



AUSTRALIA: EMPLOYMENT LAW | FEBRUARY 2023

SEXUAL HARASSMENT IN THE WORKPLACE: FEBRUARY 2023 UPDATE

December 2022 was a busy month in Australia's Federal Parliament for workplace relations reforms. The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Secure Jobs, Better Pay Act) and the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Respect at Work Act) were both passed. These Acts bring with them, among other things, wide-ranging impacts on employer obligations with respect to sexual and sex-based harassment. This article focusses on some of those changes and what employers need to do to comply.

Prohibition against sexual harassment

The Secure Jobs, Better Pay Act introduced some reforms to the *Fair Work Act 2009* (Cth) (**FW Act**). Importantly, from 6 March 2023, a prohibition against sexual harassment in connection with work will be enshrined in the FW Act. It will prohibit sexual harassment of "workers" (which is wider than employees and also includes contractors, subcontractors, outworkers, apprentices, trainees, work experience students and volunteers) as well as, prospective workers, and persons conducting a business or undertaking (**PCBU**). Importantly, the prohibition will be a civil remedy provision, so if it is contravened, penalties may be ordered.

Principals, such as employers, will be vicariously liable for the acts of their employees and agents who contravene this prohibition, unless they can demonstrate that they took all reasonable steps to prevent those acts. So, employers need to be taking positive steps to address these reforms.

The prohibition will be supported by a dispute resolution framework which will allow applications to be made to the Fair Work Commission (**Commission**) to deal with a dispute about an alleged contravention. That framework will be operational from March 2023 and will be largely modelled on the existing process for general protections applications. Its purpose is to remedy past harm caused by sexual harassment. Applications can be made by the person who has been harassed or their union. The Commission will have the right to dismiss an application if it is made more than 24 months after the alleged contravention.

There will still be capacity for persons who are subjected to sexual harassment, or their union, to apply to the Commission for a Stop Sexual Harassment Order. In contrast to the dispute resolution framework discussed above, the purpose of any order will be to stop future sexual harassment, and not to offer a remedy for any past harm.

Prohibition on conduct that subjects another to a workplace environment that is hostile on the ground of sex

Not to be outdone, the Respect at Work Act also brought some significant reforms, including a new obligation in the *Sex Discrimination Act 1984* (Cth) (**SD Act**) prohibiting conduct that subjects another to a workplace environment that is hostile on the ground of sex.

This reform commenced on 13 December 2022 and came about because the Respect@Work report¹ found that sexual harassment may occur where a workplace environment is sexually charged or hostile, even if the conduct is

¹ Respect@Work: Sexual Harassment National Inquiry Report (2020), produced following the National Inquiry into Sexual Harassment in Australian Workplaces, at page 458.

not directed at a particular person. The kind of conduct this reform has in mind is the displaying of pornographic or obscene materials, general sexual banter and offensive jokes and innuendo.

This reform is intended to align with other provisions in the SD Act in so far as it assesses whether a workplace environment is hostile on the ground of sex by reference to the usual test – that is, whether a reasonable person, having regard to all the circumstances, would have anticipated the possibility of the conduct resulting in a workplace environment being offensive, humiliating or intimidating to a person on the ground of their sex.

Positive duty to eliminate sex discrimination

The Respect at Work Act also amended the SD Act to include a new positive duty on employers and PCBUs to take reasonable and proportionate measures to eliminate, as far as possible, unlawful sex discrimination, sexual and sex-based harassment, a hostile workplace environment on the ground of sex and related acts of victimisation. (The obligation extends to conduct by the employer or PCBU, their employees, workers and agents, and to conduct by other persons towards employees and workers.)

Previously, employers were generally largely liable for such conduct if they failed to take reasonable steps to prevent it. However, employers will need to do more than take all reasonable steps to discharge this new, positive duty.

The Australian Human Rights Commission (**AHRC**) has been given the power to publish guidelines for compliance with this positive duty and to promote greater understanding about the duty. So, employers should keep an eye out for these guidelines.

As you would expect, the positive duty is intended to operate concurrently with existing duties under work health and safety laws, which require the provision of a safe workplace so far as reasonably practicable.

Australian Human Rights Commission has more powers

In addition to the power to publish the abovementioned guidelines about compliance with the positive duty, as a result of the Respect at Work Act, the AHRC has been or will be given the following additional powers:

1. From December 2022, the power to inquire into systemic (or suspected systemic) unlawful discrimination, being unlawful discrimination that affects a class or group of persons and is continuous, repetitive or forms a pattern, and the power to do anything incidental or conducive to the performance of this inquiry function; and
2. From December 2023, the power to inquire into compliance with the new positive duty and if the AHRC reasonably suspects non-compliance, it can issue a compliance notice, apply to Federal Courts for orders to direct compliance with those notices and, like the Fair Work Ombudsman, will have power to enter enforceable undertakings. The delay in the commencement of this compliance power is to allow employers the chance to understand their obligations around the positive duty and to develop and implement a strategy and changes to meet them. So, employers should be actively working on that strategy now.

What Next?

The steps employers have taken in the past to avoid vicarious liability are not likely to be sufficient to meet all of these new obligations, particularly the positive duty. Employers should therefore assess what further steps they should take to be more proactive in this space, including having regard to any guidelines published by the AHRC.

In the meantime, we have put together a non-exhaustive checklist of matters for employers to consider when developing a strategy for compliance.

Employer checklist

Action items

Risk assessment

- Conduct a risk assessment to understand the risks of unlawful sex discrimination (including the various forms of sex and sex-based harassment) at your workplace and in connection with work and develop a plan to address those risks.
- Do not forget obligations to consult with respect to matters affecting work health and safety.

Audit policies

- Review and edit your appropriate workplace behaviour policies and complaints procedures for compliance with these reforms.

Review values and approach to training and education

- Check your corporate values sufficiently extend to reflect the requirements of these reforms.
- Update your induction and periodic appropriate workplace behaviour training for compliance with these reforms and roll it out.
- Consider a wider array of education options, including targeted for particular groups (e.g., leaders), different channels for education (face to face, e-learning), different formats (such as town halls).

Consider data points

- Consider whether there are other sources of data that you can access to assess and measure compliance with your obligations, such as surveys, exit interview data, performance review data, EAP use, absenteeism records and the like.

Do not underestimate the importance of good leadership

- Educate, inform and involve leaders and the Board of Directors in measures to address sex discrimination/harassment.
- Reward leaders that promote respectful and inclusive behaviours (e.g., make KPIs).

Review HR practices

- Review HR practices to check they meet the desired culture and the obligations in this space, including with respect to recruitment, reward and recognition, talent management, support for persons involved in complaints and the like.

Get in Touch

This article was prepared by Stephanie Nicol and Laure-Elise Kenworthy. If you would like any assistance with your compliance strategy or would like to understand more about the new reforms, please reach out to one of our capable team members.



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