SERIES 2: RESPECT AT WORK

RESPECT@WORK:
Summary of key changes to workplace sexual harassment laws

SEX DISCRIMINATION AND FAIR WORK (RESPECT AT WORK) AMENDMENT ACT 2021

On 11 September 2021, the Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 (Respect at Work Act) commenced.

The Respect at Work Act makes changes to the *Fair Work Act 2009 (Cth)* (FW Act), the *Sex Discrimination Act 1984* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth), and gives effect to some of the recommendations contained in the Sex Discrimination Commissioner's Respect@Work report.

Key Changes to the Fair Work Act

1. Stop Sexual Harassment Orders

The Fair Work Commission (**FWC)** can make an order to stop sexual harassment in the workplace as part of its existing anti-bullying jurisdiction.

The orders are limited to stop 'conduct at work'. In order to make the order, the FWC must be satisfied that the harassment has occurred and there is a risk of future harassment at work. The remedy provided is preventative rather than monetary.

2. Unfair dismissal: Sexual harassment is a valid reason for dismissal

The FW Act has been amended to clarify that sexual harassment can be a valid reason in determining whether a dismissal was harsh, unjust or unreasonable. The definition of 'serious misconduct' in the Fair Work Regulations has also been amended to include sexual harassment.

Sexual harassment as a valid reason for dismissal is not new and employers will still be required to investigate the conduct and ensure procedural fairness. The change will likely assist employers to defend unfair dismissal claims where the reason for dismissal was sexual harassment.

3. Miscarriage Leave

The FW Act includes a new entitlement for employees who experience a miscarriage, and their current partners to take up to two days of paid compassionate leave. Casuals are entitled to up to two days of unpaid leave

Key Changes to the Fair Work Act

1. Expansion of the application of the Sex Discrimination Act

The protection from sexual harassment under the Sex Discrimination Act now expressly covers members of Parliament, judges and public servants.

In line with work health and safety laws, the definitions of 'workers' and 'workplace participant' have been expanded to include interns, apprentices, volunteers, unpaid workers and self-employed workers.

2. Prohibition on Sex-Based Harassment

Sex-based harassment is now prohibited under the Sex Discrimination Act.

Sex-based harassment is unwelcome conduct of a seriously demeaning nature by reason of the person's sex, in circumstances which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimated.

This is relevant to both employees, as well as employers who can be held liable (vicariously) for the conduct of their workers. Ancillary liability provisions also apply, meaning for example, a supervisor may be held liable as an 'accessory' to the sex-based harassment if they aided and permitted its continuation.

3. Victimisation

The FW Act includes a new entitlement for employees who experience a miscarriage, and their current

Victimising conduct (such as threatening or subjecting a person to detriment for taking action such as lodging a complaint) can now form the basis of a civil action for unlawful discrimination (in addition to a criminal complaint) under the Sex Discrimination Act.

4. Complaints: termination due to time delay

Instead of the previous six months, a complaint under the Sex Discrimination Act can now only be terminated by the Australian Human Rights Commission (AHRC), if it is made more than 24 months after the alleged unlawful conduct took place.

This may result in more employees considering making their sexual harassment claim in the AHRC (which has the power to award costs) as state and territory jurisdictions generally have more limited discretionary timeframes (eg. 12 months) for the making of sexual harassment complaints

5. What do employers need to do?

Although the Respect at Work Act does not expressly include a positive duty on employers to proactively take all reasonable steps to eliminate sexual harassment, employers will still need to take all reasonable steps to prevent and respond to workplace sexual harassment.

Under the Sex Discrimination Act and state and territory anti-discrimination laws, employers can still be held vicariously liable for incidents of sexual harassment by their employees. In Victoria, a positive duty exists to eliminate sexual harassment under the *Equal Opportunity Act 2010* (Vic).

ACCI prepared the Respect@Work Employer Guide which LPA shared with Member to assist them to navigate the changes to the *Fair Work Act 2009*, *Sex Discrimination Act 1984* and *Australian Human Rights Commission Act 1986.*

ANTI-DISCRIMINATION AND HUMAN RIGHTS LEGISLATION AMENDMENT (RESPECT AT WORK) BILL 2022

On 27 September 2022, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2021* (Bill), was introduced by the Federal Government. The Bill has passed the House of Representatives.

The Bill seeks to implement seven more recommendations from the Respect@Work Report. The key changes to be effected by the Bill, which would amend the *Sex Discrimination Act 1984* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth), are:

- **A prohibition** against conduct that subjects another person to a workplace environment that is hostile on the ground of sex
- **A positive duty** on employers to actively take reasonable and proportionate steps to eliminate sex discrimination, sexual harassment, and victimisation at work
- **New powers** for the Australian Human Rights Commission to inquire into systemic unlawful discrimination and enforce compliance with the positive duty, including by issuing compliance notices
- **Changes to standard costs orders** – the default rule will be for parties to bear their own costs in claims under federal anti-discrimination laws
- **Unions and other representative bodies will be able to bring court claims** for groups of claimants for unlawful discrimination matters.

Other changes proposed by the Bill include:

- increasing the time for making age, race and disability discrimination complaints to 24-months;
    - clarifying that victimising conduct can form the basis of a civil action for unlawful discrimination under age, race and disability anti-discrimination legislation; and
    - lowering the bar for proving harassment on the grounds of sex.

1. Prohibition on subjecting a person to a hostile workplace environment on the ground of sex

The Bill proposes an amendment that prohibits conduct that subjects a person to a hostile workplace environment on the grounds of sex.

Such conduct is not directed towards a particular person. The conduct results in a generally hostile environment based on sex – not directed to anyone in particular.

For example, if a workplace has obscene or pornographic materials displayed, is replete with general sexual banter, sexual innuendo or offensive jokes based on sex, it could be a hostile work environment based on sex.

The test is whether a reasonable person, having regard to all the circumstances, would have anticipated the possibility of the conduct resulting in the workplace environment being offensive, intimidating or humiliating to a person, by reason of:

- the sex of the person or
- a characteristic that appertains generally to persons of the sex of the person or
- a characteristic that is generally imputed to persons of the sex of the person.

The circumstances for determining whether the conduct is unlawful include:

- the seriousness of the conduct;
- whether the conduct was continuous or repetitive;
- the role, influence or authority of the person engaging in the conduct; and
- any other relevant circumstance.

2. Introduction of a positive duty to eliminate unlawful sex discrimination

Employers and PCBUs will have a new positive duty to prevent unlawful sex-based discrimination.

Employers and PCBUs will have to take reasonable and proportionate measures to eliminate sex discrimination, sexual and sex-based harassment, hostile work environments and victimisation, as far as possible.

The 'reasonableness' of the measures will vary from employer to employer, depending on the size, nature and circumstances of the organisation, as well as resources, practicability and costs.

Employers and PCBUs must take these measures to prevent unlawful conduct by their organisations, their employees, workers and agents, and third parties (such as clients or customers). Otherwise, they will fail to meet the positive duty and will contravene the law. Additionally, failing to meet the duty will mean employers/PCBUs will be vicariously liable for unlawful conduct by employees and agents.

3. New powers for the Australian Human Rights Commission

The Australian Human Rights Commission (AHRC) will have new powers to monitor and assess compliance with the positive duty to eliminate unlawful sex discrimination. The powers will include:

- conducting inquiries, into a person's compliance with the positive duty and provide recommendations to achieve compliance
- issuing compliance notices, specifying the action that a person must take, or refrain from taking, to address their non-compliance
- applying to federal courts for orders to direct compliance with the compliance notices, and
- entering into enforceable undertakings.

The AHRC will also have powers to conduct inquiries into systemic unlawful discrimination or suspected systemic unlawful discrimination. Systemic unlawful discrimination means unlawful discrimination that affects a class or group of persons and is continuous, repetitive or forms a pattern. The AHRC may commence an inquiry after receiving a complaint or on its own accord.

The AHRC's new powers will only commence 12 months after the changes commence. This is to allow employers and PCBUs sufficient time to understand their obligations under the positive duty and implement changes, if necessary.

4. New powers for unions and other representative bodies

Representative bodies, such as unions, can already make a representative complaint in the AHRC on behalf of one or a group of persons. However, they cannot then make a court application on behalf of the group. The Report found that the complexities of the court system can be difficult and costly for applicants. Representative applications provide a mechanism for courts to hear genuine cases.

The Bill would enable representative bodies, such as unions, to make representative court applications on behalf of groups of people who have experienced unlawful discrimination. For example, a union could lead a representative complaint from the AHRC in the federal courts for a group of employees subjected to a hostile work environment based on sex.

5. What do employers need to do?

Employers and PCBUs will need to review and update their implementing policies and procedures, collect and monitor data about sex discrimination, provide appropriate support to workers and employees, and deliver training and education on a regular basis.

Practical steps employers can take include updating policies and procedures to reflect the new laws; instituting registers of complaints and risks; and reviewing their training programs to ensure training addresses the new positive duty and hostile work environments.

Employers should use the same approach to eliminating sex discrimination as they do for health and safety. This includes conducting hazard and risk assessments, using job safety environmental analysis and even creating safe work method statements specifically dealing with hostile work environments based on sex.

STATE-BASED LEGISLATIVE AMENDMENTS

In addition to numerous reviews into these issues in a number of states and territories, similar amendments have been proposed to anti-discrimination legislation at the state level.

JURISDICTION	RECENT DEVELOPMENTS
Western Australia	Review of the *Equal Opportunity Act 1984* (WA) • In May 2022, the Final Report of the WA Law Reform Commission's review of the *Equal Opportunity Act 1984* (WA) was released. • It set out 163 recommendations, including imposing a positive duty on employers to prevent harassment at work. The Report was tabled in state parliament and the WA Government has broadly accepted the recommendations. Further consideration is being given to the extent to which they will be implemented in the drafting of a new Equal Opportunity Act.
Queensland	• On 1 September, the Queensland Human Rights Commission tabled its *Building Belonging* report in the Queensland Parliament. • It makes 46 recommendations, including for the introduction of a new Anti-Discrimination Act to replace the *Anti-Discrimination Act 1991* (Qld), which, amongst other things, would: o Introduce a positive duty on employers (and any person with a legal obligation under the Act) to take reasonable and

	proportionate measures to eliminate sexual harassment, discrimination and other prohibited conduct as far as possible; and ○ Extend the timeframe for making a complaint to the Queensland Human Rights Commission in respect of sexual harassment or discrimination from one year to two years, with the QHRC to have discretion to decline to provide or to continue to provide dispute resolution if the contravention occurred more than 2 years before the complaint was lodged.
Northern Territory	**Anti-Discrimination Amendment Bill 2022** • In July 2022, the Northern Territory Government released an exposure draft of the *Anti-Discrimination Amendment Bill 2022*. • The proposed Bill imposes a positive duty on employers to eliminate discrimination, sexual harassment and victimisation, while it also intends to expunge an exemption that permits religious schools to discriminate against LGBTIQ+ teachers.
New South Wales	**SafeWork Respect at Work Taskforce** SafeWork NSW is establishing a Respect at Work Taskforce to address, amongst other things, sexual harassment.
Victoria	**Equal Opportunity Act 2010** A positive duty on employers already exists under the *Equal Opportunity Act 2010* (Vic) not to engage in discrimination or sexual harassment, and to take reasonable steps to eliminate these behaviours.
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