

High Court battle looms for state Labor's work-from-home push

By Daniella White

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A High Court showdown is looming over a Victorian plan to legislate a right to work from home, as legal experts warn the Allan government's move would unconstitutionally encroach on federal industrial relations powers.

Premier Jacinta Allan has maintained that the government could enshrine a right for public and private sector employees to work from home two days a week via state anti-discrimination laws, but lawyers warn the move directly challenges federal workplace law.



"The advice we have is that when it comes to the federal workplace arrangements, there is the Fair Work Act and there is explicit provision in the Fair Work Act for state-based anti-discrimination laws to continue to apply," Allan told ABC radio on Monday.

"The Fair Work Act provides us with the floor, and what we're choosing to do here in Victoria is build on that floor to protect working from home as a right."

Allan's comments put her at odds with lawyers and other legal experts who have cast deep doubt on the government's ability to legislate the right to work

from home as most workplace laws are under the jurisdiction of the federal government.

In Victoria, the state has even fewer powers because of a 1996 Kennett government deal that handed powers to regulate employment conditions to the Commonwealth.

This means that unlike other states, Victoria does not even have the ability to create workplace laws for its own public sector employees.

Stephen Smith, principal at ACTUS Workplace Lawyers, said Victorian legislation to enact a broad right to work from home would be a major constitutional issue.

“The Fair Work Act has wide coverage of employment arrangements for Victorian employees, and Victorian legislation is invalid if inconsistent with the Fair Work Act,” he said.

Smith said the government would face serious problems trying to use anti-discrimination laws because the right to work from home would then need to relate to a recognised ground of discrimination such as an employee’s sex, age, race or disability.

“One of two things is likely to happen. If the government implements broad working-from-home rights, the laws are likely to be overturned in the High Court,” he said. “Alternatively, if the government implements laws that are likely to be valid, the rights of employees will be very different to what has been announced.”

Professor Andrew Stewart, a legal expert from the Queensland University of Technology, said a constitutional clash appeared unavoidable.

“It’s very hard to see how the state can regulate this without running into the federal Fair Work Act and awards and enterprise agreements under the Fair Work Act,” Stewart said. “That’s an issue even for the government’s own workers, let alone the private sector.”

Stewart agreed that the government could not easily use anti-discrimination laws as a way to circumvent federal laws.



Premier Jacinta Allan during Labor's state conference at the weekend.

"The argument will be, you can't just put it in the Discrimination Act and call it discrimination law," he said.

"The broader the right that is given, the harder it will be to argue it is legally enforceable.

"They certainly could turn it into a law about discrimination – they'd need to limit it to workers who have protected characteristics like caring responsibilities or age."

Stewart said the government might also decide to go ahead and legislate knowing there would be a clash with federal law, pointing to the state's introduction of wage theft laws which have faced a successful constitutional challenge.

"Those laws are in the process of being repealed, but they had the desired effect because they raised the profile of wage theft, and laid the foundation for the Albanese government for their own laws," he said.

"It's entirely possible [the state government] might take the same approach here – raising the profile of the issue, potentially even putting pressure on the Commonwealth to adopt a similar law in the future. The point is, even if it's hard to see how it can be done lawfully, that's not in itself going to stop the Victorian government."

Currently, the federal Fair Work Act gives certain employees – such as parents, carers, or those with a disability – the right to request flexible work arrangements.

Employers can refuse these requests only on “reasonable business grounds”.

The state government’s proposal goes further by establishing a presumptive right for all employees where a job can reasonably be done remotely.

Sara Charlesworth, a professor emerita in RMIT University’s College of Business & Law, supported laws to strengthen rights to work from home but agreed they would not easily be implemented through the state’s anti-discrimination laws.

She said it could instead use procurement or payroll tax incentives to encourage businesses to allow workers to work from home.