



PRE-EMPLOYMENT GUIDELINES

The law governing employment relationship generally is fairly well known, but it can be easy to forget that there are also laws governing the pre-employment process, especially in relation to job advertisements and interview questions. Clean slate, privacy and human rights legislation dictate how employers can advertise for employees, what questions potential employees can be asked at an interview, and who can be contacted to provide references for candidates.

The Human Rights Commission recently published a detailed booklet called “*Pre-employment Guidelines*” on these points for employers, which can be downloaded at www.hrc.co.nz.

A useful “rule of thumb” for employers regarding advertisements or interview questions is that *if the requirement or question is not directly related to the employee’s ability to do the job, you should not state or ask it.*

The legislation

The *Criminal Records (Clean Slate) Act 2004* allows individuals with criminal convictions older than seven years who have never been to jail to withhold information about those convictions. There are certain provisos to this and some types of offending are excluded, for example, convictions for sexual crimes. While employers are still allowed to ask employees about their criminal record, an employer who asks a candidate for employment to ignore the clean slate legislation and disclose all convictions could be liable for a fine of up to \$10,000.

The Privacy Act 1993 puts in place certain protections regarding the collection of personal information. In particular, information must only be used in relation to the purpose for which it was collected and cannot be disclosed except in specific circumstances. With regard to reference checking, this means that employers cannot seek information from anyone without the employee’s consent, and similarly cannot disclose information about an employee to anyone else without consent.

The Human Rights Act 1993 prohibits discrimination in employment on the grounds of:

- sex, which includes pregnancy and childbirth
- marital status
- religious belief
- colour
- race
- ethnic or national origins, which includes nationality or citizenship
- disability, which means-
 - physical disability or impairment
 - physical illness
 - psychiatric illness
 - intellectual or psychological disability or impairment

- any other loss or abnormality of psychological, physiological, or anatomical structure or function
- reliance on a guide dog, wheelchair, or other remedial means
- the presence in the body of organisms capable of causing illness
- age
- political opinion
- employment status (including being unemployed or on a benefit)
- family status
- sexual orientation

Employers need to be sure that their job advertisements, application forms and interview questions are worded appropriately and do not breach human rights legislation, to avoid allegations of discrimination.

How to Avoid Breaking the Law

Generally, a job advertisement cannot specify that the employer is seeking someone:

- of a particular age, or a “young” or “old” person
- “straight” or “gay”
- single or married
- of a specific gender
- without children

In a job interview, these guidelines mean that it is okay to ask:

- questions relating to the candidate’s ability to do the job
- questions to enable assessment of the person’s potential as a candidate for the specific role
- whether the candidate has any convictions
- that the candidate undergo a credit check, if the role has a financial or cash handling responsibility
- whether there is anything that may prevent the candidate from performing the role
- whether the candidate has any health issues which may prevent him or her from performing the role

It is not okay to ask:

- questions relating to the candidate’s age, marital or family status, intention to have children, political preferences, union membership, sexual orientation
- whether the candidate has any convictions which they are entitled to withhold information about under the clean slate legislation
- whether the candidate has any convictions that the clean slate legislation applies to, or in other words ask the candidate to disregard the legislation
- whether the candidate has a disability

There are some exceptions to these guidelines, for example:

- where being of a particular age or in a particular age group is a requirement for the role, for example, management of a licensed premises
- where the role is domestic employment in a private household
- where for reasons of authenticity, being of a particular age is a genuine occupational qualification, such as for acting work

- Where there is a particular reason for seeking to employ a person with any of the listed qualities, we recommend seeking advice about how to do this without breaking the law



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Before joining Hesketh Henry, Kate worked with a specialist boutique employment law firm and in corporate human resources for a large public sector organisation in Australia.

Kate has expertise in advising employers across a range of industries, on the full spectrum of employment law issues. Kate provides pragmatic solutions to meet client's legal, employment and business needs and can assist with all employment related queries.