

A NEW ANTI-DISCRIMINATION BILL AND HUMAN RIGHTS BILL

On 27 September 2022, the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Bill) was introduced to the House of Representatives. The Bill is a response to the recommendations of the 2020 Respect@Work Report (Report) and is yet to be passed. It seeks to implement a further seven of the Report's recommendations (with some recommendations having already been implemented). The Bill is expected to significantly strengthen Australia's regulatory framework in respect of sex discrimination, and in particular, sexual harassment.

A New Positive Duty

The Bill proposes to amend the *Sex Discrimination Act 1984 (Cth)* (**SD Act**) to introduce a new positive duty for all employers and persons conducting a business of undertaking (**PCBU's**) to take *'reasonable and proportionate measures'* to eliminate, as far as possible, unlawful sex discrimination, including sexual harassment, sex-based harassment, hostile work environments and victimisation. This duty will coexist with existing duties under model work health and safety laws, including the duty of employers and PCBU's to provide a safe working environment for workers, so far as reasonably practicable.

The introduction of this new positive duty will require that all employers and PCBU's adopt a *proactive* (rather than reactive) approach to the prevention of all forms of sex discrimination. Previously, such an approach was only applied in the context of a defence to vicarious liability, where the employer has been required to demonstrate that it took 'all reasonable steps' to stop the alleged conduct from occurring. Under this new duty, it will be imperative that employers adopt preventative measures to address sex discrimination and sexual harassment in the workplace. These might include implementing (or updating) policies and procedures, collecting and interpreting workplace data, supporting workers and employees in the workplace, and regularly delivering training or providing educational resources.

New Hostile Workplace Provisions

The courts have clarified that protection from being subjected to a hostile workplace environment on the ground of sex is already available under the SD Act. However, this is not well understood and the source of the obligation under the legislation has been unclear. To combat this, the Bill proposes to introduce an express prohibition making it unlawful to subject persons to workplace environments that are hostile on the grounds of sex.

According to the Report, sexual harassment may occur where a workplace environment or culture is sexually charged, even if the conduct is not directed at a particular person. The Bill takes this into account by clarifying that a workplace environment will be hostile on the grounds of sex where a person's conduct results in an offensive, intimidating or humiliating environment for people of one sex. This means that a workplace may potentially be a hostile environment if, for example, general sexual banter, innuendo or offensive jokes are common or generally tolerated. Given that these circumstances may easily arise within what may be considered to be a 'friendly' or inclusive workplace, this provides a number of potential issues for employers to consider.

Australian Human Rights Commission

In conjunction with the new positive duty on employers to prevent sex discrimination in the workplace, the Australian Human Rights Commission (**AHRC**) will gain new powers (following a 12-month grace period to allow employers to prepare) to monitor, assess and enforce employer compliance. This will include a broad power to inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination on its own volition or upon request by the Minister. Also, the time limit for making complaints related to age, disability and race discrimination to the AHRC will be extended to 24 months (as under the SD Act) rather than the current 6 months.

Other Changes

The Bill also proposes for the first time to give representative bodies, including trade unions, the power to make class action applications in the Federal Courts on behalf of a group of people who have experienced unlawful discrimination.

Additionally, the Bill proposes to reduce the threshold for applicants alleging sex-based harassment under the SD Act from 'seriously demeaning' conduct to 'demeaning' conduct, in recognition of the high bar currently set for making out a claim of sex-based harassment.

What Now?

Given that the Bill could be passed and implemented at any time now, it is important that employers take steps now to ensure compliance with these new duties.

If you would like assistance with dealing with these changes including refreshing your policies and procedures and your training resources, please contact our experienced team of workplace relations lawyers today.

For more information, please contact



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