

# Human Resource Management

The HR Legal Framework  
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(slides adapted from Willy Lecturer Resource)

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## Objectives

- Understand the importance of the law as it relates to HRM
- Distinguish between an employee and an independent contractor
- Identify the sources of legal obligations in employment law
- Understand the importance of the contract of employment and its essential terms
- Recognise the amendments to the federal legislation by Recent Governments

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## Objectives

- Understand the implications of current industrial law to the employment relationship
- Identify the legal requirements at various stages of employee recruitment and selection
- Discuss the procedures for terminating employees
- Understand an employee's rights of review upon dismissal

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### Some facts...

- The largest single group of defamation litigants in Australia is politicians followed by company owners.
- Experience shows that most 'whistleblower' hotlines are taken up with complaints about harassment, discrimination and other office problems. Few relate to serious fraud.

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### HRM and the Law

- HR managers need to be aware of legal issues that govern the employee/employer relationship.
- Labour law, law of employment and industrial law

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### The Legal Framework

- Equal Employment Opportunity (EEO Act 1984)
- OH&S (1984 Act – esp s19 and s20 duties for employers and employees)
- Workers Compensation and Injury Management Act (1981)
- Privacy Principles (Privacy Act 1988)
- Spent Convictions Act (1988)
- Contracts and Employment Relations (Fair Work Act 2009 esp. the ten NES's)
- Working with Children (Working with Children {Criminal Record Checking} Act 2004
- Employment of Children (The Children and Community Services Act 2004 )
- Professional Registrations

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## Children and Community Services Act

**Employing Children:**

A few years ago a Perth business was fined \$30,000 by Industrial Magistrates Court for illegally employing a total of 16 children across three fast food outlets. The fine was the result of 16 charges under the Children and Community Services Act of unlawfully employing children aged less than 15 years. The charges arose out of the employer working the children on 153 separate occasions in shifts of work that were completed after 10pm. In one instance a 14 year old employee was rostered to work until 1am.

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## The Spent Convictions Act 1988

- In Western Australia the Spent Convictions Act 1988 provides for certain convictions to be spent (expunged from the record) generally after 10 years provided there have been no further convictions.
- This prevents discrimination against people for whom disclosing certain convictions may cause difficulties in; for example, finding or keeping employment, access to finance or travel, in legal proceedings, holding public office, fulfilling civic duties or in home or social life.

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## Spent Convictions

- Under the provisions of Section 7(1) of the Spent Convictions Act 1988, only lesser convictions can be spent by the WA Police Service, after a time period of 10 years plus any term of imprisonment that may have been imposed. The application form provides details of further restrictions. A lesser conviction is one for which imprisonment of twelve months or less, or a fine of less than \$15,000 was imposed.
- All other convictions, such as serious convictions applicable under Section 6 of the Spent Conviction Act 1988 can only be spent by applying to the District Court. Once spent, a conviction will not usually be disclosed on a criminal record check. However, exemptions from provisions of the Spent Convictions Act 1988 allow certain employers access to information about such convictions.

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### Privacy Act 1988

- The ten National Privacy Principles (NPPs) contained in schedule 3 of the Privacy Act 1988 (Privacy Act) regulate how large businesses, all health service providers and some small businesses and non-government organisations handle individuals' personal information
- The privacy provisions apply to businesses (including non-profit organisations) with an annual turnover of more than \$3 million and health service providers.
- See <https://www.oaic.gov.au/privacy-law/privacy-archive/privacy-resources-archive/national-privacy-principles>

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### The Workers' Compensation and Injury Management Act 1981

- WorkCover WA is the statutory authority charged with administering the workers compensation and rehabilitation scheme for Western Australia. WorkCover also monitors compliance with the scheme and the performance of service providers in the scheme.
- The Workers' Compensation and Injury Management Act 1981 provides for the **compensation** of workers who suffer an injury and for certain dependants of those workers where the injury results in their death.
- It also provides for **return to work programs**, specialised retraining programs for certain injured workers and the promotion of safety measures aimed at preventing or minimising work-related injuries.

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### The Workers' Compensation and Injury Management Act 1981 Obligations

Employers have the following legal obligations:

- holding a current workers' compensation policy
- possession of a certificate of currency (proof that they hold a current policy)
- provision of an injury management system
- report notifiable incidents to WorkSafe
- forwarding an injured worker's claim for workers compensation to the insurer within 3 working days
- upon advice from the insurer, payment of weekly payments to the injured workers.

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## Injury Management

The Workers' Compensation and Injury Management Act 1981 requires all employers to establish an injury management system.

This system must be documented in writing and available to all workers on request.

It should include an outline of the procedure to follow when an injury occurs and the contact details of the person responsible for the injury management system.

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## Employee or Contractor

- A person is a contractor if the service provider:
  - Is not an employee of the principal
  - Is providing special labour which may require special qualifications
  - Has control over the manner of performing their own work
  - Provides their own tools and equipment to perform the work
  - Is not presented to the public as an emanation of the principle

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## Sources of legal obligations

- Contracts, statutes, statutory agreements, awards and the common law
- Employment contract
  - An informal (oral) or formal (written) legally binding agreement between an employer and an employee specifying the legal rights and obligations of each party
- Types of contracts:
  - Indefinite duration
  - Fixed term

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### Policy and Reasonableness

- Workplace policy
  - A document of general application that is prepared by the employer and is designed to govern (either with or without contractual force) any and all aspects of the conduct, rights and obligations of the parties to a contract of employment
- Reasonableness as a test

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### Considerations

- Confidentiality agreements
  - During and after the course of employment
- Workplace intellectual property
  - Invention created during the course of employment will usually belong to the employer
- Moral rights
  - The employee may still have rights with respect to the inventions created during the course of employment

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### Agreements and Legislation

- Statutes
  - In the context of employment, statutes legislate the minimum conditions of employment that must apply in any employer–employee relationship
- Statutory agreements

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### Common Law

- Case law developed in the court system as opposed to statute law.
- It includes laws and principles that have been established by courts over the years.
- It may be codified into a statute or overruled by a statute passed by the government.
- General duties prescribed:
  - Employer's duties
  - Employees' duties

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### Recruitment and Selection

- A myriad of laws govern arrangements for selecting and engaging employees.
- The following areas require particular consideration in the pre-employment phase:
  - The job advertisement
  - The job description
  - The application form
  - The interview

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### Unfair Discrimination

- Any practice that makes distinctions between different groups based on characteristics such as sex, race, age, religion and so on, which results in particular individuals or groups being advantaged and others disadvantaged in an unreasonable or unjust manner.

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Direct discrimination versus indirect discrimination

	DIRECT DISCRIMINATION	INDIRECT DISCRIMINATION
Definition	Treating a person or group less favourably than another person or group in similar circumstances.	A practice that appears inoffensive but that results in a person or group being disadvantaged.
Example	An employer dismisses a woman purely on the basis of her gender.	A company makes promotion dependent upon five years continuous service. This disadvantages women who may be more likely to take time off to have children.
Remedy	Damages — pecuniary loss, hurt, loss of career prospects, stress, humiliation.	Damages — pecuniary loss, hurt, loss of career prospects, stress, humiliation.

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Issues to consider

- The job advertisement and legal requirements
- The job description and the law, basic elements:
  - The title of the position
  - The qualifications required
  - The level of experience required
  - The level of responsibility that the position holds
  - The person to whom the employee must report

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Issues to consider

- Application forms
- Freedom of (and from) association
- Age
- Sex
- Physical and mental capacity
- Criminal convictions
- References and previous employment
- Testing employees
- The interview

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### Legal issues during employment

- Occupational health and safety requirements
- Discriminatory treatment of employees
- Statutory benefits:
  - Payment of wages
  - The provision of leave

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### Types of dismissal

- Summary dismissal
- Notice of termination or payment in lieu of notice
- Redundancy
- Constructive dismissal

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### Grounds for Summary Dismissal

- Serious misconduct
- Physical/verbal abuse
- Disobedience of an employer's lawful and reasonable directions
- Drunkenness at work
- Incompetence (where previously thought competent)
- Neglect of duties

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### Grounds for Summary Dismissal

- Dishonesty/bribery
- Criminal behaviour in connection with employment
- Absenteeism

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### Dismissal

- Valid reason — substantive fairness
- Unlawful termination for proscribed reasons
- The employer's right to 'hire and fire'

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### Termination — Employee entitlements

- Be furnished with *reasons* for the impending dismissal
- A *fair hearing* so that the employee is afforded a right to response to those reasons
- An *unbiased* decision-making process that takes the employee's response into account before any final decision is made

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### The rights of the employee

- Means of appeal
  - A statutory action including that for unfair or unlawful dismissal
  - A common law action for wrongful dismissal in breach of contract
- Unfair dismissal
  - Occurs where a dismissal is harsh, unjust or unreasonable, but need not involve a fundamental breach of the employment relationship

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### Summary

- The relationship between the employer and the employee is governed by law.
  - e.g. employment contracts, legislation, statutory agreements, awards and the common law.
- HR managers need to be aware of requirements to minimise an organisation's exposure to dispute and litigation.
- Having a balanced approach is the key.

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