

ALERT

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New Victorian Equal Opportunity Legislation

The Victorian Parliament recently passed a new *Equal Opportunity Act 2010 (Act)*, the substantive provisions of which come into effect on 1 August 2011.

While the concepts and framework of the Act are the same as the current *Victorian Equal Opportunity Act 1995*, the new Act does introduce some key changes. These include:

- introducing a positive obligation on employers to eliminate discrimination, sexual harassment and victimisation;
- simplifying the definitions of discrimination;
- a revised role for the Victorian Equal Opportunity and Human Rights Commission (**Commission**);
- amendments to the exceptions and exemptions available to allow what would otherwise be unlawful discrimination;
- volunteers are covered by the sexual harassment provisions in the Act for the first time;
- the duty to make reasonable adjustments for employees with an impairment.

Key changes

Duty to eliminate discrimination

Currently, employers are only required to demonstrate the steps taken to prevent unlawful discriminatory behaviour from occurring if a complaint is made. However, the Act imposes a new, positive obligation on employers to take 'reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible'.

When considering what measures would be 'reasonable and proportionate' the Act indicates certain factors that will be taken into account, such as the size, nature and circumstance of the employer's business, the employer's resources and the practicability and cost of the measures. Accordingly, a large company will be required to do more to eliminate discrimination than, for example, a small not for profit organisation.

A new discrimination definition

The Act redefines and simplifies the concepts of direct and indirect discrimination.

Direct discrimination will occur if a person is treated unfavourably



because they have a particular protected attribute (such as race, sex, disability). There will no longer be a requirement to compare the position of an individual without the protected attribute in the same or similar circumstances.

Indirect discrimination will occur if a person imposes an unreasonable requirement, condition or practice that has, or is likely to have, the effect of disadvantaging persons with a protected attribute. The complainant will not have to demonstrate (as they currently do) that a substantially higher proportion of people without the protected attribute can comply with the requirement.

The changes to these definitions will make it easier for complainants to demonstrate that they have been discriminated against.

Altered role of the Commission

The Commission's role in handling complaints will be limited to simply facilitating the resolution of disputes – a process that will be completely voluntary. Accordingly, an employer (or the complainant) will be able to walk away from the dispute resolution process at any time. However, complainants will now be able to make an application directly to the Victorian Civil and Administrative Tribunal (**VCAT**) without having first gone through the Commission. This is likely to mean employees will simply bypass the Commission and bring a complaint directly to VCAT or pursue a grievance through other mechanisms, such as claiming they are the victim of 'adverse action' and applying to Fair Work Australia.

While the Commission will no longer be involved in investigating individual complaints, it will be able to investigate or conduct a public inquiry into an alleged breach of the Act where the breach involves a class or group of people. The purpose of this new power is to try to identify and eliminate systemic causes of discrimination (such as a discriminatory policy pursued by an organisation that affects a group of employees).

Changes to exceptions and exemptions

Some of the exemptions available in the current *Equal Opportunity Act 1995* will be removed, such as those permitting discrimination in family employment, by small businesses or the setting and enforcing of standards of dress and appearance. The extent to which religious bodies and schools can discriminate against people in employment situations will be tightened up, with the exception only applying if conformity with a particular requirement is an 'inherent requirement' of the particular position.

The 'special needs' exemption has also been broadened, allowing employers and others to limit eligibility for certain services, benefits or facilities to meet the needs of people with a particular attribute, without the need to demonstrate those people are at a disadvantage.

Protection for volunteers

Volunteers have previously fallen outside the scope of protection offered by the Equal Opportunity Act. However, the new Act will apply to volunteers in respect of sexual harassment (not discrimination).

Duty to accommodate

The Act requires an employer to make reasonable adjustments for employees (or those offered employment) with an impairment, if such an adjustment is required for him/her to perform the genuine and reasonable requirements of the role. This change reflects a recent change to the federal *Disability Discrimination Act 1992* and could require an employer to, for example, provide ramp access to the workplace, modify work instructions or permit an employee to take more frequent breaks.

What employers should be doing now:

- Review your policies and procedures that deal with discrimination, harassment and victimisation – are they up to date and comprehensive? Ensure they are updated to take into account the changes to the Act.
- Review the training provided to staff – has it been provided to all employees and is it up to date?
- Ensure employees are aware of how to make complaints about discrimination, harassment and/or victimisation and that those



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who receive complaints understand how to handle such complaints properly.

- Consider your organisation's history of complaints – are there any particular risk areas?
- Assign responsibility for reviewing compliance with the Act and ensure this task is completed.

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