

WORKPLACE LAW UPDATE

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THE EQUAL OPPORTUNITY ACT 2010 - WHAT THIS MEANS FOR EMPLOYERS

The last two years has seen significant changes in anti-discrimination laws in the area of employment providing greater protection to employees.

The Victorian *Equal Opportunity Act 2010* commenced operation on 1 August 2011, replacing the *Equal Opportunity Act 1995*.

Definitional changes

Direct Discrimination

The new Act provides modified definitions of direct and indirect discrimination, which will now make it easier for employees to establish that discrimination has occurred.

Previously, the definition of direct discrimination provided that a person would discriminate against another person by treating that person less favourably because of a protected attribute than someone without that attribute who was in the same or similar circumstances.

The new Act now provides that direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute. The effect of this simplified definition is that an employee will not have to compare their treatment with the treatment of another employee who did not have that particular attribute but was in same or similar circumstances (the comparator test). This comparator test has proven to be a significant obstacle for employees in establishing a claim of direct discrimination against employers.

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About CCI Lawyers

CCI Lawyers is a boutique workplace relations practice.

CCI Lawyers operates as an independently managed legal practice, providing legal services that are charged at competitive rates to employers across Australia.

CCI Lawyers is associated with the Victorian Employers' Chamber of Commerce and Industry (VECCI). Your business does not need to be a VECCI member to engage our services.

Indirect Discrimination

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Previously, indirect discrimination occurred when a person imposed a requirement or condition that someone with an attribute could not comply with and a higher proportion of people without that attribute could comply with and the requirement or condition was unreasonable.

The new Act removes the need for the employee to establish that a higher proportion of people without the attribute in question could comply with the requirement or condition. The employee is required to only show that the effect of the requirement or condition has or is likely to have the effect of disadvantaging a person with their attribute. The onus is on the employer to show that the requirement is reasonable rather than on the employee to establish that it was unreasonable.

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Positive obligations on employers

The new Act imposes two positive obligations on employers, that being the duty to provide reasonable adjustment for job applicants and employees with impairments, and to eliminate discrimination, sexual harassment and victimisation in the workplace.

Duty to accommodate persons with impairments

The new Act provides that employers are under a duty to provide reasonable adjustments for job applicants or employees with impairments. An exception to this duty to accommodate applies if the adjustment is not reasonable in certain circumstances or if even after the adjustment is made, the job applicant or employee could not adequately perform the *genuine and reasonable requirements* of the employment.

In determining whether a request for adjustment is reasonable an employer is required to balance the competing interests of the employer with those of the employee. Factors to consider include the employee's circumstances, the consequences for the employee if the adjustment is not made, the nature of the adjustment, the size of the business, the financial circumstances of the employer and the costs of the adjustments.

Typical adjustments that can be made by an employer include adjustments to workload, providing ramp access, allowing time away for rehabilitation and permitting more frequent breaks.

Duty to eliminate discrimination, sexual harassment and victimisation

The duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation will require employers to be proactive as opposed to simply responding to a complaint of discrimination, sexual harassment or victimisation.

This duty will require employers to identify potential areas of non-compliance within the organisation and develop strategies to rectify and maintain compliance such as by updating policies and providing equal opportunity training to employees. Whatever the measures implemented, these need to be reasonable and proportionate, which will depend on the size of the business, the company's resources and the practicality and costs associated with implementing the measures. Accordingly, a large organisation with substantial resources will be held to a higher standard and required to do more than a smaller organisation with limited resources in order to comply with this obligation.

Victorian Equal Opportunity & Human Rights Commission (VEOHRC)

The new Act has shifted the focus of the VEOHRC from having an individual complaints handling function to now tackling issues of systemic discrimination. The VEOHRC now has the power to investigate systemic issues of discrimination into alleged breaches of the Act where the breach could not be pursued as an individual complaint, it involves a class or group of people, and raises issues of a serious nature. Complainants will also be able to bypass the dispute resolution process at the VEOHRC and directly make an application to the Victorian Civil and Administrative Tribunal (VCAT).

Sexual Harassment

The new Act extends protection to volunteer and unpaid workers from sexual harassment, whereas such persons were not previously protected.

Small Business Exception

Under the previous Act, businesses with less than 5 full time equivalent employees were not prevented from discriminating against persons with respect to offering employment, known as the small business exception. This exception has been removed, requiring such businesses to now comply with the anti-discrimination provisions of the new Act.

Implications for employers

Given the additional obligations imposed on employers by the new Act, employers will need to be more proactive in their handling of discrimination, sexual harassment and victimisation risks and behaviours in the workplace rather than reacting only when complaints are made.

As such, employers need to ensure that equal opportunity and anti-discrimination policies are developed and updated and that these policies are communicated regularly to employees. Further, employers should ensure that employees at all levels are educated with respect to equal opportunity and that management have adequate training in handling issues of equal opportunity and discrimination that may arise.

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