

MANAGING THE WORKPLACE

SEXUAL HARASSMENT & DISCRIMINATION IN THE WORKPLACE

SUMMARY OF THE LAW AS AT 13 OCTOBER 2004

Sexual Harassment

Sexual harassment is expressly prohibited in the workplace pursuant to the *Sex Discrimination Act 1984 (Cth)* and the *Equal Opportunity Act 1995 (Vic)* [the Acts].

Sexual harassment under the Acts occurs where a person:

- makes an unwelcome sexual advance; or
- makes an unwelcome request for sexual favours; or
- engages in other unwelcome conduct of a sexual nature

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that other person would be offended, humiliated or intimidated.

The legal definition contains three distinct elements:

1. the **behaviour must be unwelcome** – considerations include
 - was the conduct solicited or invited;
 - the respective ages and level of experience of the parties;
 - the power relationship between the parties.
2. conduct of a **sexual nature**
3. **reasonableness** – would a reasonable person anticipate that the conduct would be unwelcome? – objective test

Sexual harassment will usually fall into one of three categories:

- behaviour which is accompanied by a direct or implied threat, benefit or promise;
- behaviour which creates a sexually permeated or hostile working environment;
- behaviour which is also an offence under the criminal law

Who must not harass or be harassed?

- employers;
- employees;
- contract workers and commission agents;
- a person carrying out duties in the same workplace;
- a client, customer or any other person during the course of supplying goods, services or facilities

Liability and duties of employers

Employer may be vicariously liable for an incident of sexual harassment by an employee or agent. Employers have a duty to take all reasonable steps to prevent sexual harassment. Lack of awareness will not discharge liability. If claim made

against employer on basis of vicarious liability, onus is on the employer to prove that all reasonable steps have been taken.

Remedies

- compensation based upon an assessment of loss or damage suffered;
- compensation for diminished earning capacity;
- costs of medical care or psychological counselling (including future costs);
- compensation for emotional injury;
- aggravated damages;
- punitive damages;
- legal costs

Minimising the risk

- establish a clear policy – explain what sexual harassment is and that it is against the law and will not be tolerated – detail circumstances where sexual harassment can arise and what the consequences are of breaching the policy – include information as to whom employees should contact should they require further help or wish to report an incident (include alternative contact persons, preferably male and female);
- effectively communicate the policy to staff and management;
- establish procedures to deal with harassment and discrimination complaints – perhaps both formal and informal;
- document all allegations/complaints including each step taken to resolve the matter;
- appoint sexual harassment/discrimination officer and an investigations officer;
- review policy and procedures on a regular basis

Discrimination in the Workplace

In both Victorian and Commonwealth jurisdictions, there exists legislation which prohibits discrimination in the workplace. Most of the anti-discrimination legislation that exists covers two categories of discrimination, *direct* and *indirect discrimination*, which must be linked to a field of activity covered by the legislation. That is, the discrimination must be both prohibited under the relevant legislation (for example, discrimination because of race, colour or sexual preference AND be discrimination that is either direct or indirect.

Direct Discrimination

Generally, direct discrimination occurs when a person discriminates against another person on the ground of a certain attribute of the aggrieved person. To establish whether a complainant has been subject to direct discrimination, three conditions must be present:

1. the complainant was subject to less favourable treatment than persons without the attribute;
2. the treatment he or she received was by reason of that attribute; and
3. the circumstances of the treatment were the same or not materially different from those of persons without the attribute.

Intention to discriminate is **not** a necessary element and *reasonable conduct* is not a defence to an allegation.

Indirect Discrimination

Indirect discrimination occurs where a person must meet an unreasonable requirement or condition which they would have difficulty meeting and with which a substantially higher proportion of persons without the attribute comply or are able to comply and which is not reasonable. To establish whether a complainant has been subject to indirect discrimination, four conditions must be present:

1. the discriminator requires the aggrieved person to comply with the requirement or condition, which is a condition of fact, and can apply to future requirements;
2. a substantially higher proportion of persons without the attribute comply or are able to comply with the requirement or condition than persons of the same status as the complainant;
3. the aggrieved person does not or is not able to comply with that requirement or condition; and
4. the requirement to comply with the requirement or condition is not reasonable having regard to the circumstances of the case.

Examples of discrimination

An employer is prohibited from discriminating during the *job application stage* in the following areas:

1. in deciding who should be offered work; or
2. in the terms of the work offered; or
3. in failing to offer work; or
4. by denying a person seeking work access to a training program.

Further, discrimination is prohibited against employees and contract workers in that a person must not discriminate:

1. by denying or limiting access to an employee of opportunities for promotion, transfer or training or to any other benefits connected with the employment; or
2. by dismissing the employee or otherwise terminating his or her employment; or
3. by denying the employee access to a training program; or
4. by subjecting the employee to any other detriment

Discrimination is also prohibited on the basis of the following attributes (note that this list is not exhaustive):

- gender
- sexual preference;
- pregnancy;
- marital status;
- race;
- impairment;
- political or religious beliefs

Employers should be aware that where any prohibited discriminatory acts are done by an employee in the course of employment, the employer or principal will be vicariously liable unless he or she took all reasonable precautions to ensure that the employee would not act in contravention of the prohibitions.

Exemptions

The imposition of a genuine occupational requirement for a position is not unlawful. It is not unlawful for an employer to discriminate in the some circumstances, including but not limited to the following:

- determining who should be offered employment in relation to the provision of domestic or personal services in, or in relation to, any person's home;
- genuine occupational qualifications of the employment, such as having particular physical characteristics, or the need to preserve decency or privacy;
- the requirement of particular political views with respect to employment as a ministerial adviser or member of the staff of a political party or of the electoral staff of members of parliament;
- a particular attribute in relation to the provision of services for the promotion of the welfare or advancement of people with the same attribute, if those services can be provided most effectively by people with that attribute;
- people who are his or her relatives in a business carried on by him or her;
- who should be offered employment if the employer employs no more than the equivalent of five people on a full-time basis (including the people to whom employment is offered);
- another person on the basis of impairment in any of the areas specified in ss 13 or 14 of the (VIC) Equal Opportunity Act 1995 (the 'Act') if
 - (a) in order to perform the genuine and reasonable requirements of the employment, the other person requires special services or facilities, and it is not reasonable in the circumstances for those special services or facilities to be provided; or
 - (b) the other person cannot or could not adequately perform the genuine and reasonable requirements of the employment even after the provision of the special services or facilities;
- setting reasonable terms or requirements of employment, or making reasonable variations to those terms or requirements, to take into account the reasonable and genuine requirements of the employment; any special limitations that a person's impairment or physical features imposes on his or her capacity to undertake the employment; or any special services or facilities that are required to enable him or her to undertake the employment or to facilitate the conduct of the employment;
- the setting and enforcement of standards of dress, appearance and behavior for employees that are reasonable having regard to the nature and circumstances of the employment;
- any of the criteria set out in ss13 or 14 of the Act if the employment involves the care, instruction or supervision of children; and the employer genuinely and rationally believes that the discrimination is necessary to protect the physical, psychological or emotional well-being of the children;
- paying an employee who is under the age of 21 years according to the employee's age;
- limiting the offering of employment to people of one sex if they will be required to live in communal accommodation provided by the employer that is not suitable for occupation by people of both sexes.

Disclaimer

This information has been provided by Maddens Lawyers by way of general guidance and should not be treated as advice on the circumstance of any particular case.