

AGE AND DISABILITY DISCRIMINATION INFORMATION UPDATE

MARCH 2010

Employees will find it easier to raise a discrimination complaint as a result of various amendments to the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) which came into effect on 5 August 2009. These changes were initiated by suggestions from the Productivity Commission in its 2004 report covering disability law. The Human Rights and Equal Opportunity Commission (HREOC) has been renamed the Australian Human Rights Commission.

CHANGES TO THE *AGE DISCRIMINATION ACT*

Previously, age had to be shown to be the dominant of two or more reasons for discrimination before it could be said that discrimination had occurred due to a person's age. Now age can be taken as the reason for discrimination, even if it is not the dominant reason.

CHANGES TO THE *DISABILITY DISCRIMINATION ACT* – DEFENCES AND 'INDIRECT DISCRIMINATION'

The 'unjustifiable hardship' defence (available to both employers and employees) has been broadened to encompass all unlawful discrimination on the grounds of disability (except harassment and victimisation). However, the person wishing to claim 'unjustifiable hardship' must be able to prove the existence of this hardship.

For example, a blind employee might require an electronic audio system in order to perform their work. However, the employer might not be able to afford this system and might, as a result, have to terminate the employment of this employee. If the employee decided to bring a claim against the employer for discrimination, the employer could prove that the system would have caused them unjustifiable hardship and the discrimination claim would therefore fail.

A further change is that employers are now able to use the 'inherent requirements' defence in most employment contexts. For example, if the employee was unable to perform the inherent requirements set out in the terms and conditions offered by the employer, it would not be unlawful for the employer to terminate the employee's employment.

Finally, the definition of 'indirect discrimination' has been amended so that one must prove that an imposed condition would make it difficult for such a person to perform their duties. This applies unless the person imposing this condition can prove that it is reasonable, in relation to the specific circumstances.

FACILITATING PEOPLE WITH DISABILITIES

Under the *Disability Discrimination Act*, employers are also required to take all reasonable steps to facilitate for people with disabilities. For example, to facilitate the return of an employee with a stress related illness to work, an employer would have to determine the factors that caused or exacerbated the illness. They would then have to implement strategies and policies to prevent the incident reoccurring. One possible strategy might be reducing the stressed employee's workload.

These changes are a timely reminder for employers to ensure their practices and procedures do not offend the discrimination laws.

If you require further information in relation to these or any other workplace matters then please do not hesitate to contact a member of our workplace law team.

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