

Topic 10: Anti-discrimination and bullying protections

- Note: if you choose to bring a claim under a Federal Law (**FW Act s 351**, part of **adverse action provisions**), you cannot lodge a claim under State law: **EO Act**.

Background and Overview:

Equal Opportunity Act 2010 (Vic)

EOA says if you can show you have been treated unfavourably because you have an attribute that is listed in the Act, then you may be able to take legal action against your employer and get a remedy (compensation, reinstatement etc.)

- No 6 month compensation cap like unfair dismissal.

Objectives: **s 3; s 15:**

- **s 3: (a) eliminate discrimination, sexual harassment and victimisation to the greatest possible extent; (c) to encourage the identification and elimination of systemic causes of discrimination, sexual harassment and victimisation; (d) to promote and facilitate the progressive realisation of equality, as far as reasonably practicable, by recognising that— (i) discrimination can cause social and economic disadvantage and that access to opportunities is not equitably distributed throughout society (ii) equal application of a rule to different groups can have unequal results or outcomes; (iii) the achievement of substantive equality may require the making of reasonable adjustments and reasonable accommodation and the taking of special measures.**

Employers have a positive duty to eliminate discrimination, sexual harassment or victimisation:

- **s 15(2):** a person must take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible.
(4) A contravention of the duty imposed by subsection (2) may be the subject of an investigation undertaken by the Commission.
(6) In determining whether a measure is reasonable and proportionate the following factors must 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.
- **Examples- s 15**
 - 1** A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.
 - 2** A large company undertakes an assessment of its compliance with this Act. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.

Attributes protected by the EO Act

- You need to establish that you have been discriminated against on the basis of a particular attribute you have.
- Attributes on which discrimination is prohibited: s 6
 - (a) age;
 - (b) breastfeeding (s 4: act of expressing milk)
 - (c) employment activity;
 - (d) gender identity;
 - (e) disability: s 4 definition
 - (a) total or partial loss of a bodily function; or
 - (b) the presence in the body of organisms that may cause disease; or
 - (c) total or partial loss of a part of the body; or
 - (d) malfunction of a part of the body, including—
 - (i) a mental or psychological disease or disorder;
 - (ii) a condition or disorder that results in a person learning more slowly than people who do not have that condition or disorder; or
 - (e) malformation or disfigurement of a part of the body—and includes a disability that may exist in the future (including because of a genetic predisposition to that disability) and, to avoid doubt, behaviour that is a symptom or manifestation of a disability;
 - (f) industrial activity;
 - (g) lawful sexual activity;
 - (h) marital status;
 - (i) parental status or status as a carer;
 - s 4: Carer- wholly/partly; or commercially
 - s :4 Parent- Step, adoptive, foster or guardian
 - (j) physical features (s 4: height, weight, size or other characteristics)
 - (k) political belief or activity: s 4
 - (a) holding or not holding political view or belief
 - (b) engaging/not engaging in lawful political activity
 - (l) pregnancy;
 - (m) race (s 4: colour, ancestry, nationality, ethnicity)
 - (n) religious belief or activity;
 - (o) sex;
 - (p) sexual orientation (s 4: homosexual, bisexual or heterosexual)
 - (pa) an expunged homosexual conviction;
 - (q) personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

Discrimination 'in employment':

- Discrimination 'in employment' is widely defined to cover:
 - **Employees: s 18**

An employer must not discriminate against an employee—

 - (a) by denying or limiting access by the employee to opportunities for promotion, transfer or training or to any other benefits connected with the employment; or
 - (b) by dismissing the employee or otherwise terminating his or her employment;or
 - (c) by denying the employee access to a guidance program, an apprenticeship training program or other occupational training or retraining program; or
 - (d) by subjecting the employee to any other detriment.
 - **Job applicants: s 16**

An employer must not discriminate against a person—

 - (a) in determining who should be offered employment; or
 - (b) in the terms on which employment is offered to the person; or
 - (c) by refusing or deliberately omitting to offer employment to the person; or

(d) by denying the person access to a guidance program, an apprenticeship training program or other occupational training or retraining program.

○ **Contract workers: s 21**

(1) A principal must not discriminate against a contract worker—

(a) in the terms on which the principal allows the contract worker to work; or

(b) by not allowing the contract worker to work or continue to work; or

(c) by denying or limiting access by the contract worker to any benefit connected with the work; or

(d) by subjecting the contract worker to any other detriment.

(2) Subsection (1) does not apply to anything done or omitted to be done by a principal in relation to a contract worker that would not contravene this Act if done or omitted to be done by the employer of that contract worker.

Direct versus Indirect Discrimination

Meaning of discrimination: s 7

(1) Discrimination means—

(a) direct or indirect discrimination on the basis of an attribute; or

(b) a contravention of section 17, 19, 20, 22, 32, 33, 40, 45, 54, 55 or 56.

(2) **Discrimination on the basis of an attribute includes discrimination on the basis—**

(a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;

(b) of a characteristic that a person with that attribute generally has;

(c) of a characteristic that is generally imputed to a person with that attribute;

(d) that a person is presumed to have that attribute or to have had it at any time.

Person with a disability → Assistance aid

s 7 (3) For the purposes of subsection (2), if a person with a disability is accompanied by or possesses an assistance aid, being accompanied by or the possession of that assistance aid is taken to be a characteristic that a person with that attribute generally has.

(4) In subsection (3)—

"assistance aid" means any of the following that alleviates the effects of a person's disability—

(a) equipment (including a palliative or therapeutic device);

(b) a person who provides assistance or services to a person with a [disability](#);

Examples

1 an interpreter;

2 a reader.

(c) an assistance dog.

Direct discrimination *ask: would they have been treated differently if they lacked the attribute?*

○ **s 8(1):** Direct discrimination occurs if a person treats, or proposes to treat, a person with an attribute unfavourably because of that attribute.

Examples

1 An employer advises an employee that she will not be trained to work on new machinery because she is too old to learn new skills. The employer has discriminated against the employee by denying her training in her employment on the basis of her age.

S 8(2) In determining whether a person directly discriminates it is **irrelevant—**

(a) whether or not that person is aware of the discrimination or considers the treatment to be unfavourable;

(b) whether or not the attribute is the only or dominant reason for the treatment, provided that it is a substantial reason.

Case examples:


- Sex: *Ansett Transport Industries (Operations) Pty Ltd v Wardley*
 - Woman was refused employment as a trainee pilot by Ansett because she was of child bearing age.
 - There was evidence to show that she would have been appointed if she was a male.
 - Vic equal opp commission held: women's childbearing potential could not be used to limit their role in society. It also ordered Ansett to employ Ms Wardley in its next pilot intake.

- Disability: *Madafferi*
 - ✚ *An employer cant base an assessment of a person's health risk on statistical probabilities.*
 - ✚ *This information is a generalisation only, and not based on the person in question.*
 - Local council discriminated against applicant on the ground of disability, relying on a statistical survey of the effect of the disability.
 - A doctor, on behalf of an employer, decided, based on statistics that the complainant would get arthritis and would be, therefore, unable to do the job.
 - He provided a certificate to the employer to this effect.
 - The complainant was not employed.
 - Held: You cant rely on these conclusions, you must assess the individual person, an employer cant rely just on a doctors certificate, they must assess all of the criteria for the job

- Pregnancy: *Tran*
 - 20th January 1997: Tran has been employed by Swinburne since 1993
 - Tran appointed to supervisor position for the Accounts Payable section
 - Position included a 6 month probationary period
 - 22nd May 1997:
 - Tran gave notice to Hruby about her pregnancy and previous miscarriage
 - Tran applied for a few days leave for early June
 - Leave application was declined and later shredded by Read
 - Note: there was a large backlog of work which dated back to July 1996.
 - **27th May 1997:**
 - Tran was called in for a meeting with Hruby and Read to discuss her alleged poor performance
 - A formal 5 week performance review process was initiated accordingly which included weekly reviews to discuss Tran's progress
 - Prior to the 22nd there had been no mention of any deficiencies
 - **2nd June to 3rd July 1997: [The performance review process]**
 - No weekly review meetings occurred
 - Tran only worked for 14 days due to morning sickness
 - This amounted to only working for 58% of the 5 week period
 - **4th July 1997:**
 - Tran had a performance meeting with Hruby
 - **7th July 1997:**
 - Tran received a notice of termination which:
 - Referenced 6 points she had failed to improve on over the 5 weeks
 - Attached 2 performance meeting memos dated 6th June and 30th June
 - Evidence during cross examination indicated that:
 - Only 3 of the points were actually discussed in the first meeting
 - The 2 meetings never occurred, but were instead Hruby's observations 'through the gap between the [two] screens' on her desk

Held: Was Tran's pregnancy a substantial reason for termination? Senior Member Cooney

- If it was:
 - Deficiencies could have been raised during the 4 months prior to the pregnancy notification
 - Further feedback, training or assistance could have been offered to Tran over the course of her employment as supervisor
 - The performance review period could have been extended to accommodate for Tran's extensive sick leave absences
- Evident that the performance review process:
 - Was *'not a genuine process'*, but initiated out of fears of potentially breaching any discrimination laws
 - *'Was in effect camouflage'* for the substantial reason that Tran's pregnancy would only further disrupt the already inefficient Accounts Payable section
- **Was Tran treated less favourably due to her pregnancy?**
 - The *'lack of thoroughness and transparency'* in the *'artificial and hasty'* conduct during the performance review highlighted how the entire process was *'inevitably designed'* to lead to termination
- Had Tran not been pregnant:
 - Any deficiencies or grievances may not have even been raised at all; or
 - Termination could have occurred lawfully as Tran's employment was still within the probationary period (which requires no reasons or performance review process)
 - **Remedies:** salary till end of contract and superannuation.

 **Indirect discrimination:** E.g. if we got all of our employees in the firm to walk up the stairs to get to the office, instead of taking the lift, then there would be a set group of people who can't fit that requirement.

❖ Then I am indirectly discriminating against people who can't walk up the stairs.

- s 9:

- (1) Indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice—
 - (a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and
 - (b) that is not reasonable.
- The person who imposes, or proposes to impose, the requirement, condition or practice has the burden of proving that the requirement, condition or practice is reasonable (s 9(2))
- (3) Whether a requirement, condition or practice is reasonable depends on all the relevant circumstances of the case, including the following—
 - (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice;
 - (b) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice;
 - (c) the cost of any alternative requirement, condition or practice;
 - (d) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice;
 - (e) whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve