

8. Equal opportunity, harassment and bullying

Equal Opportunity (EO) is a significant policy issue in the management of human resources. This area of policy should influence every human resource decision from recruitment and selection through performance management to remuneration, industrial relations, termination and redundancy. EO requirements impact on every area of human resource management.

The fundamental principle of anti-discrimination laws relating to employment is that all people should be managed on their ability to perform the inherent requirements of the job and not on any presumed or real attributes an employer or other employee thinks may affect their job performance.

8.1 The legislation

Australia has a complex series of State and Federal anti-discrimination and occupational health and safety laws. State and Federal legislation establish minimum standards with respect to the elimination of discrimination, harassment and bullying in employment and the requirement to provide a safe workplace. This legislation imposes serious responsibilities on both employers and employees to prevent any incidence of discrimination, harassment and bullying.

8.1.1 Victorian legislation

The cornerstone of Victorian anti-discrimination legislation is the *Equal Opportunity Act 2010 (Vic)*, which arguably demands the most stringent accountability and responsibility in comparison to other state legislation of this type.

The substantive provisions of the Act commenced on 1 August 2011. The Act introduces new obligations that will impact national and Victorian employers, including a new duty to eliminate discrimination, sexual harassment and victimisation. It also heralds a new era in complaint handling by the Victorian Equal Opportunity and Human Rights Commission (Commission). It gives the Commission powers to investigate systemic discrimination, sexual harassment and victimisation even without a complaint and to issue compliance notices to employers.

The Act represents a significant shift in the approach taken to equal opportunity law in Victoria, and may foreshadow a change in focus of laws in this area from other states and territories in the future.

The traditional focus of the Commission was on the investigation and resolution of individual complaints of unlawful behaviour. Under the new Act, the Commission's role is refined to one of education and resolution of individual complaints, with its investigative and inquiry role reserved for issues affecting a broader group of people in an effort to deal with systematic discrimination.

The objectives of the *Equal Opportunity Act 2010 (Vic)* are to:

- > eliminate discrimination, sexual harassment and victimisation, to the greatest possible extent;
- > further promote and protect the right to equality set out in the Charter of Human Rights and Responsibilities;
- > encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation
- > promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that:

- discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society;
- equal application of a rule to different groups can have unequal results or outcomes;
- the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures.

Other legislation which is relevant in this area of human resource management is the *Occupational Health and Safety Act 2004 (Vic)*, particularly when considering the issue of bullying in the workplace (outlined later in this chapter), and the *Racial and Religious Tolerance Act 2001 (Vic)*, which prohibits the vilification or inciting of hatred against an individual or a group of individuals on the basis of their race or religious belief.

8.1.2 Federal legislation

Victorians are also covered by the following Federal Acts:

- > *Age Discrimination Act 2004*
- > *Disability Discrimination Act 1992*
- > *Workplace Gender Equality Act 2012 (previously named the Equal Opportunity for Women in the Workplace Act 1999)*
- > *Fair Work Act 2009*
- > *Human Rights and Equal Opportunity Commission Act 1986*
- > *Racial Discrimination Act 1975*
- > *Sex Discrimination Act 1984*
- > *Affirmative Actions (Equal Employment Opportunity for Women) Act 1986*.

It is imperative that employers understand the implications of both State and Federal anti-discrimination legislation to ensure individuals are treated fairly and equitably. This chapter provides an outline of such legislation and the subsequent implications for the human resource professionals.

8.1.3 The Victorian Equal Opportunity and Human Rights Commission

Complaints of discrimination, harassment or bullying (under both State legislation) are dealt with in Victoria by the Victorian Equal Opportunity and Human Rights Commission. It provides an impartial, confidential and free complaint resolution service to promote equal opportunity and eliminate unlawful discrimination.

The Commission has the ability to investigate and conciliate complaints that come within the jurisdiction of the *Equal Opportunity Act 2010 (Vic)*. The Federal Human Rights and Equal Opportunity Commission has the ability to investigate and conciliate complaints under Federal legislation.

8.1.4 The Fair Work Commission

From 1 January 2014, workers, who believe that they are being bullied, have the right to apply to the Fair Work Commission (FWC) for an order to stop the bullying. The definition of workers includes employee, contractor, contractor's employee, apprentice, trainee, volunteer or labour hire employee. Under this provision, FWC must start the process of the application within 14 days if they are satisfied that bullying has occurred. The FWC has the discretion to be able to select the appropriate way to handle the matter which includes but is not limited to offering voluntary mediations, conducting public hearings or referring the matter to a workplace health and safety regulator.

If the FWC finds that bullying has occurred in the workplace and there is a risk that it will continue to occur a Commissioner can make an order to stop bullying in the following ways:

- > relocation of individuals
- > order an individual or group to stop bullying
- > providing support to the applicant
- > changing or enforcing an company's bullying policy

However no order for payment or pecuniary amount can be issued by the FWC.

Although the order made by the FWC cannot be a financial payment, if the order is not followed it would be a statutory offence of a civil remedy which will attract a monetary penalty. An alleged breach must be reported within 6 years by the Fair Work inspector, relevant parties or an industrial association.

8.2 Discrimination

The operation of Federal and State legislation in Victoria prohibits discrimination on the basis of certain attributes or personal characteristics.

8.2.1 Grounds of discrimination

In Victoria, discrimination on the following grounds is unlawful:

- | | |
|--|--|
| > age | > political belief or activity |
| > breastfeeding | > pregnancy |
| > employment activity | > race |
| > gender identity | > religious belief or activity |
| > impairment | > sex |
| > industrial activity/inactivity | > sexual orientation |
| > lawful sexual activity | > personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes. |
| > marital status | |
| > parental status or status as a carer | |
| > physical features | |

8.2.2 Discrimination

Discrimination can be defined in two ways – direct and indirect discrimination.

Direct discrimination occurs when a person treats, or proposes to treat, a person with one of the attributes or personal characteristics unfavourably because of that attribute.

Indirect discrimination occurs when a person imposes, or proposes to impose, a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging persons with an attribute and that is not reasonable. For example, if an employer requires all employees to work full time from 9-5.30pm regardless of their role despite being able to accommodate part time workers.

8.2.3 Intent/Motive is irrelevant to discrimination

In determining whether or not a person discriminates, the person's intent/motive is irrelevant.

8.2.4 Areas of prohibited discrimination

For discrimination to be considered unlawful, the discrimination must occur in an area covered by the legislation. The areas of discrimination that apply in Victoria are:

- > employment and employment-related
- > education
- > provision of goods and services
- > disposal of land
- > accommodation
- > clubs and club membership
- > sport
- > local government.

Most employees are covered in the 'employment and employment-related' and 'provision of goods and services' areas in their dealings with others during the course of their work. The new legislation also now extends to job applicants. In effect, this takes into account not only immediate working relationships with managers, supervisors and co-workers, but also covers providing goods and services to, and receiving them from, members of the public.

8.2.5 Grounds of discrimination

The grounds of discrimination covered by the legislation that apply in Victoria are designed to protect people from being disadvantaged on grounds that do not impact on their ability to perform in a position. It basically codifies the rights of individuals to be treated on their merits and on their demonstrated abilities and experience. The legislation aims to prevent employers making decisions in employment that do not relate to the inherent requirements of the job.

Some people may argue that this places great obligations and restraints on employers. However, if employers approach all aspects of human resource management with a view to ensuring they have the best people in the most suitable positions and are giving them every opportunity to do their best, there are only benefits to be had by all.

The following grounds of discrimination apply in Victoria, and an explanation of each is provided.

Age

It is unlawful to discriminate on the basis of age. This means that an employer must not make employment-related decisions based on the age of a person. This applies to all aspects of human resource management including recruitment and selection, promotion, training and development opportunities, retirement, and termination of employment.

For example, an employer must not choose to give a promotion to one person over another based on the fact that one person is younger and the employer assumes that they will be with the organisation for a longer period of time. Such decisions must be made based on the individual's ability to perform in the position and

not influenced by the employer's assumptions as to whether the person will be best for the position based on their age.

Breastfeeding

It is unlawful to discriminate on the basis of breastfeeding. Where an employer does not allow an employee to take breaks other than scheduled lunch and tea breaks, a breastfeeding woman may not be able to express milk when necessary in order to breastfeed her baby. If the rule is not based on the inherent requirements of the job, or because alternative arrangements cannot be made, this may be indirect breastfeeding discrimination.

Impairment / disability

While the legislation refers to 'impairment', the term 'disability' is also used in relation to this attribute. It is unlawful to discriminate against a person because of their disability in all areas of activity covered by the Act.

The Act defines impairment as:

- (a) total or partial loss of a bodily function (e.g. hearing loss, incontinence)
- (b) the presence in the body of organisms that may cause disease (e.g. hepatitis or HIV/AIDS virus)
- (c) total or partial loss of a part of the body (e.g. loss of fingers or an arm)
- (d) malfunction of a part of the body, including:
 - i. mental or psychological disease or disorder (e.g. depression)
 - ii. condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder (e.g. Downs Syndrome)
- (e) malformation or disfigurement of a part of the body.

It also includes an impairment that may exist in the future (including because of a genetic predisposition to that impairment) and, to avoid doubt, behaviour that is a symptom or manifestation of an impairment. Employers must be sure to make decisions that are based on an individual's ability to meet the inherent requirements of the job and avoid making assumptions about the impact of the impairment.

Gender identity

It is unlawful to discriminate against a person on the basis of gender identity. Gender identity means self-identification as a person of a relevant gender. Identification may be expressed by style of dress, medical intervention or by other means, including change of name. For example, a transsexual must not be treated unfavourably in recruitment on the basis that they are a transsexual. The person must be evaluated on their ability to meet the inherent requirements of the job. A decision not to employ the person because they are a transsexual may be discriminatory.

Industrial activity/inactivity

The Act makes it unlawful to discriminate on the basis of industrial activity/inactivity or industrial association. Industrial activity means:

- > Being or not being a member of, or joining or not joining or refusing to join, an industrial organisation.
- > Participating in, not participating in or refusing to participate in a lawful activity organised or promoted by an industrial organisation.

Industrial association is defined to mean:

- > A group of employees or employers, formed formally or informally to represent or advance the views, claims or interests of the employees or employers in a particular industry, trade, profession, business or employment, not including an industrial organisation.

Industrial organisation is defined as:

- > An organisation of employees (e.g. a trade union)
- > An organisation of employers (e.g. Victorian Chamber of Commerce and Industry)
- > Any other organisation established for the purposes of people who carry on a particular industry, trade, profession, business or employment – registered or recognised under a State or Commonwealth enactment.

Lawful sexual activity

Under the Act, it is unlawful to discriminate on the basis of a person's lawful sexual activity. The Act defines lawful sexual activity as engaging in, not engaging in or refusing to engage in a lawful sexual activity.

Marital status

It is unlawful to discriminate against a person on the basis of their marital status. This includes disadvantaging a person because they are married, single, divorced, separated, de facto or widowed. As such, assumptions made about a person that affect a decision relating to their employment may be viewed as discrimination.

The legislation now uses the term domestic partner, in lieu of de facto as it also applies to same sex couples.

Parental status or status as a carer

It is unlawful to discriminate against another person because of their status as a parent or carer.

The section of the Act dealing with parenthood is aimed at preventing employers from making assumptions about a variety of factors, including: a person's commitment, ability to work required hours, and days of work. This attribute also includes being discriminated on the basis of not being a parent (e.g. in relation to applying for job).

The Act defines carer as a person on whom another is wholly or substantially dependent for ongoing care and attention, other than a person who provides that care on a wholly or substantially commercial basis. Carers are not confined to family members. Dependent people may include babies and children, the elderly and people with impairments.

Employers must be careful to ensure that policies and practices are not indirectly discriminatory against people who are carers. For example, a policy or practice that training and development programs are always held outside work hours (whether paid or unpaid) may prevent people with responsibilities as parents or carers from attending and therefore be indirectly discriminating against them.

Physical features

It is unlawful to discriminate on the basis of a person's physical features in an area of activity covered by the Act. Physical features mean a person's height, weight, size or other bodily characteristic beyond a person's control. The definition is not intended to include things such as body piercing or tattoos, over which a

person does have control. Therefore, if a person can meet the inherent requirements of a job, their physical appearance must not impact on the decision.

Political belief and/or activity

It is unlawful to discriminate on the basis of political beliefs or activities. Political belief or activity means:

- > holding or not holding a lawful political belief or view
- > engaging in, not engaging in or refusing to engage in a lawful political activity.

Pregnancy

It is unlawful to discriminate on the basis of pregnancy. However, it is lawful to discriminate on the basis of pregnancy if it is reasonably necessary to protect the health and safety of the pregnant person, or others, be they a pregnant employee, the unborn child or a member of the public. It is also discriminatory to disadvantage a person based on a presumption of pregnancy (i.e. assuming that a woman is likely to become pregnant given her personal circumstances).

Religious belief and/or activity

The Act makes it unlawful to discriminate on the basis of religious belief or activity. Religious belief or activity means holding or not holding a religious belief or view, engaging in, not engaging in or refusing to engage in a lawful religious activity. Employers should be aware of the religious requirements of some people and ensure that policies and/or practices of the organisation do not directly or indirectly discriminate against a person because of their religious beliefs.

Race

Under the Act, it is unlawful to discriminate on the basis of race. Race is defined broadly and includes:

- > colour, descent or ancestry, nationality or national origin, ethnicity or ethnic origin.

Sex

It is unlawful to discriminate on the basis of sex. This applies equally to men and women. This can have wider implications than may be first thought. For example, a policy concerning dress or uniform may discriminate against one sex. If the policy prohibited the wearing of earrings by males but allowed women to wear earrings, this may be discriminatory.

Sexual orientation

It is unlawful to discriminate on the basis of sexual orientation. Sexual orientation is defined in the legislation as homosexuality (including lesbianism), bisexuality and heterosexuality. This also extends to transgendered people. For example, should an employee decide not to engage a person because of their transgender status, this would be considered discrimination.

Employment activity

An employer is prohibited from directly or indirectly discriminating against an employee where the employee:

- > makes a 'reasonable request' to an employer for information about his or her employment entitlements, or
- > communicates a concern to an employer that the employee's entitlements have not been, are not being or will not be provided to the employee.

Personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes

Discrimination is unlawful if a person is treated unfairly because of their actual or assumed personal association with someone who has, or is assumed to have, one of the attributes covered by the legislation. For example, a person may be disadvantaged in employment (e.g. failure to receive a deserved promotion) based on the fact that the person is married to a political activist whose views do not accord with those of an employer. This action may be discriminatory on the ground of personal association.

Irrelevant criminal conviction

The *Australian Human Rights Commission Act 1986 (Cth)* prohibits discrimination based on an employee having a criminal conviction that is not relevant, and would not prevent, the employee from performing the inherent requirements of their role.

8.3 Human resources management applications

Discrimination issues apply to all areas of the employment relationship, however, most arise in the following areas: Recruitment and Selection, Terms and Conditions of Employment, Performance Management, Disciplinary Action and Termination of Employment.

8.3.1 Recruitment and selection

Many equal opportunity problems arise in the context of recruitment and internal selection processes. One of the most important ways to avoid claims in this area is to focus on the inherent requirements of the job (i.e. the tasks that the job genuinely involves and the attributes that are required).

It is imperative that organisations have effective equal opportunity policies, procedures and objectives to not only avoid a potential breach of anti-discrimination legislation, but also to ensure the right candidate for the job is appointed. Application forms should only request information that is relevant to the particular job and necessary for selection.

Further, they should be reviewed regularly to make sure they comply with any changes to the legislation.

The *Equal Opportunity Act 2010 (Vic)* prohibits employers from requesting job applicants and employees to supply information, either orally or in writing, which could be used for discriminatory purposes unless that information is required for a purpose that would not breach the Act. Well-developed policies and procedures provide guidelines for line managers. For instance, the procedures should alert managers to questions to avoid in the recruitment process because they may be discriminatory. In addition, the documentation may be needed to defend an allegation of discrimination.

Should a discrimination complaint relate to a selection or promotion, the employer must be able to demonstrate the objective nature of the selection process. In this context, discrimination can be said to have occurred only if the complainant did not get the job because of one of the grounds under which discrimination is unlawful.

8.3.2 Terms and conditions of employment

There should be no distinction in the application of the terms and conditions of employment for reasons unrelated to the job. In this context, conditions of employment include remuneration, access to training and career development programs, and access to overtime.

For example, age discrimination is unlawful. Compulsory retirement on the basis of age became unlawful on 1 January 1997. It would, therefore, be discriminatory to preclude a 62-year-old employee from an employee development program on the presumption that, because they would retire at 65, it would not be a wise investment due to the employee having only a short-term future with the organisation.

Indirect discrimination issues can also arise in this area, such as employees with a disability having restricted access to career development opportunities.

8.3.3 Performance management, disciplinary action and termination of employment

Anti-discrimination legislation applies to performance management, disciplinary action and termination of employment, including redundancy practices and decisions. While many organisations are more aware of potential discrimination in this area, many continue to breach the law through discriminatory policies and practices. To reduce the risk of discrimination claims:

- > Performance management and disciplinary action should be applied consistently across an organisation and employees should not be targeted due to an attribute.
- > When terminating an employee's employment, the employer should ensure that it is not for an unlawful reason which includes discrimination.
- > A redundancy policy should be based, as far as possible, on criteria that are directly relevant to the employment circumstances. For example, skills required for the future operations of the organisation measured against employees' existing skills.

In terms of redundancy, a common mistake in this area is a tendency to select employees for redundancy based on the 'last on, first off' rule. This rule was introduced many years ago as a fair and objective method of selecting people for redundancy. However, in practice, this rule may be discriminatory in its effect.

An example of where this approach to redundancy was found to be discriminatory was in the case where an organisation had only recently begun to employ women in certain jobs. Therefore, the majority of people made redundant using the 'last on, first off' rule were women.

The practice, therefore, was found to be indirectly discriminating against women.

8.4 Harassment and bullying

8.4.1 Harassment

Although most harassment claims tend to be of a sexual nature, it is essential to recognise other types of harassment. Harassment may occur in relation to any of the attributes protected by the legislation (refer 8.2.1 *Grounds of discrimination*). Racial harassment, disability harassment and industrial harassment are equally unlawful and can culminate in formal complaints and legal action.

Harassment is a form of discrimination and is any behaviour which is unwanted or unwelcome that makes a person feel offended, humiliated and/or intimidated. It can create a hostile, intimidating or offensive work environment, which can result in illness, injury or loss of employment.

Examples of harassment include:

- > distribution or display of offensive material (posters, pictures, cartoons, etc.) based on disability, race, gender, sexuality, etc.
- > mocking remarks or derogatory comments making reference to the characteristics of a person with a disability
- > intimidation or verbal abuse oriented at a person's race
- > repeated irrelevant reference to a person's pregnancy
- > jokes based on a person's age
- > actions that increase a person's negative sense of disability
- > isolation or segregation of people with a different sexuality
- > derogatory jokes on the basis of religious beliefs.

8.4.2 Sexual harassment

Sexual harassment is 'unwelcome conduct of a sexual nature' which might be an unwelcome sexual advance or an explicit request for sexual favours. It may also include a wide range of verbal, visual or physical behaviour by which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

Conduct of a sexual nature is defined in the Equal Opportunity Act to include:

- > subjecting a person to an act of physical intimacy
- > making any remark or statement with sexual connotations to a person or about a person in their presence, whether orally or in writing. This may include remarks or statements which are transmitted by phone, fax, video conference or e-mail
- > making any gesture, action or comment of a sexual nature in a person's presence.

8.4.3 Bullying

WorkSafe has produced a Guidance Note for the *Prevention of Bullying and Violence at Work*, which includes the following definition:

'Workplace bullying is repeated, unreasonable behaviour directed toward an employee, or group of employees, that creates a risk to health and safety'.

Within this definition:

- > 'Unreasonable behaviour' means behaviour that a reasonable person, having regard to all the circumstances, would expect to victimise, humiliate, undermine or threaten.
- > 'Behaviour' includes actions of individuals or a group, and may involve using a system of work as a means of victimising, humiliating, undermining or threatening.
- > 'Risk to health and safety' includes risk to the mental or physical health of an employee.

The following types of behaviour, where repeated or occurring as part of a pattern of behaviour, could be considered bullying:

- > verbal abuse
- > excluding or isolating employees
- > psychological harassment
- > intimidation
- > assigning meaningless tasks unrelated to the job
- > giving employees impossible assignments
- > deliberately changing work rosters to inconvenience particular employees
- > deliberately withholding information that is vital for effective work performance. This list is not exhaustive as other types of behaviour may also constitute bullying.

Note: An employee may also be a manager or supervisor.

Managerial Actions – the Guidance Note is not intended to diminish an employer's managerial prerogative to direct and control how work is done in their organisation, other than in terms of ensuring, so far as is practicable, the health and safety of employees.

The Guidance Note is not intended to cover poor or bad management practices on their own, because they are not considered bullying. The issue is really about how that managerial prerogative is exercised – is it exercised in a reasonable or unreasonable way?

The Guidance Note does not cover situations where an employee has a grievance about legitimate and reasonable actions taken by an employer when performance management processes, disciplinary action or the allocation of work in compliance with systems is involved. Again, it is the way in which these managerial prerogatives are exercised.

The Guidance Note does not treat business processes, such as the implementation of organisational change or downsizing, as incidents of bullying. However, they may contribute to producing an environment where bullying is more likely to occur.

8.4.4 Victimisation

Victimisation is treating or threatening to treat a person detrimentally because they:

- > consider making a complaint or have made a complaint
- > act as a witness
- > support a claimant. Victimisation is unlawful.

8.4.5 Employer responsibilities

Employers are responsible for providing a workplace free from harassment and bullying. This requires that they:

- > issue a clear statement or policy indicating that the organisation will not tolerate unlawful harassment or bullying
- > conduct an awareness program to ensure all employees understand what constitutes unlawful harassment and bullying and their rights and responsibilities

- > develop an internal grievance procedure and complaint management process that gives employees with concerns an opportunity to discuss their concerns and a possible resolution.

Vicarious liability

Both State and Federal Equal Opportunity legislation contain vicarious liability for employers for any acts of their employees which breach the legislation.

'Vicarious liability' is a legal concept in which the law holds an employer responsible for their employees' misconduct even though the employer is free from personal blame, or fault. However, the legislation provides a defence to this liability if employers have taken 'reasonable steps' or precautions to ensure that unlawful acts do not occur.

8.4.6 Minimise risk - 'reasonable steps'

In the event of a claim of harassment or bullying, the Commission may examine the precautions (if any) that have been taken by your organisation to prevent harassment and bullying. While there is no way to prevent allegations, the following steps will help to protect you against costly litigation.

You should:

1. Develop a policy and procedures document and implement the policy.
2. Communicate the policy and procedures to your employees on a regular basis, emphasising the complaints resolution process
3. Provide training for managers and supervisors to help them identify and manage unlawful behaviour in the workplace.
4. Conduct awareness sessions to inform employees about appropriate behaviour, and their rights and responsibilities.
5. Ensure all employees have acknowledged and understood their obligations.
6. Follow-up with employees to ensure they understand the types of behaviour that are unacceptable and constitute unlawful harassment or bullying.
7. Establish an effective internal grievance procedure and a complaints resolution process that deals with complaints effectively and confidentially and includes the education of managers and supervisors in how to deal with complaints.
8. Monitor types and numbers of complaints to identify areas that need improving.

The Victorian Chamber has specialist consultants who can help you deliver a training and/or information program to minimise the risks to your organisation.

8.4.7 Internal grievance and complaints resolution

An essential step to prevent instances of harassment and bullying is the development and implementation of a formal process to handle complaints. It is vital that an organisation establishes a well understood procedure for counselling, investigating and resolving complaints. There are several features of a good procedure which are universal and include:

- > speed
- > sensitivity
- > confidentiality

- > consistent application
- > professionalism
- > procedural fairness.

The Investigation Officer and Contact Officer and/or managers and supervisors should be trained to carry out their functions in the organisation's complaint resolution process so that they are able to resolve issues quickly and effectively.

Internal complaint resolution model for employees

Some complaints can be resolved by working with the complainant to assist him/her to say "No" to the alleged harassment or bullying. This is often possible when the alleged harasser or bully is oblivious to the impact of their behaviour towards the complainant.

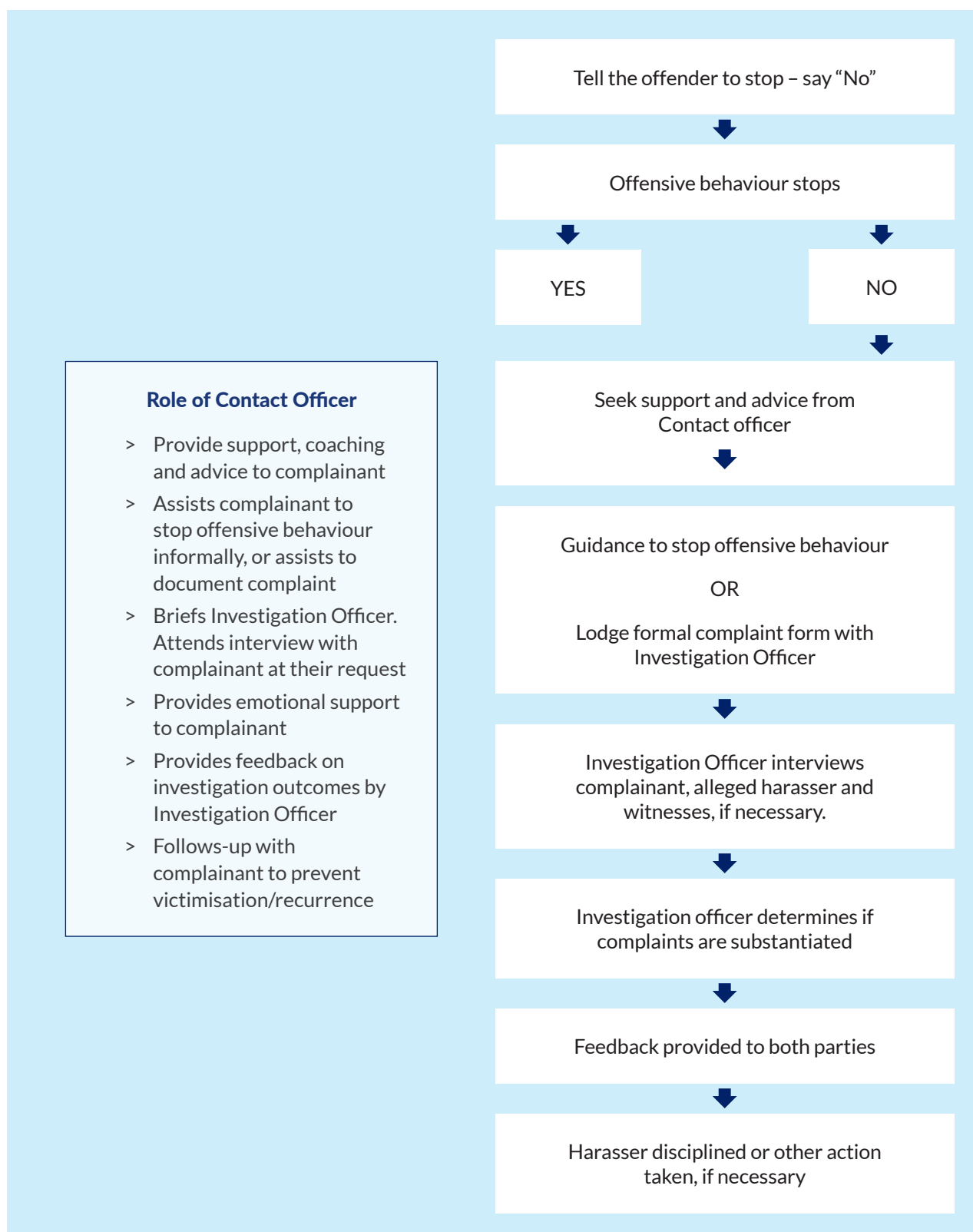
However, not all cases are so straightforward. It may, therefore, be appropriate to conduct an internal investigation. A complaint form should be used when conducting the investigation to ensure the information is retained on file until such time that an outcome is determined. This process also ensures that all the information needed to make a decision is collected for review.

Note: If the allegations are not substantiated, then details of the complaint should not be left on the respondent's personnel record. They should be destroyed.

The purpose of an investigation is to obtain the following information:

- > Name of the complainant.
- > The complainant's work location.
- > Name of the alleged harasser (or respondent).
- > Workplace of the alleged harasser or bully.
- > Relationship, if any, between the complainant and the alleged harasser or bully (both personal and professional).
- > Specific incidents of harassment or bullying.
- > If there has been a delay between the incident/s and the complaint. If so, why?
- > If there are any witnesses to the incident/s. If so, who are they?
- > The views of the witnesses.
- > If the alleged harasser or bully has been confronted with the allegations. If so, what was their response?
- > The nature of the resolution sought by the complainant

Internal complaint resolution model – flow chart



Both parties have a number of rights and responsibilities. It is important to understand and respect the rights of the parties throughout the process.

Complainant's rights	Respondent's rights
<ul style="list-style-type: none"> > the right to have the complaint investigated and, if necessary, conciliated > the right to have support/representation, if requested > the right to express views and opinions without intimidation from others > the right to discontinue a complaint, noting that the employer may still have responsibilities to investigate matters known to them that may constitute risk to the employer or other employees > the right to have the situation remedied > the right to privacy > the right not to be discriminated against. 	<ul style="list-style-type: none"> > the right to natural justice > the right to respond to the allegation/s > the right not to be discriminated against > the right not to be dismissed unfairly, harshly or unreasonably > the right to privacy > the right to have support/representation, if requested > the right not to be defamed > the right not to be the subject of unfounded or malicious complaints.

Once all of the information is gathered, the internal investigation officer needs to determine whether the complaint can be substantiated, on the balance of probabilities. If the complaint is substantiated, appropriate discipline needs to be applied.

Irrespective of the findings of the investigation officer, the decision needs to be communicated to the relevant parties, together with an appropriate explanation.

8.4.8 Key points of law

- > Victims of harassment or bullying are not obliged to inform the alleged harasser or bully that their behaviour is unacceptable.
- > The intent of the harasser or bully is irrelevant.
- > The victim's feelings in relation to the behaviour are important.
- > In Victoria, a co-worker can be named a sole respondent in cases of alleged sexual harassment.
- > There is no upper limit in terms of maximum compensation that can be awarded to the victim.
- > Sexual harassment is unlawful in common workplaces regardless of a person's status as employer or employee and irrespective of whether they work for the same employer or not. In this context, 'common workplace' is defined as any place a person attends for the purpose of carrying out any functions in relation to their employment, occupation, trade or profession, regardless of whether it is their principal place of business or employment.

8.5 Formal complaint resolution process

Stages of the discrimination and sexual harassment complaint resolution process provided by the Victorian Equal Opportunity and Human Rights Commission:

- > Inquiry
- > Lodgement
- > Conciliation
- > VCAT
- > Supreme Court

8.5.1 Inquiry

If an individual feels that they have been discriminated against, sexually harassed, victimised or vilified, they (or someone they know) can make a complaint to the Commission. The Commission will try and help resolve the complaint, although they will not advocate on behalf of the complainant. They may however contact the person or organisation that the complaint has been made against in order to resolve the issue. In some cases the Commission may decide they cannot deal with a complaint; if this happens they will contact the complainant to explain why.

Note: Complainant is the person who believes they have been discriminated against in a manner which breached the Act.

If the person alleging discrimination is unable to make a complaint personally - for instance, because of a disability - they may authorise someone else to make the complaint on their behalf. If the person is a child, the child may make a complaint on their own behalf. Alternatively, a parent of the child or a person authorised by the child or parent may make the complaint.

8.5.2 Lodgement

A complaint can be lodged in any language and, if necessary, the Commission can assist an individual to draft a complaint. Below are the relevant contact details for the Commission:

Complaints

Tel: 1300 891 848
TTU: 1300 289 921
Email: complaints@veohrc.vic.gov.au

Enquiry Line

9am–5pm Monday to Friday
Tel: 1300 292 153 or (03) 9032 3583
TTY: 1300 289 621
Email: enquiries@veohrc.vic.gov.au

General

Phone: 1300 891 848
Fax: 1300 891 858
Email: information@veohrc.vic.gov.au
Hearing impaired (TTY): 1300 289 621
Interpreters: 1300 152 494
Charter notifications fax: 1300 286 834

Location - Level 3, 204 Lygon Street, Carlton VIC 3053

8.5.3 Conciliation

Complaints to the Commission are resolved through a conciliation process. The purpose of conciliation is to give the parties an opportunity to discuss all of the issues relating to the complaint and reach a resolution through negotiation.

The Conciliator will not act as an advocate for the parties. The Conciliator's main objective is to ensure equal access to the process. He/she will not determine the merit or strength of a complaint nor advise on proposed settlements.

If conciliation fails, the complainant then has 60 days to ask that the Commission refer the matter to the Victorian Civil and Administrative Tribunal for hearing and determination.

8.5.4 Hearing by the Victorian Civil and Administrative Tribunal (VCAT)

The Tribunal is independent and separate from the Commission. Unlike the Commission, the Tribunal's processes are public and may involve a hearing where witnesses may be called and cross-examined. Only a small proportion of complaints go to the Tribunal - most are dealt with at the Commission level. Legal representation is strongly recommended at Tribunal hearings.

8.5.5 Appeals to the Supreme Court

Any party to proceedings before the Tribunal may appeal to the Supreme Court on a question of law, from an order of the Tribunal to those proceedings.

8.6 Equal employment opportunity for women

In May 1984, the Federal Government released a Green Paper titled, Affirmative Action for Women. The paper defined 'affirmative action' as:

"...systematic means, determined by the employer in consultation with senior management, employees, and unions, of achieving equal employment opportunity (EEO) for women. Affirmative action is compatible with appointment and promotion on the basis of the principle of merit, skills and qualifications. It does not mean women will be given preference over better-qualified men. It does mean men may expect to face stiffer competition for jobs. This is not discrimination."

Despite strong protests from employer groups, Federal Parliament passed the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth)* on 22 August 1986. While employer groups supported the intent of this legislation, they argued that there should be a voluntary approach to affirmative action. Roundtable consultations with employers have been held throughout Australia since that time. The results

contributed to the most significant changes to the legislation since its inception; these changes were passed by the Senate on 9 December 1999.

8.6.1 Equal Opportunity for Women in the Workplace Act 1999

On 1 January 1999, the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986 (Cth)* became the *Equal Opportunity for Women in the Workplace Act 1999 (Cth)*, and the Affirmative Action Agency became the Equal Opportunity for Women in the Workplace Agency. Other aspects of the legislation were amended, in particular the reporting requirements for employers (refer 8.6.6 *Reporting Requirements*).

8.6.2 Equal opportunity (EO) for women

The intent of EO for Women legislation is to enable positive initiatives to achieve equality, focusing on particular problem areas. The 1999 Act specifically targets employment practices as they relate to women. It requires employers to develop and implement workplace programs and to provide an annual report (refer 8.6.6 *Reporting Requirements*) to the EO for Women in the Workplace Agency ('the Agency'). It does not require employers to take any action which is incompatible with the principle that employment matters should be dealt with on the basis of merit. A key objective of the Act is to encourage consultation between employers and their employees in respect to issues affecting EO for women in the workplace.

8.6.3 Workplace Gender Equality Act 2012

The Equal Opportunity for Women in the Workplace act was renamed to the Workplace Gender Equality Act in 2012. The new, strengthened legislation aims to improve and promote equality for both women and men in the workplace.

The **Workplace Gender Equality Act 2012** requires non-public sector employers with 100 or more staff (relevant employers) to submit a report to the Workplace Gender Equality Agency between 1 April and 31 May each year for the preceding 12 month period (1 April – 31 March reporting period) (Workplace Gender Equality Act 2012).

8.6.4 Employers covered by the Act

The WGEA requires all non-public sector employers with over 100 employees to submit annual reports to the Workplace Gender Equality Agency. If an employer that has more than 100 employee's falls below 100, that employer will still be required to submit annual reports until the number of employees fall below 80. Employers that have continually had less than 100 employees are not required to submit annual reports.

8.6.5 Administration of the legislation

The Agency is set up to help employers ensure EO for women in their workplace and to administer the Act's legal requirements. The Agency is available to advise and assist employers in the development of a workplace program, to issue guidelines to assist employers to achieve the purposes of the Act, to monitor reports, and undertake research and public discussion in relation to equality for women in the workplace.

The Workplace Gender Equality Agency is located at:
Level 7, 111 Pacific Highway
North Sydney NSW 2060
Tel: (02) 9448 8500

8.6.6 Reporting requirements

General

Workplace gender composition of both workforce and governing bodies of the employer (including board of directors and committees of management):

- > Remuneration of male and female employees
- > Availability and usage of flexible working arrangements (including employee family/caring responsibilities)
- > Consultation with employees on workplace gender equality issues
- > Any other matters specified by the Minister for the Status of Women (Minister)

The precise information that must be lodged is specified by the Minister prior to the start of each reporting period. Thirty-one reportable matters have been specified for the 2013–2014 reporting period. A further eight reportable matters were specified for the 2014–2015 reporting period however the federal government as at the 26 March 2014 have delayed these further eight matters until the 2015–2016 reporting period.

A minimum standard from 1 October 2014 will be in operation for relevant employers with more than 500 employees whereby they must have a policy or strategy in at least one of the following areas:

- > gender composition of the workforce
- > equal remuneration between men and women
- > availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities; or
- > sex-based harassment and discrimination.

This report must be signed by the Chief Executive Officer. Reports can be submitted online through the Workplace Gender Equality Agency website.

8.6.7 Non-compliance

The Act contains sanctions for failing to submit a report or further information, if requested.

The Agency may name the employer in its annual report to the Minister. This report is tabled in Federal Parliament. The Agency must give the employer not less than 28 days' notice of its intention to name the employer. It must also provide reasons for the naming.

In addition, the Federal Government has a policy that makes Commonwealth contracts for goods and services and specified industry assistance available only to employers that comply with the requirements of the Act.

8.7 Documentation

8.7.1 Equal Opportunity – Discrimination, Harassment and Bullying

8.7.2 Harassment Complaint Notification