

PENDLEBURY WORKPLACE LAW UPDATE

Developments in HR & IR Law in Australia
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Changes to the Sex Discrimination Act



Hello to all friends & colleagues of Pendlebury Workplace Law.

I hope you are all taking advantage of the Christmas period to take some time off work and relax. It has been a busy year in industrial relations, to say the least. This issue we will consider the changes that may be on the not too distant horizon to the Sex Discrimination Act. These suggested changes will impact employers quite significantly, and will require more robust sex discrimination and sexual harassment workplace policies in place.

I hope you find this issue informative.

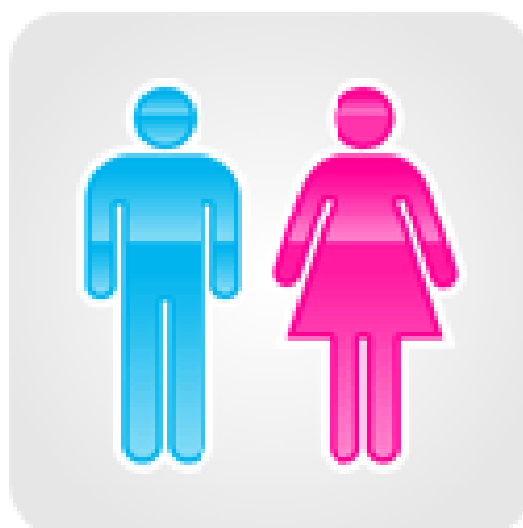
Sex Discrimination Act

A Labor-dominated Senate committee has called for changes that would make it easier for workers to establish they have been discriminated against under the *Sex Discrimination Act*.

The Senate committee on Legal and Constitutional Affairs' majority supports changes to laws on both direct and indirect discrimination in a new report on the effectiveness of the *Sex Discrimination Act*.

On direct discrimination, the majority report, prepared by committee chair Senator Trish Crossin, on behalf of

senators David Feeney, Don Farrell, and Gavin Marshall, recommends a shift in the onus of proof to make it easier for a claimant to prove their case.



The change, modelled on UK laws, would

require the respondent to prove they did not discriminate where, in the absence of adequate explanation, it appears to the court that discrimination is the most plausible reason for their actions.

Another important recommendation would remove the need for claimants to prove they were discriminated against by comparing the way they were treated with a person of the opposite sex in the same position.

The "comparator test", confirmed by the High Court in Purvis v New South Wales, would be replaced by a requirement that the claimant show they had received unfavourable treatment because of their gender.

Beth Gaze, associate professor in the University of Melbourne's Law School, says shifting the onus of proof in direct discrimination cases could help claimants bring successful cases.

"If you don't make this kind of change discrimination can be virtually impossible to prove - often the reasons something has occurred are known only to the respondent and there is no mechanism to force them to give evidence," she says. She says the two changes together are likely to shift the balance of power towards claimants, which could give workers more muscle in settlement negotiations.

"People making a claim may be more likely to be able to settle their case if they can say 'look, you will be put in a position to



justify that what you did was reasonable', and that may make them think twice about going to the tribunal," she says.

Majority seeks new "legitimate and proportionate" test for indirect bias

The majority also calls for the introduction of more "claimant-friendly" indirect discrimination provisions, recommending that the current reasonableness test be replaced by a requirement that conduct is "legitimate and proportionate."

"Conditions, requirements or practices that disadvantage such groups should only be imposed in pursuit of a legitimate object and where they are proportionate, in the sense that they are the least restrictive means of achieving that object," the majority report says.

Gaze says that, if introduced, this change could be more effective in getting

employers to actively ensure their policies and procedures are non-discriminatory and make them more vulnerable to indirect discrimination claims.

"Indirect discrimination can be very difficult to prove, and there have been a number of cases where higher courts have overturned lower courts purely because they disagree on what is reasonable. It really just means it's up the judge to decide, and in this area that's not such a good thing," she says.

The majority also canvasses the idea of introducing a single 'equality act' to replace the various federal discrimination statutes.

It says the idea should be considered further and recommends an interim change to allow HREOC to join applications made under different discrimination laws and award a singly remedy where appropriate.

Other key recommendations of the majority report include:

- amending the act to require that it be interpreted in accordance with relevant international conventions such as the Convention on the Elimination of Discrimination Against Women;
- extending protection from discrimination on the basis of relationship status to same-sex couples;
- enlarging the act's coverage to cover volunteers, independent contractors and partnerships of all sizes;
- prohibiting explicitly discrimination because a woman is breastfeeding;

- extending the ban on direct discrimination on the basis of family responsibilities to indirect discrimination and circumstances other than termination of employment;
- increasing the amount of time to lodge a claim from 28 to 60 days;
- imposing a positive obligation on employers to reasonably accommodate requests for flexible working arrangements, similar to that in s14A [link] of Victoria's Equal Opportunity Act; and
- broadening the definition of sexual harassment so that it is easier to prove and applies to the worker-customer relationship.



Support for the Changes

The Coalition minority dissents from most of those recommendations, arguing the committee did not hear enough evidence or have enough time to consider to justify calling for such sweeping changes.

The minority - Coalition senators Guy Barnett, Mary Jo Fisher, Russell Trood and Helen Kroger - backs several of the smaller changes including those relating to breastfeeding and the time limit for applications, however.

Greens Senator Sarah Hanson-Young supports most of Labor's proposals but also argues for a new law to expressly prohibit discrimination on the grounds of sexual orientation and gender identity.



Employer's Beware

If these changes are introduced, employers will need to be active in ensuring their policies and procedures are non-discriminatory.

These changes will also make employers more vulnerable to indirect discrimination claims.

There will be an increased onus on the employer to prove that the discrimination did not occur where it appears to the court that the complaint of discrimination is plausible.

This may be an ideal time to review your sex discrimination and sexual harassment policies. Please do not hesitate to contact me, Brooke Pendlebury, to discuss these matters further.

Source: Workplace Express

Forward with Fairness

We have been keeping you abreast of the changes in relation to Forward with Fairness during the year. There are some clear actions for employers arising out of the proposed legislation, particularly in relation to redundancies, transmission of businesses and future industrial strategies.

Our message to our clients is to deal with these matters sooner rather than later so that you can explore all of your options.

We will provide you with a more detailed update in early 2009.

HAPPY NEW YEAR!

If you would like more information, please contact **Brooke** P: 9231 0250, M: 0403 818 912, E: info@pendlebury.com.au. Please have a look at the website at www.pendlebury.com.au.