



Leanne Tully
Senior Lawyer
Workplace Relations

Leanne has experience in advising clients on all aspects of employment law. Leanne has advised both businesses and individuals on:

- employment issues such as employment contracts,
- employee entitlements,
- termination,
- unfair dismissals,
- sexual harassment and discrimination,
- WorkCover and
- employment policies and procedures.

Leanne also has experience in acting for people who are seriously injured at work.

Matters of equality

In this edition of Employment Alert, we look at two topical issues:

- Changes to equal opportunity legislation – this is relevant to all employers; and
- The equal pay test case currently before Fair Work Australia – this is of primary relevance to employers in the Social and Community Services Industry.

Equal votes = No equal opportunity reform

Important changes are afoot in the area of Victorian equal opportunity law. The changes are due to take effect on 1 August 2011.

Unfortunately, there is some doubt as to what the new laws will look like, after a Government MP missed a crucial parliamentary vote and the Government's amendments to the laws were defeated.

Although the Government plans to reintroduce the defeated Bill, the Opposition has cast doubt on whether this is permissible.

The very brief history of the proposed changes to the law is as follows:

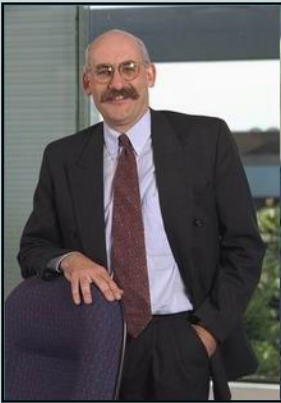
- In 2010, the Victorian Parliament passed the *Equal Opportunity Act 2010* ('the EO Act 2010'), at the instigation of the then Labor Government, following two reviews into the existing legislation.
- The EO Act 2010 is due to come into full operation on 1 August 2011.
- Mr Baillieu's Coalition Government sought to make some significant changes to the EO Act 2010, by introducing the *Equal Opportunity Amendment Bill 2011* ('the 2011 Bill').
- The 2011 Bill was defeated on Friday 27 May 2011, when Mary Wooldridge missed the vote.

What are the changes in the EO Act 2010?

Some of the key features of the EO Act 2010 are:

- There will be a positive duty to make 'reasonable adjustments' for a person with an impairment who is offered employment or is an employee. This duty will apply not only to employers, but also to firms (in relation to partners), educational authorities and service providers. The duty will apply unless the employee "could not or cannot adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made".

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Peter Andrew
Special Counsel
Workplace Relations

Peter has extensive experience in workplace relations issues, including unfair dismissal litigation, employment litigation and occupational health and safety issues.

- Peter advises on issues including
- negotiation of executive terminations;
- drafting of employment and contractor agreements;
- leave entitlements;
- impact of workplace relations laws on business;
- termination and redundancy;
- workplace procedures including drafting of policies;
- transfer of business, particularly in relation to sale of business;
- restraint of trade;
- protection of intellectual property and other confidential information;
- employee discipline and performance evaluation.

<from page 1>

- There will be an obligation to accommodate the family responsibilities of contractors. Since 2008 there has been an obligation on employers to “not, in relation to the work arrangements of an employee, unreasonably refuse to accommodate the responsibilities that the employee has as a parent or carer”. The EO Act 2010 will extend this obligation to contract workers.
- Religious bodies and schools will not be permitted to discriminate on the grounds of race, age or disability, in relying on the religious exceptions.
- When employing staff, religious bodies and schools will need to show that having a particular attribute (such as being Christian or heterosexual) is an inherent requirement of the job, if they wish to discriminate on the basis of such an attribute.
- The Victorian Human Rights and Equal Opportunity Commission will be invested with new powers, to enable it to respond to systemic discrimination. In relation to individual complaints, it will no longer be obligatory to obtain a referral from the Commission before proceeding to VCAT, and so the Commission process may be by-passed.
- There will be a positive obligation on employers (and others with duties under the Act) to take “reasonable and proportionate measures” to eliminate discrimination, sexual harassment and victimisation “as far as possible”. Breach of this obligation may lead to investigation.
- Clubs will be covered by the EO Act 2010 if they comprise more than 30 people, hold a liquor licence and operate their facilities at least partly from their own funds. Previously, clubs were covered by the legislation if they received government funding or occupied government land.
- Volunteers will be protected from sexual harassment under the EO Act 2010 (from 1 July 2012).
- The definition of discrimination will change, so that the key issue will be whether there has been ‘unfavourable treatment’ (not whether the person has been treated less favourably than another person), or whether a condition, requirement or practice has the effect or disadvantaging people (not whether other people would be able to comply with the condition). This change removes a technical argument often raised in defences to discrimination claims.

What are the changes in the 2011 Bill?

If enacted, the 2011 Bill will reverse some of the key changes made by the EO Act 2010, such as:

- It will preserve the existing religious exceptions, removing the proposed new requirement for religious bodies or schools to show that an attribute, such as religious faith, is an inherent requirement of the particular job.
- It will reduce the investigative powers of the Victorian Human Rights and Equal Opportunity Commission (for example, removing the power to compel the production of information and documents, issue compliance notices and conduct public inquiries).
- It will expand the circumstances in which single-sex sports are permitted.
- It will use the term ‘disability’ instead of ‘impairment’.
- In relation to making reasonable adjustments for those with a disability, it will provide that compliance with Commonwealth Disability Standards satisfies the requirements of the Victorian EO Act.

These changes will only take effect if the Government can pass further legislation.

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Frances Anderson
Senior Lawyer
Workplace Relations

Frances has considerable experience in workplace relations, having practiced exclusively in this area since 1989, both in Australia and overseas. She has advised several employers across several industries and business sectors in both industrial relations and employment law.

Frances has given comprehensive advice in relation to a broad range of workplace relations issues in Australia, including employment related litigation; discrimination complaints; enterprise bargaining; employment contracts; and workplace policies.

Frances has also advised on the employment related implications of sale of business/sale of shares transactions.

<from page 2>

Implications

Equal Opportunity legislation applies to a broad range of organisations, including businesses, clubs, schools, accommodation-providers and service-providers. It also applies to a range of activities, such as engaging staff, providing goods and services, admitting people to membership of clubs, enrolling students at school, and all the terms and conditions associated with those activities.

Businesses and not-for-profit organisations alike need to be aware of their obligations under the EO Act 2010, in relation to a range of people, including employees, contractors, customers and students.

In making decisions relating to employment and service provision, businesses and organisations should be aware of the new duty to make reasonable adjustments to accommodate impairments and the general duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation.

Unfortunately, religious bodies and schools do not yet have certainty as to whether they will have to show that possessing an attribute related to religious belief is an "inherent requirement of the job" before discrimination is permitted. This will depend on whether the 2011 Bill is passed.

The extension of the sexual harassment provisions to volunteers will pose challenges for many not-for-profit organisations, which may now need to conduct training in this area for volunteers as well as employees.

Equal remuneration case—social and community services industry

On 16 May 2011, Fair Work Australia handed down its decision in the Equal Remuneration Case. Under the *Fair Work Act 2009*, Fair Work Australia can make an order which overrides award pay rates, to ensure that male and female workers receive equal remuneration for work of equal value or comparable value.

This case involved an application for an equal remuneration order applying to employees in the social and community services ('SACS') industry, on the basis that the SACS industry is female dominated, work in the SACS industry is undervalued, and that undervaluation is referable to the SACS industry being female dominated.

In handing down its decision, FWA reviewed the history of Equal Remuneration, noting that "Until World War II, the female basic wage was, generally speaking, approximately 54 per cent of the male basic wage". It was not until 1974 that the Australian Conciliation and Arbitration Commission "extended the minimum wage to females, awarding the same minimum wage to adult males and females in three instalments". Finally, in 1993, the Commonwealth *Industrial Relations Act 1988* was amended to enshrine the principle of equal remuneration for men and women workers for work of equal value.

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<from page 3>

The concept of equal remuneration has been extended in the *Fair Work Act 2009* to include work of "comparable value". This allows comparison between different but comparable work. The FW Act also removes any requirement to show that there has been discrimination in setting the remuneration levels.

In its recent decision, Fair Work Australia noted that:

- more than 80% of workers in the SACS industry are female;
- the industry bears a "female characterisation" in that it involves caring work;
- there is not equal remuneration for work of equal or comparable value by comparison with state and local government employment.

However, Fair Work Australia called for further submissions on the extent to which wages in the SACS industry are lower than they would otherwise be because of gender considerations, and on how wages should be calculated. A further hearing is scheduled to commence on 8 August 2011.

We will keep you updated with further developments on this case.

Leanne Tully
Senior Lawyer

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.

Moores Legal is a law firm servicing companies and businesses, Not for Profit organisations and individuals across Melbourne in the areas of Commercial Law, Workplace Relations, Property Law, Not for Profit Law, Aged Care, Elder Law, Estate Planning, Superannuation & Structuring, Dispute Resolution, Family Law and Personal Injury Law.

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