

## Article Information

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## Breaking news: Federal Government introduces Respect@Work Bill

**The newly introduced *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth)* seeks to implement a further seven recommendations made by Sex Discrimination Commissioner Kate Jenkins' Respect@Work Report. Joe Murphy, Emily Haar and Juliana Marcus discuss the proposed amendments, and their potential impact on Australian workplaces.**

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Following a number of recent announcements, on Tuesday 27 September 2022 the Federal Government introduced the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth)* into Parliament. The Bill's aim is to take proactive steps to address sexual harassment, discrimination and victimisation in Australian workplaces, by continuing to implement recommendations from the Sex Discrimination Commissioner's Respect@Work Report in 2020.

The Federal Government has advised that their ultimate goal is to introduce and apply all 55 recommendations in order to create safer, more respectful and more equitable workplaces.

The changes proposed by the Bill further demonstrate the shift in focus in these matters from dealing with individual complaints and issues to a more "preventative" approach, in line with how other work health and safety hazards and risks are managed.

### Hostile Work Environment

The Bill will insert a new objects clause to expressly state that the intention of the *Sex Discrimination Act 1984 (Cth)* (**SD Act**) is to 'eliminate, so far as is possible, discrimination involving subjecting persons to workplace environments that are hostile on the ground of sex'.<sup>[1]</sup> In order to recognise that sexual harassment can occur even if it is not directed at a specific person, the protection intends to capture and prohibit conduct that creates an 'offensive, intimidating and humiliating' environment for people of one sex.<sup>[2]</sup>

Whilst conduct that results in a hostile work environment arguably currently falls within the SD Act's operation, the new amendments are intended to clarify and confirm the law by setting clear limitations on acceptable conduct in the workplace.

### Positive Duty

This introduction of a positive duty to prevent sexual harassment and sexual discrimination is the Bill's centrepiece. The Bill intends to insert a new provision in the SD Act, which will confer a positive duty on all employees and persons conducting a business or undertaking (**PCBU**) to 'take reasonable and proportionate measures to eliminate, as far as possible, certain discriminatory conduct'<sup>[3]</sup>.

This places a focus on the prevention of sexual harassment in the workplace. The introduction of a *positive* duty is not

exactly a foreign concept – preventing discrimination and harassment by employees or agents is something that businesses should already be doing in order to defend against vicarious liability claims for sexual harassment by employees under section 106 of the SD Act.

The Explanatory Memorandum explains that it is also intended that the positive duty will operate concurrently with the existing model Work Health and Safety framework, which requires employers and PCBUs to ensure, so far as is reasonably practicable, the physical and psychological health and safety of workers.<sup>[4]</sup> The Bill will also insert provisions in the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) that enable the Australian Human Rights Commission (**AHRC**) to monitor and assess compliance with the positive duty.

#### Procedural Changes to Confer More Power on the AHRC

The Bill proposes a new provision in the AHRC Act to provide the AHRC with a broad power to inquire into systemic unlawful discrimination.

Currently, if the AHRC has not resolved and terminated a matter, representative bodies (such as an industrial union) are unable to make an application to the Federal Courts on behalf of a member or on behalf of a group. The Bill's proposed amendment to the AHRC Act will enable representative actions to proceed from conciliation at the AHRC to make an application to the Courts.

It is intended that by removing such existing procedural challenges, the AHRC will be better suited to engage with the complexities arising out of difficult and costly Court proceedings.

The Bill also proposes to insert a costs protection provision (in terms similar to *Fair Work Act* proceedings) into the AHRC Act to provide greater certainty in relation to the cost of pursuing legal action.

#### Other Recommendations Implemented in the Bill

- Amend the *Workplace Gender Equality Act 2012* (Cth) (**WGE Act**) to clarify that victimisation can be the basis for a civil action of unlawful discrimination in addition to a criminal complaint under the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Racial Discrimination Act 1975* (Cth) .
- Amend the WGE Act to require the Commonwealth public sector to report against six gender equality indicators to the Workplace Gender Equality Agency. It is intended that the enhanced data collection will allow a better understanding of gender inequality within Australian workplaces.
- Amend the objects clause of the SD Act to state that the object of the Act is to 'achieve substantive equality between men and women'.
- Amend the timeframe for when a complaint under anti-discrimination law may be terminated by the President of the Australian Human Rights Commission from 6 months to 24 months. This is designed to ameliorate procedural challenges and complications that arose as a result of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) only amending the time frame for just the SD Act.

#### **Conclusion**

The Bill seeks to provide clarification by introducing express prohibitions on sexual harassment and sexual discrimination within the workplace. The majority of amendments work alongside current provisions within anti-discrimination legislation, and are not entirely unfamiliar concepts for employers.

However, the Bill does not cover **all** of the Recommendations arising out of the Respect@Work Report. Some of the more potentially controversial Recommendations, such as those relating to non-disclosure agreements, have not been included in this round of proposed changes. It will be of interest to see the Federal Government's next steps in working towards passing the Bill and how they will continue to implement recommendations from the Respect@Work report.

While the Bill is not yet law, it is likely to be enacted without major changes as the Government has a mandate arising from an election promise.

#### **Key Takeaways**

Now, more than at any point in the past, employers will need to ensure they are compliant with the requirements of the various amendments. Good employers will be ready for this legislation before it commences operation, which means:

- New policies to cover sexual harassment, sex discrimination and related WHS risks in their workplace (including pro-active measures and appropriate complaint procedures)
- Meaningful and regular training for all staff, but properly tailored for leaders, line managers and staff generally

- WHS practices enhanced to include risk assessments to identify the likelihood of discrimination and harassment occurring, and measures to eliminate or control hazards/risks
- Pro-active reporting methods, and other workplace monitoring programs to ensure they are best placed to continue to provide safe and thriving working environments

As we bear down on Christmas for 2022, Piper Alderman is running an updated training session for business leaders and HR/ER practitioners to ensure they are ready for these new laws, which will include provision of an updated and compliant sexual harassment policy for your business. The training is currently scheduled to take place nationally online, on Thursday, 8 December 2022, 9am - 1:30pm. Please register your interest in this or any other training session.

[1] *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (Cth) sch 1.

[2] Ibid.

[3] Ibid sch 2.

[4] *Work Health and Safety Act 2011* (Cth) s 19.