

THE NEW EQUAL OPPORTUNITY ACT 2010

Victorian employers should be aware of the new *Equal Opportunity Act 2010* (Vic) ("new EO Act") which will significantly change the equal opportunity landscape when it comes into operation in August 2011.

In this Employment Alert, we look at some of the key features of the new EO Act and the implications for employers.

Background

In Victoria, there is both Federal and State anti-discrimination legislation. This Alert considers the State legislation, ie the current *Equal Opportunity Act 1995* ("the current Act") and its successor, the new EO Act.

The current Act lists a number of protected attributes (ie features such as race, age, sex etc) and protects a person from discrimination on the basis of that attribute in certain contexts such as in employment, education, the provision of goods and services and accommodation.

The current Act also contains a number of general exceptions from the prohibition of discrimination, including certain exceptions for religious schools, religious bodies and where discrimination is necessary for a person to comply with their genuine religious beliefs or principles (Religious Belief Exceptions).

The current Act has been under review over the past two years and this has included public consultation. During the consultation process, particular concern was expressed over whether the Religious Belief Exceptions were going to be eliminated or significantly reduced.

The new EO Act was passed by the Victorian Parliament in April 2010 and comes into operation in August 2011. While it does not go as far as some feared it might, it does change the equal opportunity landscape and narrows the Religious Belief Exceptions quite significantly.

As this Alert is a general overview of the new EO Act, we will look at the Religious Belief Exceptions more closely in a subsequent Alert.

Key features of the new EO Act

Mirrors EO Act

Much of what is in the new EO Act is a repeat of the old, for example, there is no change to the list of protected attributes, although the definition of impairment has been extended to include:

- an impairment that may exist in the future (eg because of a genetic predisposition to that impairment); and
- behaviour that is a symptom or manifestation of an impairment.

Similarly, the exemption provisions under the new EO Act are very similar to the current Act, ie a party can apply for an exemption as before, save that under the new EO Act, an exemption can be granted for up to 5 years (under the current Act exemptions can be granted for up to 3 years).

New definitions for direct and indirect discrimination

Under the new EO Act, it will be easier for a person to bring a discrimination claim as the definitions for direct and indirect discrimination have been simplified.

Under the new EO Act direct discrimination will occur if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute. Unlike the current Act, there will be no need for a complainant to identify a comparator.

Indirect discrimination will occur if 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. Unlike the current Act, there is no need for a complainant to show that a substantially higher proportion of people without that attribute can comply with the requirement, condition or practice. As is the case at present, the onus will remain on the person imposing the requirement, condition or practice to show that it is reasonable.

Positive duties

Under the new EO Act, there is a positive duty on duty holders (including employers) to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation.

Relevant factors in determining what “reasonable and proportionate” will be, include:

- The size of the business or operation;
- The nature and circumstances of the business or operation;
- The available resources;
- The business or operational priorities;
- Practicality and cost.

There is also a positive duty on the employer to make reasonable adjustments for persons with an impairment so they can adequately perform the genuine and reasonable requirements of the employment. Such adjustments could include providing ramp access to the workplace, modifying work instructions, allowing the employee to be absent during work hours for rehabilitation or treatment, or to allow the employee to take extra breaks. This requirement is in line with the Federal *Disability Discrimination Act 1992*.

General exceptions

The new EO Act removes some exceptions to discrimination from the current Act including:

- in family employment;
- by small business;
- standards of dress and behaviour;
- youth wages; and
- single sex accommodation.

Some of these exceptions were removed as similar provisions are contained in Federal legislation. For example, the youth wages exception allowing employers to pay employees

under 21 in accordance with their age is already provided for in the *Age Discrimination Act 2004*.

As outlined above, the new EO Act has narrowed the Religious Belief Exceptions - we will explain this in more detail in a subsequent Alert.

One of the most significant new exceptions introduced by the new EO Act is the ability for employers to lawfully discriminate by taking special measures in order to promote or realise substantive equality within a group. For example, a company may operate in an industry where indigenous people are under-represented. The company may develop a program to increase employment opportunities for indigenous people.

A special measure must be:

- undertaken in good faith;
- likely to promote or achieve substantive equality;
- a proportionate means to promoting or achieving substantive equality; and
- justified that the group has a need for advancement or assistance.

It will no longer be necessary to apply for an exemption from the Act to do this.

Sexual harassment protection

The sexual harassment provisions in the new EO Act mirror the current Act.

An employer will have a positive duty to eliminate sexual harassment from the workplace. Sexual harassment occurs where a person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to another person, or engages in unwelcome conduct of a sexual nature in relation to the other person. The conduct needs to be such that an objective person would have anticipated that the other person would be offended, humiliated or intimidated.

Dispute process

The new EO Act allows an individual to raise a dispute in relation to alleged discrimination, sexual harassment or victimisation with the Victorian Human Rights and Equal Opportunity Commission ("Commission"). The dispute resolution process is voluntary and a complainant is not required to lodge the dispute in writing.

The Commission may attempt to resolve a dispute by discussing an individual's rights and obligations over the telephone, by providing information or advice in a letter or email, or through a telephone or face-to-face conciliation between the parties.

The informal nature of dispute resolution and the wide range of dispute resolution methods available to the Commission are geared towards an early resolution to the dispute.

A complainant has the option of bypassing the Commission and directly applying to VCAT to determine the matter. VCAT may make an order that:

- there has or has not been a contravention;
- compensation be payable for any loss, damage or injury suffered; or
- action be taken to redress any loss, damage or injury suffered.

The Commission may also initiate action without requiring a complaint first to be made. As a result, the Commission will be able to launch its own inquiries into systemic discrimination and take appropriate enforcement action if required. This reform is designed to overcome the limits of a complaints based system and is a significant change with the current Act which is purely complaints based.

Implications for employers

The new EO Act places a positive duty on employers to eliminate as far as possible, discrimination, sexual harassment and victimisation in the workplace. The new legislation will take effect in August 2011. In the meantime, employers should:

- review all current equal opportunity policies;
- audit the workplace to identify areas of non-compliance;
- provide equal opportunity training to all employees. Ensure training records are kept and signed by each employee; and
- train all executive and management staff in the new legislation and how to deal with a dispute.

For further assistance and guidance on the new EO Act, please contact the Workplace Relations team at Moores Legal.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations, contact the Workplace Relations team at Moores Legal.

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