommodation, or to provide separate premises, for each sex.
- (4) Nothing in section 22 of this Act shall prevent different treatment based on sex, race, ethnic or national origins, or sexual orientation where the position is that of a counsellor on highly personal matters such as sexual matters or the prevention of violence.
- (5) Where as a term or condition of employment, a position ordinarily obliges or qualifies the

holder of that position to live in premises provided by the employer, the employer does not commit a breach of section 22 of this Act by omitting to apply that term or condition in respect of employees of a particular sex or marital status if in all the circumstances it is not reasonably practicable for the employer to do so.

Section 28: Exceptions for purposes of religion

- (1) Nothing in section 22 of this Act shall prevent different treatment based on sex where the position is for the purposes of an organised religion and is limited to one sex so as to comply with the doctrines or rules or established customs of that religion.
- (2) Nothing in section 22 of this Act shall prevent different treatment based on religious or ethical belief where –
 - (a) That treatment is accorded under section 65 of the Private Schools Conditional Integration Act 1975; or
 - (b) The sole or principal duties of the position (not being a position to which section 65 of the Private Schools Conditional Integration Act 1975 applies) –
 - (i) Are, or are substantially the same as, those of a clergyman, priest, pastor, official, or teacher among adherents of that belief or otherwise involve propagation of that belief; or
 - (ii) Are those of a teacher in a private school; or
 - (iii) Consist of action as a social worker on behalf of an organisation whose members comprise solely or principally adherents of that belief.
- (3) Where a religious or ethical belief requires its adherents to follow a particular practice, an employer must accommodate the practice so long as any adjustment of the employer's activities required to accommodate the practice does not unreasonably disrupt the employer's activities.

Section 29: Further exceptions in relation to disability

- (1) Nothing in section 22 of this Act shall prevent different treatment based on disability where –
 - (a) The position is such that the person could perform the duties of the position satisfactorily only with the aid of special services or facilities and it is not reasonable to expect the employer to provide those services or facilities; or
 - (b) The environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.
- (2) Nothing in subsection (1) (b) of this section shall apply if the employer could, without reasonable disruption, take reasonable measures to reduce the risk to a normal level.
- (3) Nothing in section 22 of this Act shall apply to terms of employment or conditions of work that are set or varied after taking into account –
 - (a) Any special limitations that the disability of a person imposes on his or her capacity to carry out the work; and
 - (b) Any special services or facilities that are provided to enable or facilitate the carrying out of the work.

Section 30: Further exceptions in relation to age

- (1) Nothing in section 22 (1) (a) or section 22 (1) (d) of this Act shall apply in relation to any position or employment where being of a particular age or in a particular age group is a genuine occupational qualification for that position or employment, whether for reasons of safety or for any other reason.
- (2) Nothing in section 22 (1) (b) of this Act shall prevent payment of a person at a lower rate than another person employed in the same or substantially similar circumstances where the lower rate is paid on the basis that the first-mentioned person had not attained a particular age, not exceeding 20 years of age.
- (3) Nothing in section 22 (1) (a) of this Act shall prevent preferential treatment based on age accorded to persons who are to be paid in accordance with subsection (2) of this section.

Section 31: Exception in relation to employment of a political nature

Nothing in section 22 of this Act shall prevent different treatment based on political opinion where the position is one as –

- (a) A political adviser or secretary to a member of Parliament; or
- (b) A political adviser to a member of a local authority; or
- (c) A political adviser to a candidate seeking election to the House of Representatives or to a local authority within the meaning of the Local Elections and Polls Act 1976; or
- (d) A member of the staff of a political party.

Section 32: Exception in relation to family status

Nothing in section 22 of this Act shall prevent restrictions imposed by an employer –

- (a) On the employment of any person who is married to, or living in a relationship in the nature of marriage with, or who is a relative of, another employee if –
 - (i) There would be a reporting relationship between them; or
 - (ii) There is a risk of collusion between them to the detriment of the employer; or
- (b) On the employment of any person who is married to, or living in a relationship in the nature of marriage with, or who is a relative of, an employee of another employer if there is a risk of collusion between them to the detriment of that person's employer.

Section 33: Armed Forces

Nothing in section 22 of this Act shall prevent preferential treatment based on sex being given within the Armed Forces to any member of those forces who has the duty of serving in an active combat role in those forces.

Section 35: General qualification on exceptions

No employer shall be entitled, by virtue of any of the exceptions in this Part of this Act, to accord to any person in respect of any position different treatment based on a prohibited ground of discrimination even though some of the duties of that position would fall within any of those exceptions if, with some adjustment of the activities of the employer (not being an adjustment involving unreasonable disruption of the activities of the employer), some other employee could carry out those particular duties.

www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes&clientid=218337444&viewtype=contents