

# VECCI WORKPLACE RELATIONS SERVICES

## EQUAL OPPORTUNITY – DISCRIMINATION, HARASSMENT AND BULLYING

The new *Equal Opportunity Act 2010 (Vic)* increases the obligations on employers to prevent discrimination, sexual harassment and victimisation in the workplace. VECCI's Workplace Relations team can help you with all your equal opportunity requirements from assisting you to implement new policies and procedures that are compliant with the Act through to completing a workplace audit and implementing a detailed compliance strategy for your business.

Below are some of the questions asked in VECCI's Equal Opportunity briefings. These answers are intended as general information. If you have a specific situation or need advice we recommend you call VECCI's Workplace Relations helpline on **03 8662 5222** and speak to one of our experienced advisors to get advice tailored to your business needs.

### Frequently Asked Questions

#### **What are the key features for employers under the new Equal Opportunity Act?**

The Equal Opportunity Act 2010 has a number of important features:

- a positive duty to eliminate discrimination
- a duty to provide reasonable adjustments for people with disabilities in employment, education and provision of goods and services, to help the person with a disability to perform the job or access education and goods and services
- an extended definition of disability to specifically address genetic predisposition and behaviour that is a manifestation of a disability
- protection of volunteers and unpaid workers from sexual harassment in employment
- a new dispute resolution process and direct access to VCAT for complainants.

### **What can I do to protect my company from claims of vicarious liability?**

Under the new Equal Opportunity Act 2010 employers have a positive duty to take reasonable and proportionate steps to prevent discrimination, sexual harassment and victimisation. What is reasonable and proportionate will depend on your individual circumstances. The Equal Opportunity Act 2010 (Vic) (EO Act) provides that the following should be considered:

- a) the size of the person's business or operations
- b) the nature and circumstances of the person's business or operations
- c) the person's resources
- d) the person's business and operational priorities
- e) the practicability and the cost of the measures.

For a small business, compliance with the EO Act may involve taking steps to ensure employees are aware of the organisation's commitment to treating employees with dignity, fairness and respect and making a clear statement about how complaints from employees will be managed.

For a large company this may involve undertaking an assessment of its compliance with the EO Act and then; as a result of the assessment, developing a detailed compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.

What is 'reasonable and proportionate' will differ from company to company under the EO Act. If you need support or assistance in this new and difficult area contact VECCI.

### **What can I do when an employee brings a complaint to me but says they don't want anything to be done about it? What if I am aware there is an issue but no one is actually 'formally' complaining?**

Under the new Equal Opportunity Act 2010 (Vic) (EO Act) employers and managers have a positive obligation to prevent discrimination in the workplace. In addition Occupational Health and Safety legislation requires that steps be taken to deal with concerns of an unsafe workplace.

If an employee makes a complaint but asks you not to do anything the first step is to talk to them about why they do not want anything to be done. Are they concerned about victimisation? Are they attempting to deal with it themselves? The answers to these questions will assist you to decide what you need to do. If the employee is concerned about victimisation this needs to be taken seriously. If the employee agrees to let you proceed it is important to take all steps to prevent them being victimised for making a complaint.

If the employee is adamant they do not wish to proceed with the matter you still have an obligation to provide a safe and discrimination free workplace. This is also the case if you are aware of an issue but do not have a specific complainant.

This can be done without breaching the employee's confidence in most instances. Rather than just focussing on the complaint, focus on the workplace. You can look at steps such as:

- conducting refresher training for employees and managers on equal opportunity and bullying and harassment
- emphasising policy, which may be through a number of forums – employers are including it on meeting agendas, sending it with payslips and rosters – some employers also use it with a 'must mark as acknowledged' box when logging in to email or IT systems
- encouraging all managers to be proactive in preventing and dealing with any issues
- conducting a workplace audit to see where any problem areas are
- offering any affected employees access to an employee assistance program.

In some circumstances where there are allegations of severe bullying, harassment or discrimination you may have to breach an employee's confidence. In these circumstances explain to the employee the legal obligations you have and ensure they are given support through the process.

If you are unsure of your obligations or what action to take, it is important you seek advice.

### **What should I do if I get a complaint of discrimination, sexual harassment, bullying or harassment?**

If an employee makes a complaint treat it seriously. It can often be tempting to ignore it and hope it goes away. If an employee has come to you with an issue or concern it is important it is dealt with.

If you have a complaints process in place, ensure that you - and your managers - follow it. If you don't have an existing policy we recommend you implement one. VECCI has a number of pro-forma policies available to members on our website or alternatively you can speak to us about getting a policy customised to suit your business needs.

Once a complaint has been made ensure you explain the process to all parties and ensure you document everything that is done throughout the process.

- Ensure you speak with all parties involved and apply natural justice.
- If disciplinary action is to be taken make sure you have investigated the matter properly and allowed the respondent a chance to respond to the allegations and to provide any mitigating factors.
- If you are unsure about how to investigate the matter or what steps to take it is important you seek advice and assistance before the matter becomes more serious.

VECCI can provide you with support in investigating the matter yourself or can provide an experienced consultant to investigate the matter on your behalf.

### **When there is banter in the office how do I ensure I don't come across as the fun police?**

Although we want to encourage positive working relationships in the office, different people have different ideas of 'fun'. Inappropriate sexual or discriminatory jokes are not fun and should not come in to the workplace.

Encourage employees to get along and enjoy themselves at work but ensure there are boundaries of appropriate workplace behaviour. Sometimes as an owner or manager you will have to be the voice of reason as the consequences for any breaches of the law are significant both for you and for individual employees.

### **What is the timeframe to lodge a complaint with Fair Work Commission and the VEOHRC?**

Generally employees have up to a year to lodge a claim with the Victorian Equal Opportunity and Human Rights Commission but this can be extended if the employee can show good reasons for the delay. To lodge a general protections claim involving dismissal with the Fair Work Commission, employees have 21 days from their dismissal. If it does not involve dismissal the employee has up to six years to make a claim.

Employees who believe they are being bullied in the workplace may apply to FWC for an order to stop the bullying. Under this provision, the FWC must process the application within 14 days upon receiving the application if they are satisfied that bullying has occurred. Importantly, while the FWC will have authority to issue orders for the bullying to stop, no order for payment or pecuniary amount can be issued under this provision.

### **Lawful sexual activity – what does that mean?**

Lawful sexual activity is defined in the EO Act as “engaging in, not engaging in or refusing to engage in a lawful sexual activity”. The courts have used the second reading speech for the bill which eventually became the EO Act 1995, to clarify its meaning. The then attorney general in that speech refers, when she speaks of lawful sexual activity, to bestiality as an example of a sexual activity that would not be covered by that term. Although this helps us understand what lawful sexual activity is not; it does not give a definite interpretation of what lawful sexual activity is.

The Anti-Discrimination Act 1991 (Qld) states lawful sexual activity as meaning a person's status as a lawfully employed sex worker, whether or not self-employed. But as the term in Victoria has not been defined in this manner we recommend employers assume that this means all lawful sexual activity and is not limited to lawful prostitution. For Victoria, this section covers any sexual activity that is legally permissible in Victoria, including legal prostitution.

### **Has the term 'indirect discrimination' been removed?**

No, although it is not specifically defined in the Act. The terminology in the Act relates to unlawful actions. Indirect discrimination is referenced in the Act as occurring if you impose or propose to impose a practice, condition or requirement that has or is likely to have the effect of disadvantaging people with an attribute which is not reasonable.

An example of indirect discrimination may be having height restrictions on jobs. Although this does not appear to target anyone and the rule is 'the same for everyone', this could have the impact of disadvantaging particular races, or a gender.

### **How do individual flexibility arrangements (IFAs) interact with the modern awards and the family responsibilities under the Victorian Equal Opportunity Act 2010 and how do I get out of an IFA if it no longer suits?**

Flexibility terms within modern awards will only allow IFAs to vary:

- arrangements for when work is performed such as working hours
- overtime rates
- penalty rates
- allowances, and
- leave loading.

The IFA should include information about how it may be terminated. Generally, an IFA may be terminated by agreement or by either party giving the required written notice. Modern awards require following notice periods:

- for IFA's created prior to December 4 2013, a 4 week written notice period applies.
- for IFA's created on or after December 4 2013 a 13 week written notice period will apply.

The above notice requirements do not affect employees covered by an enterprise agreement.

Because the IFA must satisfy the BOOT (better off overall test), it generally will not be considered discriminatory especially if it is done to assist someone who has carer or parental responsibilities. An IFA in an enterprise agreement can generally be ended by providing 28 days' notice but VECCI recommend that you meet with the employee before a decision has been made to discuss the reasons you are considering terminating the IFA and to discuss any alternative options. Employers cannot reasonably refuse to accommodate a person's carer or parental responsibilities so it is important you have clear, concise reasons for the termination of the IFA.

VECCI recommends you advise the employee that they are welcome to have a support person present if they need to.

If the termination of the IFA will result in a major change to the person's employment there should be consultation prior to any final decision being made. In addition you must genuinely consider any alternative proposals put forward by the employee.

### **What do I do if I have two employees who have made claims against each other?**

It is important in these situations that you address all complaints seriously and separately. Don't assume that an employee has only made a complaint because a complaint has been made against them. This may have occurred however the employee may still have a genuine grievance.

VECCI recommends you investigate all matters that have been raised but deal with them as two separate complaints. It is important that you treat all complainants fairly and equally and ensure you are not biased in favour of the first complainant. In situations like these it can often be of benefit to engage an external consultant to investigate the matters.

### **Are there any exemptions or exceptions to the Act?**

The small business exemption has now been removed. Previously, small business was exempt for the purposes of recruitment exercises.

There are exceptions in the Act relating to the areas of accommodation, clubs, education, provision of goods and services, and sport.

The Victorian Civil and Administrative Tribunal (VCAT) Anti-Discrimination List may grant a temporary exemption from the provisions of the Equal Opportunity Act 2010 if it believes that doing so would further the Act's goal of promoting equal opportunity .

Some examples of recent exemptions granted by VCAT and listed on the VHREOC website are:

- an employment round at a government department where applications are limited to indigenous people, with the aim of improving the rate of indigenous people employed in the public sector in Victoria
- a local council closing the public swimming pool early on two nights per week, and limiting admission to women, to enable Muslim women who cannot swim in mixed company to use the pool.

Safety considerations may also frequently interact with matters under the EO Act. While this is not specifically referenced in the EO Act, safety must be paramount in the workplace and employers are required to protect the health and safety of all workers. Where these issues overlay, VECCI recommends seeking specific advice.

## **Our managers are concerned about their own liability – what can I do to support them and the business?**

Manager should be fully trained in both the requirements under the Act and also the requirements of your business when it comes to receiving and managing complaints. Unfortunately the initial stages of complaint handling are often handled inappropriately, which leads to a divided workforce and ultimately costs for the business.

You should ensure that your expectations throughout each stage of the employment cycle are clearly articulated and documented. For example, during a recruitment exercise, this includes ensuring that:

- the parties who are conducting interviews are aware of their obligations and do not ask questions that are irrelevant to the job (but relevant to a discrimination claim)
- any testing is consistent with the inherent requirements of the role
- any feedback to unsuccessful candidates is delivered in a careful and consistent manner
- any selection decisions are based on merit – and that you can demonstrate this if called upon to do so.

Training for general people management functions is unfortunately often overlooked until there is an issue. VECCI proactively engages with a number of employers – and sees the results of this investment – in the delivery of on-site training for support throughout the employment cycle, including Recruitment and Selection; Performance Management Conversations; Engagement and Retention; and Confidently Managing Disciplinary and Termination matters.

Employers should ensure that their managers have the right ‘tools’ to confidently approach the day-to-day situations involved in managing a workforce as any issues arise. This is often where the first signs of an issue, or unrest, will be detected and represent a strong opportunity to mitigate risk as well as seeing the benefits of an engaged workforce.

On top of this, it is important that your people understand the channels in your business for raising issues and the support that is available for them.

**For further assistance in customising and implementing employment practices in your workplace, please contact VECCI’s Workplace Relations Helpline on 03 8662 5222.**

### **Disclaimer**

The information contained in this document has been prepared by VECCI in this format for the convenience and benefit of its members and is provided as a source of information only. VECCI does not accept responsibility for the accuracy of the information or its relevance or applicability in particular circumstances. The information does not constitute, and should not be relied on, as legal or other professional advice about the content and does not reflect the opinion of VECCI, its employees or agents. VECCI and its employees, officers, authors or agents expressly disclaim all and any liability to any person, whether a member of VECCI or not, in respect of any action or decision to act or not act which is taken in reliance, whether partially or wholly, on the information in this communication. Without limiting the generality of this disclaimer, no responsibility or liability is accepted for any losses incurred in contract, tort, negligence, or any other cause of action, or for any consequential or other forms of loss. If you are uncertain about the application of this information in your own circumstances you should obtain specific advice.