

**Premier's Department
New South Wales**

**EMPLOYMENT HEALTH ASSESSMENT:
POLICY AND GUIDELINES**

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Part 1 - Policy

Introduction

A person may only be appointed to, or employed in, a position in the NSW public sector when a person's fitness to carry out the inherent job requirements and job demands of a position have been confirmed by a health assessment. ¹Fitness to carry out duties includes the ability to carry out those duties without endangering the health and safety of the public, of other persons employed in the Department and of the person concerned. In order to carry out the inherent job requirements and job demands of a position, an applicant with a disability must be provided with services or facilities required unless this would cause "unjustifiable hardship" to the employer.

To be effective and fair, health assessments must relate directly to tasks performed in the position, take into account the hazards to which employees may be exposed, and not unlawfully discriminate against people with disabilities. Health assessments are only one component of a risk management system and they are not a substitute for adequate risk control.

It is important that agencies familiarise themselves with key terms used in this document - these are outlined in the Glossary at Appendix A.

The Public Sector Management (General) Regulation 1996, Part 2 (s) 6 provides for health assessments prior to the appointment of persons to public sector positions. The health assessment is to be in the form considered necessary by the Chief Executive Officer (CEO) and in most cases a statutory health declaration will meet this requirement. Selection should be on the basis of merit in the first instance.

Policy Requirements

This policy forms an integral part of the Premier's Department *Taking Safety Seriously - improving workplace safety management in the NSW public sector: Policy and guidelines* which outlines key components of an effective workplace safety management system.

Agencies are required to develop and implement an effective health assessment system for their organisation that captures the issues outlined in Part 2 of this document. In developing an effective health assessment system, agencies need to consult with relevant unions and other key stakeholders. For those agencies that have existing systems, a review in respect of the issues raised in this policy and guidelines should be undertaken.

Aim

The aim of this policy and guidelines is to provide agencies with an operating framework to establish, review and implement a system for health assessments at the time of recruitment, transfer, promotion or at trigger points identified in the guidelines.

¹ Public Sector Management (General) Regulation 1996

Underlying Principles

- adherence to relevant legislative and policy provisions
- provision of services and facilities ("adjustments") to enable the best applicant to carry out the inherent requirements of the job, where this would not cause unjustifiable hardship to the employer
- senior management commitment to a healthy and safe workplace
- training for staff who are responsible for tasks associated with health assessments
- employment by merit
- fair and transparent employment processes

Relevant Legislation

- *Public Sector Management Act 1988*
- *Public Sector Management (General) Regulation 1996*
- *Occupational Health and Safety Act 1983 (NSW)*
- *Anti-Discrimination Act 1977 (NSW)* including obligations under Part 9A
- *Disability Discrimination Act 1992 (Commonwealth)* and the *Disability Standards in Employment*
- *State Records Act 1998 (NSW)*
- *Privacy and Personal Information Protection Act 1998 (NSW)*

Related Policies

- *Taking Safety Seriously*, NSW Premier's Department Corporate Services Reform Team, 1999
- *Equal Time - Pre-employment medical tests: When is it appropriate to use medical tests. Selection of Job Applicants with Disabilities*. Anti-Discrimination Board, 28 May 1996
- *Harassment Free Workplace: Policy and Guidelines*, Public Employment Office, 1996
- *Dealing with Employee Work-related Concerns and Grievances: Policy and Guidelines*, Public Employment Office, 1996
- *Flexible Work Practices: Policy and Guidelines*, Public Employment Office, 1995
- *ODEOPE Resource booklet and Fairways - Managing Adjustments*, 1999
- *Revised Health, Safety, Medical Assessment and Medical Retirement Procedures*, Premier's Memorandum No 98/1
- *A Risk Management Approach for Pre-Placement Health Assessment*, HealthQuest, July 1992
- *Reasonable Adjustment*, Premier's Department Information Sheet No 95/70, July 1995
- *Privacy NSW's Data Protection Principles*, 1999.

Part 2 - Guidelines

Minimum Standards

The following minimum standards should be included as part of an agency's effective health assessment system:

- all employees, whether temporary or permanent are to satisfy the inherent job requirements and job demands for the position in which they are employed;
- employees transferred or promoted to positions or those acting (higher duties) in different positions are to satisfy the inherent job requirements and job demands (where the above mentioned requirements significantly vary from the employee's current position);
- procedures to effectively manage the health assessment aspects of recruitment processes are developed and implemented; and
- training for staff who are responsible for tasks associated with health assessments.

In addition agencies must fulfil obligations:

- under the *Occupational Health and Safety Act 1983* (NSW) to ensure the health, safety and welfare of their employees and other people in the workplace; and
- under the *Anti-Discrimination Act 1977* (NSW) and *Disability Discrimination Act 1992* (Commonwealth) for agencies to provide a workplace and employment opportunities free from unlawful discrimination.

Discrimination Issues

An employer must provide any service or facility needed by a person with a disability to carry out the inherent job requirements and job demands of a position unless this would cause the employer "unjustifiable hardship". Note that the defence of unjustifiable hardship only applies in relation to prospective or dismissed employees.

In the case of an existing employee who has a disability, all services or facilities must be provided in order to allow that person to carry out the inherent job requirements and job demands of their position.

Unlawful discrimination may occur if a person is refused employment because of their disability unless the person would be unable to carry out the inherent requirements of the job with the provision of such services or facilities, or the provision of such services or facilities would cause the employer unjustifiable hardship.

Unlawful discrimination may also occur if health assessments are used to refuse employment to an applicant who is assumed likely to lodge a workers' compensation claim or take sick leave solely because:

- the person has lodged previous claims;
- the person is assumed to have a predisposition to an illness or injury; or
- it is assumed, without proper basis, that the work will aggravate an established illness or injury despite adjustments.

As part of the obligations under the *Anti-Discrimination Act 1977* (NSW) and *Disability Discrimination Act 1992* (Commonwealth), agencies must ensure that any applicants with a disability are assessed using any service or facility they routinely use to perform the inherent job requirements and job demands of a position. For example, if an applicant uses a prosthesis - then the aid should be used during the assessment.

It is expected that agencies will consult with unions and staff in the development, implementation and review of their Employment Health Assessment system.

While these responsibilities are not new, it is the way in which they are integrated into an agency's employment practices that is important. The information provided in these guidelines aims to assist agencies in developing or enhancing their existing processes.

Specifically, agencies should identify the inherent job requirements and job demands of their public sector positions as part of their general workforce management planning processes. It is recognised that this is a significant task and agencies should undertake this progressively, which might be as positions fall vacant, are reviewed or advertised.

Agencies should ensure that prior to recruitment, position descriptions are reviewed to reflect the inherent job requirements and job demands of the position and that these duties can be undertaken with safety.

Key Areas

The following key areas describe the major components of an effective health assessment system:

- Trigger Points for Employee Health Assessments
- Identifying Inherent Job Requirements and Job Demands
- Health Assessment Options
- Choosing Health Assessment Providers
- Health Assessment Process
- Appeals Process
- Record Keeping

Trigger Points for Employee Health Assessments

As indicated earlier, health assessments may occur when recruiting for permanent, temporary, or part time vacancies, or for those positions that can be filled by acting arrangements, lateral transfer or promotion within an agency. The process may affect both existing employees and new recruits.

Where an employee changes their position through promotion, transfer, higher duties or job redesign, the person should be assessed, if necessary, against the inherent job requirements and job demands of the new position (where the requirements vary significantly from the employee's current position). It is important as part of this process to ensure that agencies have systems in place to capture recruitment and staff appointments and movements.

Regular Health Assessments

An employer may require employees to undertake regular health assessment where:

- there is a residual risk to health even after the best possible control measures have been implemented and relevant tests are available to detect any adverse health outcomes that may arise; and
- current and accurate health/medical information is needed for the purpose of determining the ongoing fitness of an employee to carry out the inherent job requirements and job demands of the position.

Regular health assessments may also be required in meeting any occupational competency or certification, or by Regulations made under the *Occupational Health and Safety Act 1983* (NSW), or licensing requirements under other NSW legislation. Employees should be advised during the recruitment process (eg. via the job description and at interview) of the purpose of any routine health reviews. It is important to note that the onus is on the employer to check relevant legislation, licensing requirements, guidelines, codes and standards in this regard.

Where the nature of the job is such that regular health assessments are required, all employees undertaking that job should be assessed. Testing some employees and not others who are performing the same job could be unlawful discrimination. For example, performing health checks on older workers and not younger workers could be unlawful age discrimination.

Identifying Inherent Job Requirements and Job Demands

When action is being taken to recruit a person to fill a position, agencies will identify all inherent job requirements and job demands before initiating the recruitment process.

Provided below are some key aspects agencies should consider in establishing a health assessment system:

- identify the inherent job requirements of the position;
- conduct and document a risk assessment for the position or groups of generic positions;
- identify the job demands of the position in consultation with occupational health professionals, supervisors and other relevant employees. (This analysis may be undertaken for groups of positions where the inherent job requirements and job demands are the same);
- select the appropriate health assessment option. These include, but are not limited to, health declarations, screening tests and medical examinations (health assessment options are outlined on the following page); and
- advise applicants of inherent job requirements including job demands, the recruitment process and any avenues for appeal.

The inherent job requirements of any position should be contained in a position description to enable applicants to assess their own suitability for appointment. It may be worthwhile including the job demands within that same document or in some other form so that the applicant can self assess against the requirements. Where action is taken to fill positions through recruitment agencies or labour hire firms, it is important that this information is communicated to applicants at the time of offer.

Where utilising recruitment agencies or labour hire firms, you also have an obligation to ensure such agencies/firms use non-discriminatory recruitment procedures.

A Flowchart showing the appointment process is outlined at Appendix B.

Health Assessment Options

Chief Executive Officers (or delegates) can approve the health assessment options and determine the health assessment provider to be utilised.

Health requirements vary according to the nature and type of occupation. Two health assessment options are outlined below to assist agencies to identify the most relevant and reliable method of assessment for their requirements. Note that a health assessment in any form should only occur after an applicant has been selected on merit (Appendix B). Health assessment options include:

Health Declaration

Agencies may use a health declaration form (Appendix C) thus satisfying the minimum requirement. The declaration form simply allows the employee or applicant to choose the most appropriate statement relating to their health in respect of meeting the inherent job requirements and job demands of the position.

Other Options

In utilising this option a health assessment provider may use a variety of methodologies to ascertain a person's ability to meet the inherent job requirements and job demands of a position. This option can include appropriate questionnaires, screening tests and medical examinations where required. Medical examinations may be used where a disability is disclosed at the time of the health declaration, or as required by regulation.

Where an applicant is required to undergo a health assessment and the health assessment provider undertakes that assessment, the information provided by the health assessment provider to the employer should be limited to information which indicates whether:

- the applicant is able to perform the inherent job requirements and job demands of the position;
- adjustments need to be made to enable the applicant to perform the inherent requirements and job demands of the position and the nature of those adjustments; or
- the applicant is unable to perform the inherent requirements and job demands of the position unless the employee has consented in writing to the release of additional clinical information.

Certain medical information might be indirectly disclosed in the event that the health assessment provider recommends certain adjustments in order for the applicant to perform the inherent requirements of the position. Such information should be dealt with in accordance with *Privacy NSW's Data Protection Principles 1999*.

In the event that such an individual is employed by a public sector agency, the information in question would become subject to the provision of the *Privacy and Personal Information Protection Act 1998* (NSW).

The health assessment test must be appropriate and relevant to the genuine inherent job requirements and job demands of the position and identify the adjustment needs of prospective employees with disabilities.

Choosing Health Assessment Providers

Public sector agencies need to consider the competence of the health assessment provider contracted by the agency. The agency needs to assess the following issues in relation to the contract:

- the level of professional expertise in occupational health relevant to the agency;
- professional ethics;
- knowledge of responsibilities under *Occupational Health and Safety Act 1983* (NSW) and Anti-Discrimination legislation;
- ability to assess the position's job demands in relation to the inherent position requirements;
- knowledge of privacy and confidentiality issues, including data protection principles;
- ability to provide effective quality assurance, reporting and monitoring processes;
- ability to assess the preferred applicant's current fitness to perform the inherent job requirements;
- ability to advise on any adjustment needs; and
- any relevant accreditation required by law.

The health assessment provider must be given a position description outlining the inherent job requirements and job demands of the position. The health assessment provider must be aware of an agency's obligations under the *Anti-Discrimination Act 1977* (NSW) and *Disability Discrimination Act 1992* (Commonwealth) and understand that the examination must relate to the specific inherent job requirements and job demands identified for the position and the applicant's current fitness to carry them out.

The health assessment provider must be made aware of the legislative provisions in respect to providing adjustments and be able to recommend any adjustments necessary for the applicant to be employed in the position.

Agencies also have the option of contracting with the Government provider, HealthQuest.

Health Assessment Process

Agencies will need to develop systems that facilitate health assessment decision processes (see Flowchart at Appendix B) for each of the *trigger points* identified previously, namely:

- nature of the vacancy - permanent, temporary or part time positions;
- acting arrangements, lateral transfer or promotion within the agency; or
- where the nature of the position is such that all employees carrying out those tasks require regular health checks.

The systems need to encompass procedures for processing relevant health assessment options utilised by that agency. In particular, processes need to be established where the health assessment provider recommends that adjustments be made for a prospective employee to fulfil the inherent job requirements and job demands of the position.

In cases where medical examinations and/or tests are undertaken, the health assessment provider should forward a recommendation based solely on the person's capacity to perform the inherent job requirements and job demands of the position rather than a medical diagnosis. This may include recommendations on capacity to perform the duties with adjustments.

Adjustments

The *Anti-Discrimination Act 1977* (NSW) and the *Disability Discrimination Act 1992* (Commonwealth) require employers to make adjustments (services or facilities) to enable a person with a disability chosen on the basis of merit to carry out the inherent job requirements and job demands of a position.

Many forms of adjustment can be made to the workplace to reduce or eliminate the effects of a disability upon a person's ability to carry out the inherent requirements of the job. This can be undertaken by supporting the capabilities of people with disabilities and assisting them to perform the inherent job requirements and job demands of the position.

The nature of adjustment required needs to be determined in consultation with the person concerned and not be based on generalisations about particular disabilities. Such an approach acknowledges that there are variations between individuals with particular types of disability, as to the degree of disability experienced by them as well as other characteristics, such as skills, qualifications and experience.

Adjustments need not be provided where to do so would cause the employer unjustifiable hardship.

Recruitment and Selection

It is recommended that at all trigger points, agencies inform and/or remind applicants of the form of health assessment required for the position, and the processes, rights and mutual obligations in respect of the outcomes of the assessment procedures. This may take the form of a summary of the major provisions of the policy and guidelines. Agencies must make adjustments for people with disabilities in line with the policy and law on making such adjustments.

Health Assessments

The factors that can be considered include the person's current fitness, medical condition, functional capacity and work history where relevant to the inherent job requirements and job demands of the position. Any assessment of functional capacity must be considered in the light of a risk assessment and management strategy governing the positions or occupational group.

It is the employer's responsibility to follow the guidelines to contract a health assessment provider, as medical practices and procedures are among the many processes where employer equity considerations need to be applied. The employer should ensure that the health assessment provider is familiar with the principle of making adjustments and participates in the process of making recommendations about an applicant.

Applicants recommended for appointment to positions must be prepared to undertake the form of health assessment determined by the Agency, to provide all necessary health information to determine their capacity to undertake the inherent job requirements and job demands of the position, and to assist in determining any adjustment needs.

Protecting Privacy

All records should be dealt with in accordance with *Privacy NSW's Data Protection Principles*, which require:

- written consent by the employee to the collection and dissemination of the information;
- an employee's prior knowledge and understanding of the purpose for which the information is collected and to whom it may be disclosed;
- an agency to have transparent policies and practices on information handling;
- an agency to ensure the right of the employee to access information relating to themselves;
- secure storage and strict confidentiality of data, with information made available only when strictly necessary; and
- the establishment of consultative processes with relevant unions to develop, implement and monitor health assessment procedures, as appropriate, and select health assessment providers in accordance with the policy.

Appeals Process

Where an applicant is dissatisfied with recommendations in respect of their capacity to perform the inherent job requirements and job demands of a position, with or without adjustments, an appeal may be lodged. The applicant may wish to discuss the matter with their treating doctor or seek another medical opinion. HealthQuest can be asked to provide a second opinion or, where HealthQuest was the initial provider, the Medical Appeals Panel (Department of Health) shall provide this appeal service.

Agencies are to ensure that all applicants are advised of avenues of appeal, where applicable, including the specified period in which an appeal can be lodged. The appeal period will be 21 days from the date of notification to allow sufficient time for a dissatisfied applicant to provide additional medical evidence.

Other avenues of redress may be available to the applicant as follows:

- internal applicants could in the first instance access internal grievance mechanisms. This should not be seen as an alternative to lodging an appeal; and/or
- the Anti-Discrimination Board and the Human Rights or Equal Opportunity Commission in the case of alleged unlawful discrimination.

Record Keeping

All health declarations and medical reports should be kept confidential and in a secure place. Access to confidential information will be according to the policy and practices of the health assessment provider in agreement with the contracting organisation.

Government records should be disposed of in accordance with the requirements and explicit authorisation of the State Records Authority of NSW. The *State Records Act 1998* (NSW) establishes a penalty for the unauthorised disposal of records.

Other legislation may also contain particular requirements for the creation, retention and/or destruction of records and these should be adhered to. Where such legislation authorises the destruction of records, the authorisation of State Records is also necessary.

All destruction of records should occur in a confidential manner. Guidelines for the appropriate confidential destruction of records can be obtained from State Records NSW.

More specifically, it is recommended that medical records and reports, including medical assessments, should be:

- retained by the contracted health assessment provider for the duration of the health assessment provider's contract or for a period of seven years. Records of medical assessments carried out on employees in accordance with the *NSW Occupational Health and Safety (Hazardous Substances) Regulation 1996* are required to be retained for thirty years. After this time disposal of the records can only occur with the authorisation of State Records of NSW.
- transferred to a new contracted health assessment provider unless the records have been inactive in excess of seven years in which case they may be destroyed in a confidential manner by the previous provider; and/or
- transferred to a new organisation's health assessment provider in the case of employee transfer, providing that written consent has been given by the employee. (If consent is not given, then the transferring employee will be required to undertake any applicable health assessment used in the selection procedures in the same manner as an external applicant).
- provided (as copies of original documents) to the employee's medical practitioner or treating specialist, following receipt of a written request by the employee's doctor or on receipt of a medical release form signed by the employee or requested under Freedom of Information legislation.
- provided (as copies of original documents) on written request of the employee or under Freedom of Information legislation.
- provided under the *Occupational Health and Safety Act 1983* to a WorkCover inspector or trade union Authorised Officer requesting information from an employer (demanding documents), subject to any confidentiality requirements which apply to medical records, reports, or tests.

It should be noted that disclosure of medical reports of a deceased employee or deceased applicant should only be granted with clear legal authority such as a subpoena or a writ.

APPENDIX A

Glossary

Disability discrimination: unlawful disability discrimination occurs in employment where a person who has a disability is treated less favourably than a person who does not have that disability, or is required to comply with an unreasonable requirement or condition which is harder for people with disabilities to comply with. For example, unlawful disability discrimination may occur where one of the reasons for refusing to employ a person is because the person has a disability. An employer must consider whether, with the provision of services or facilities, a person would be able to carry out the inherent requirements of the job.

Disability: is defined under the *Anti-Discrimination Act 1977* as:

"**disability**" means:

- (a) total loss of a person's bodily or mental functions or of part of a person's body; or
- (b) the presence in the person's body of organisms causing or capable of causing disease or illness; or
- (c) the malfunction, malformation or disfigurement of a part of a person's body; or
- (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction; or
- (e) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgement or that results in disturbed behaviour.

Health assessment: interpretation of a person's health/fitness status by people using a variety of methodologies. Health assessment ranges from an administrative decision based on a health declaration, through several types of focused questionnaires and screening tests administered by various health professionals, to a comprehensive medical/physical examination.

Inherent job requirements: are the requirements that are fundamental, intrinsic or essential to the position. These requirements must be determined objectively and cannot depend on the attitude or operational methods of the employer. The term inherent job requirements carry with them associated job demands.

Job demands: integral part of the inherent job requirements but can refer specifically to the essential job characteristics which require physical, sensory and psychological capacities, and also any physical, biological and chemical hazards or accident risks which may be associated with a given job.

Medical examination: comprehensive medical history and physical examination and appropriate investigations undertaken by a doctor.

Adjustment: is used to refer to the provision of services, facilities or working arrangements which allow an individual with a disability to carry out the inherent requirements of the job.

"Adjustments" must be provided where their provision does not cause the employer "unjustifiable hardship." The employer undertakes consultation with the individual, leading to a mutually acceptable arrangement for employment to proceed, in compliance with the requirements of the *Anti-Discrimination Act, 1977* (NSW) and *Disability Discrimination Act 1992* (Commonwealth) - see also Premier's Department Information Sheet No 95-70. Note that the defence of unjustifiable hardship to the provision of services or facilities only applies in relation to recruitment and dismissal of employees. All adjustments must be made for existing employees.

Test: an objective instrument used to measure functional capacity. Tests include questionnaires, screening techniques, medical examinations etc.

Unjustifiable hardship: is a legal defence to a complaint of disability discrimination. An employer must provide services or facilities to enable an employee or potential employee to carry out the inherent requirements of a job. However, an employer may in some circumstances claim that the provision of such services or facilities would cause the employer "unjustifiable hardship".

This defence may only apply in relation to a job applicant or dismissed employee. It does not apply to an existing employee. An existing employee who has a disability and requires services or facilities in order to carry out the inherent requirements of the position must be provided with those services or facilities.

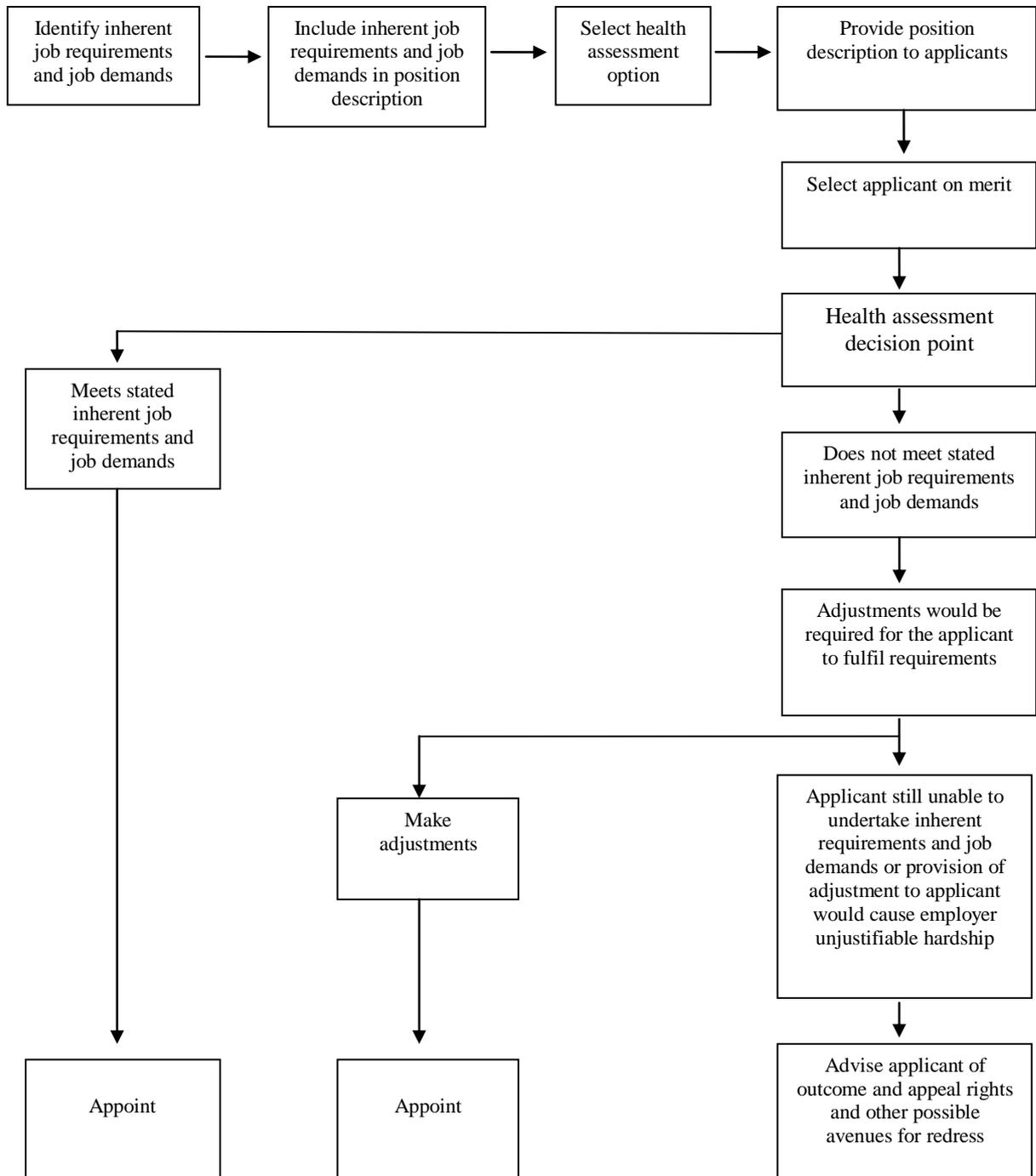
Unjustifiable hardship is a stringent standard for employers to meet. All the relevant circumstances must be taken into account when determining whether the provision of services and facilities would cause unjustifiable hardship to the employer, including:

- an assessment of the adjustments required
- nature of the benefit or detriment likely to accrue or be suffered by any person
- the benefits or detriment likely to accrue to others
- in the case of the provision of services or the making available of facilities, the existence of an action plan given to the *Human Rights and Equal Opportunity Commission (Disability) Discrimination Act 1992* (Commonwealth)
- the costs of other adjustment and financial situation of the agency

No single factor alone is likely to constitute unjustifiable hardship.

APPENDIX B

Appointment Flowchart



APPENDIX C

Model Health Declaration Form

Name:	
Address:	
Position:	

Duties of the Position:

I have read the inherent job requirements and job demands for the position and these requirements have been explained to me. I have ticked the appropriate statement below:

- I am not aware of any health condition which might interfere with my ability to perform the inherent job requirements and job demands of this position.
- I have a health condition that may require the employer to provide me with services or facilities (adjustments) so that I can successfully carry out the inherent job requirements and job demands of the position.
- I understand that adjustments to the workplace can be made to assist employees with disabilities in carrying out the inherent job requirements and job demands of the position. Any adjustments I need have been discussed with the organisation prior to completing this health declaration.
- I no longer wish to be considered for this position.

I am aware that any false or misleading statements may threaten my appointment or continued employment.

This form is to be used at the job offer stage.

Signature: _____

Date: _____

Further information

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SYDNEY NSW 2000

Contact: Gary McGrath telephone number: (02) 9228 4381
E-mail address: psmo@premiers.nsw.gov.au

Office of the Director of Equal Opportunity in Public Employment (ODEOPE)

Telephone: (02) 9248 3555
Website: www.eeo.nsw.gov.au

Anti-Discrimination Board

Telephone: (02) 9318 5444 1800 670 812
Website: www.lawlink.nsw.gov.au/adb

WorkCover NSW

Telephone: (02) 9370 5000
Website: www.workcover.nsw.gov.au

Privacy New South Wales

Telephone: (02) 9228 8199
Website: www.lawlink.nsw.gov.au/

State Records of New South Wales

Telephone: (02) 9237 0200
Website: www.srecords.nsw.gov.au

Office of the NSW Government Medical Officer (HealthQuest)

Telephone: (02) 9281 0811
E-mail: gapper@healthquest.gov.au

Other

Human resources staff and the Equal Employment Opportunity Coordinator in your agency.