

EQUAL OPPORTUNITY - OVERVIEW

There are various pieces of legislation covering the areas of Equal Opportunity in the workplace. In addition employers must establish their own internal policies and complaints procedures and outline employer and employee responsibilities. Of course, there is no use having a policy or procedure in place if no one knows of its existence so creating awareness and understanding amongst all staff of their obligations is essential. Recent developments in this arena (such as the Victorian *Equal Opportunity Act 2010*) mean that now more than ever, employers need to ensure they take a proactive approach in providing a workplace free from discrimination, harassment, bullying and occupational violence. The introduction of positive duty has also meant that employers are now being held accountable for their inaction.

Legislation

The following legislation is applicable in Victoria:

Federal Jurisdiction

- > Australian Human Rights Commission Act 1986
- > Sex Discrimination Act 1984
- > Disability Discrimination Act 1992
- > Racial Discrimination Act 1975
- > Equal Opportunity for Women in the Workplace Act 1999
- > Age Discrimination Act 2004
- > Fair Work Act 2009

State Jurisdiction

- > Equal Opportunity Act 2010
- > Racial and Religious Tolerance Act 2001
- > Occupational Health and Safety Act 2004
- > Accident Compensation Act 1985
- > The Victorian Charter of Human Rights and Responsibilities 2006 (*applicable to public sector only*)

Fair Work Act 2009

Adverse Action

Adverse Action' provisions provide an alternative way for individuals to make a complaint of discrimination.

The Fair Work Act prohibits an employer from taking 'adverse action' against an individual based on prohibited grounds such as a person's race, colour, sex, sexual preference, age, disability, marital status, family/carer responsibilities, pregnancy, religion, politics, national extraction or social origin. If a complaint is lodged, an employer will need to prove that adverse action has not been taken for an unlawful reason. Also, there is a six year timeframe for lodging a complaint

(if the adverse action does not result in termination); whereas under existing discrimination laws generally there is a twelve month limitation period.

Flexible Work Arrangements

Requests for flexible working arrangements form part of the National Employment Standards (NES). The NES includes a right for an employee who is a parent, or has responsibility for the care of a child if the child is under school age or under 18 and has a disability, to request flexible working arrangements (such as changes in hours of work) from their employer. An employer can only refuse such a request on 'reasonable business grounds'.

Anti-Bullying

The new anti-bullying amendments will take effect from 1 January 2014. The new amendments have been created as a response by the Government in order to reduce cases of bullying in Australian workplaces. Bullying is where an individual or group of individuals repeatedly behaves unreasonably towards the worker, or group of workers and creates risk to health and safety. A situation that is excluded from bullying behaviour is performance management as this is a 'reasonable management action carried out in a reasonable manner'. From 1 January 2014, workers who believe that they are being bullied in the workplace have the right to apply to the Fair Work Commission (FWC) for an order to stop the bullying. Under this provision the FWC must start the process of the application within 14 days; if they are satisfied that bullying has occurred. This will be the first time where an employee can make a direct complaint to the FWC rather than a regulator pursuing the matter. The FWC can make orders to stop the bullying, however no order for payment or pecuniary amount can be issued under this provision.

Equal Opportunity Act 2010

The Victorian Equal Opportunity Act 1995 was reviewed and the new changes set out in the Equal Opportunity Act 2010 took full effect on 1 August 2011. The amendments have simplified the definitions of direct and indirect discrimination to make the law easier to interpret, as well as putting greater emphasis on prevention and early intervention by employers. Positive duty requires all organisations to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation. This means employers must now become proactive to comply with legislation rather than waiting for a complaint to trigger any action. The new changes also provide for a more flexible and faster dispute resolution model.

The Equal Opportunity Act 2010 extends the definition of impairment to specifically address genetic predisposition and behaviour that is a manifestation of a disability. It also defines a duty to provide reasonable adjustments for people with impairments and disabilities in employment, education and provision of goods and services to assist the person with disabilities to perform the role or to have greater access to education and goods and services. It clarifies, amends and repeals certain exceptions to unlawful discrimination, as well as now protecting all volunteers and unpaid workers from sexual harassment.

Occupational Health and Safety Act 2004

All state Occupational Health and Safety jurisdictions are currently moving towards harmonisation with the Work Health and Safety Bill 2011. For further information please visit our website.

Accident Compensation Act 1985

Changes have been made to Victoria's workers compensation laws. The changes allow new discrimination provisions for employees to claim they have been discriminated against for making a workers compensation claim. The employer also bears the burden of onus of proof. These changes, taken from the Occupational Health and Safety Act, came into effect in April 2010.

Discrimination

There are two types of discrimination, 'direct' and 'indirect'.

Direct Discrimination

Under the *Equal Opportunity Act 2010* direct discrimination is treating or proposing to treat a person with a protected attribute unfavourably because of that attribute. The new test is whether or not certain treatment was unfavourable to the person claiming discrimination, placing emphasis on the consequences of the treatment on the person claiming direct discrimination because of a protected attribute.

An example of direct discrimination is: an employer refusing to invest time or money in training an employee because they are considered to be 'too old to learn new skills'. The employer has in this example discriminated against a person on the basis of their age (which is listed as a protected attribute in the Act).

Indirect Discrimination

Indirect discrimination is where a person imposes, or proposes to impose, a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging people with a protected attribute, and that is not reasonable.

The new test for indirect discrimination:

- > requires a person to show that the requirement, condition or practice causes, or is likely to cause disadvantage, rather than demonstrating that they cannot comply with a requirement, condition or practice;
- > removes the requirement that the person claiming indirect discrimination must establish that a substantially higher proportion of people without the attribute that they have can comply with the requirement, condition or practice;
- > places the onus of proof regarding the reasonableness of the requirement, condition or practice on the person who imposed or proposes to impose it; and
- > extends the factors to be considered in determining whether a requirement, condition or practice is reasonable.

An example of indirect discrimination is: a job advertisement for a cleaner requires an applicant to speak, read and write English fluently. This may disadvantage a person on the basis of their race (English as a second language). The requirement may not be reasonable if speaking, reading and writing English fluently are not necessary to perform the job (i.e. not an inherent requirement of the role).

Indirect discrimination can also occur when a policy or approach, which appears to be neutral, has the effect of discriminating against those with a particular characteristic (for example, height requirements may have the effect of eliminating more females from a recruitment exercise). The employer bears the onus of proving their policies and practices do not have a discriminatory effect, even on a one-off basis.

Protected Attributes

In Victoria, the Equal Opportunity Act 2010 prohibits direct and indirect discrimination on any of the following grounds:

- > Age
- > Breast feeding
- > Impairment/disability (also includes genetic predisposition and behaviour that is a manifestation of a disability)
- > Gender identity
- > Industrial activity
- > Lawful sexual activity
- > Marital status
- > Parental status or status as a carer
- > Physical features
- > Political belief or activity
- > Pregnancy
- > Religious belief or activity
- > Race
- > Sex
- > Sexual orientation
- > Employment activity
- > Personal association with someone who has or is assumed to have one of these personal characteristics
- > Irrelevant criminal conviction

Defining the attributes and examples in employment:

Attribute	Definition	Example of Discrimination
Age	Actual or assumed age.	Employee not given access to training because of age.
Breast feeding	Breast feeding, including the act of expressing milk	Directing a breast feeding employee to the toilet to feed an infant or express milk.

Disability	Physical and mental impairments, past and future disability and assumed disability. Also extends to incorporate genetic predisposition and behaviour that is a manifestation of a disability	Employee offered lower pay than other employee doing exactly the same job because of a disability.
Industrial activity	Participation in, or membership of, an industrial organisation.	Employee applies for job and is denied because of union membership.
Gender identity	Self-identification with a particular gender. E.g. Person can identify with a gender by the way they dress, medical intervention or name change.	Employee terminated after gender re-assignment surgery.
Lawful sexual activity and sexual orientation	Sexual orientation and lawful sexual activity - whether as homosexuals, heterosexuals, lesbians, bisexuals.	Employee denied promotion because of homosexuality.
Marital status	Marital status refers to whether someone is or isn't single, married, divorced, widowed, separated or a domestic partner. The term 'domestic partner' covers all couples irrespective of sex and sexual	Manufacturing company with a mostly male workforce wants to employ an office manager. Lucy is the best candidate but is refused the job because she is single and the manager thinks she won't fit in.
Parental status or status as a carer	Total or substantial responsibility or care and support of another person (may be child, partner, parent, relative or friend – does not apply to paid carer).	In interview employee mentions that she spends a lot of time looking after sick mother. Employer says they can't hire someone with heavy family responsibilities.
Physical features	Height, weight, size, shape or other bodily characteristic. It includes facial features, hair and birthmarks.	Restaurant will only recruit people with a certain 'look' – they have specified height, weight and build which is unrelated to the duties of the job.

Political belief or activity	Whether a person holds or does not hold a lawful political belief, or whether they participate or refuse to take part in a lawful political activity. This includes holding particular political beliefs, being a member or not being a member of a political party or participating in political action.	Employee is denied employment because of affiliation with a political party because employer holds a different political affiliation.
Pregnancy	Pregnancy or potential pregnancy.	Female employee asked if planning to have children in interview. She says 'yes' and employer decides not to hire her because worried she will go on maternity leave.
Religious belief or activity	Holding (or not holding) a religious belief or view that is not against the law. Religious activity means taking part, not taking part or refusing to take part in a religious activity that is not against the law.	At a job interview with a marketing company, Jan, a Muslim, is asked about her religious background. Even though she is very qualified, she is refused the job because Management believes she will have to leave her work duties for prayer several times a day.
Race	Race includes colour, descent, nationality, ancestry, ethnic background or any characteristics associated with a particular race.	Employee denied employment because of his racial background.
Sex	Whether a person is male or female	Sally applies for a job in a male dominated workplace. Sally is the best candidate for the job but is denied employment because, as a female, the employer thinks she won't fit in.
Employment activity	Making reasonable requests about employment entitlements or communicating a concern about employer's failure to provide for example rates of pay or annual leave entitlements.	Employee makes a reasonable request for information in relation to his rates of pay. Employee is demoted following this request for information.
Personal association	It is against the law to discriminate against someone because of their personal association with someone who has or is assumed to have one of the protected characteristics.	Sally is denied employment because the employer is uncomfortable with the fact that her brother is a trade union official.

Victimisation

In addition, victimisation of a person who is considering making a claim, has made a claim, is considering being a witness to a claim or is a witness to a claim is also unlawful.

Harassment

Harassment is unwanted and unwelcome behaviour which causes another person distress and/or makes them feel uncomfortable at work whether or not that effect was intended. Unlawful harassment occurs when someone is made to feel offended, intimidated, frightened, insulted or humiliated because of their race, sex, disability, sexual preference or some other characteristic (as specified under anti-discrimination legislation).

Sexual Harassment

Sexual harassment is any unwelcome behaviour of a sexual nature that is reasonably likely to make a person feel humiliated, intimidated or offended. Sexual harassment can include offensive material or behaviour which creates a hostile work environment.

Reasonable Person Test

In deciding whether harassment has occurred the relevant test is the 'reasonable person test' which asks 'would a reasonable person in all of the circumstances have anticipated that the behaviour would offend, intimidate or humiliate the person involved'.

Bullying and Occupational Violence

Bullying

The Victorian WorkCover Authority's Guidance Note currently defines Workplace Bullying as repeated unreasonable behaviour directed toward an employee, or group of employees, that creates a risk to health and safety. Bullying is regarded as a health and safety issue and can cause a range of psychological and physical illnesses and injuries. Employers have a duty of care to provide a safe and healthy workplace free of workplace bullying.

Reasonable management is not bullying. An employer has a managerial prerogative to direct and control how work is done in their workplace. In particular, legitimate and reasonable actions taken in accordance with organisation procedure such as performance management, disciplinary action and/or allocation of work in compliance with systems do not constitute bullying.

Occupational Violence

Occupational violence is defined as any incident where an employee is physically attacked or threatened in the workplace. Problems or tensions in the workplace need to be dealt with quickly and effectively. Ignoring these situations or not acting quickly can be dangerous and potentially expose an employer to serious liability.

Employer Responsibilities

Vicarious Liability

An employer may be held vicariously liable for the conduct of an individual employee or group of employees, directors, supervisors or managers, agents, independent contractors and/or people being paid commission. A complaint may be lodged against either the employer and/or individuals engaging in the conduct.

Reasonable Steps

The law is very clear, employers are required to take 'all reasonable steps' to prevent employees or agents from discriminating, harassing and/or bullying others. First steps are to:

- > create and communicate a workplace policy;
- > ensure a complaints procedure is accessible;
- > educate and develop relevant skills;
- > deal promptly and appropriately with infringement/s; and
- > monitor ongoing behaviour

Positive Duty

The *Equal Opportunity Act 2010* has introduced a 'positive duty' which requires all organisations to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation. This means employers must become proactive to comply with legislation rather than waiting for a complaint to trigger any action. For example, organisations ensuring their premises and services are accessible to people with a range of disabilities.

Reasonable and proportionate measures:

The legislation clearly outlines that the reasonable and proportionate measures needed to satisfy the positive duty will depend on the size and resources of each organisation.

Factors that **MUST** be considered include:

- > the size of the business;
- > the resources of the business;
- > the nature of the business;
- > business and operational priorities; and
- > the feasibility and cost of the measures in question.

Does the positive duty apply to me? Yes, if you:

- > are an employer;
- > provide accommodation, education, or goods and services;
- > are a club or sporting organisation;
- > are government; and/or

- > are in the business and community sector.

In order to comply with positive duty, organisations can implement policies aimed at preventing discrimination and harassment. These policies should outline employer and employee obligations and have a positive approach focusing on prevention. Implementing or improving current grievance procedures as well as mechanisms for reviewing and improving compliance are other steps that can aid employers to meet their positive duty requirements.

Duty to provide reasonable adjustments:

Requires an employer to make reasonable adjustments for a person with a disability who:

- > is offered employment, or is a current employee; and
- > requires adjustments in order to perform the genuine and reasonable requirements of the employment.

Making reasonable adjustments requires an employer, educational authority or service provider to balance the requirement for change with the cost or effort involved in making this change. If an adjustment is going to cost the business a large amount financially; or cause disruption, then it is not likely that this adjustment will be deemed reasonable.

There are limited exceptions to the duties to make reasonable adjustments which allow any employer to discriminate on the basis of impairment if:

- > adjustments are not reasonable; or
- > the person with the impairment cannot perform the genuine and reasonable requirements of the role, or participate in education, or access services even if the adjustments were made.

An example of a reasonable adjustment is a factory providing widened doorways and ramp access to all common areas

Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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