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Authors: Emily Haar, Joe Murphy, Professor Andrew Stewart
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The Secure Jobs, Better Pay Bill is here: How will the Bill impact gender equality and safety at work?

On 27 October 2022, the Albanese Government's Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Bill) was tabled in Federal Parliament. In this part of our series of Insights, Piper Alderman's Employment Relations team unpacks the proposals relating to gender equality and safety at work.

One of the strongest themes in the policy platform that Labor took to the last of federal election was a desire to improve the treatment of women at work. The Bill proposes significant amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) in relation to pay equity, sexual harassment and gender-based discrimination, although the last two sets of reforms are by no means limited to the protection of female workers.

Gender pay equity

In a previous article, we discussed the Bill's prohibition on pay secrecy clauses. One of the policy reasons for that reform is the effect such provisions may have in both hiding and perpetuating inequities in pay arrangements for male and female workers, especially in managerial and professional jobs. But the Bill also proposes a number of other changes that are designed to help close the persistent gap between average male and female earnings.

Part 2-7 of the FW Act permits the Fair Work Commission (**FWC**) to make orders to ensure "*equal remuneration for men and women workers for work of equal or comparable value*" (**ER orders**). In 2012 this power was used to award significant pay increases to workers in the female-dominated social and community services (SACS) sector. But in 2015 the FWC reinterpreted Part 2-7 to mean that ER orders for a group of (mostly) female workers can only be made where it can be shown that they are earning less than a "*comparator*" group of mostly male employees.

An equal remuneration claim on behalf of childcare workers subsequently failed, by reason of an inability to identify an appropriate comparison. Wage increases were, however, awarded to early childhood teachers under section 157, on the grounds that their work was not properly valued under the relevant award.

The Bill now proposes to amend section 157 to confirm that any reconsideration of award rates on work value grounds must be "*free of assumptions based on gender*" and "*include consideration of whether historically the work has been undervalued because of assumptions based on gender*".

It also amends Part 2-7 to remove any strict requirement for a comparator group. Instead, adopting the approach taken under the Queensland industrial relations system, a lack of equal remuneration could be identified purely on the basis that the work of a group of employees had been historically undervalued on the basis of gender. If satisfied of a lack of equal remuneration, the FWC would also be obliged to grant an application for an ER order, where under the present Act it has a discretion to refuse relief.

These changes should revive the possibility of ER orders being sought to lift minimum and/or negotiated rates of pay in feminised sectors.

A further change is that ER order claims would be determined not by a Full Bench of the FWC, but a new Expert Panel.

This would need to include a majority of members with expertise in gender pay equity and/or anti-discrimination, potentially including outside experts appointed on a part-time basis. The Panel would also deal with any work value claims that required consideration of "*substantive gender pay equity matters*".

There is also to be a separate new Expert Panel for the Care and Community Sector, to deal with any application to make, vary or revoke a modern award in that sector. No definition of "*Care and Community*" is given, but the Explanatory Memorandum for the Bill suggests that the sector would include the aged care, early childhood education and care, and disability care sectors. Once again, the Panel would need to have a majority of members with knowledge and experience of the sector.

Finally, and more generally, the promotion of "*gender equity*" would be added to section 3(a) as an object of the Act. There would be changes to the modern awards objective in section 134(1) and the minimum wages objective in section 284(1), to place a greater emphasis on the need to eliminate the gender-based undervaluation of work. Awards should also seek to provide "*workplace conditions that facilitate women's full economic participation*".

Prohibition on sexual harassment at work

In 2021, the Morrison Government's *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* amended the anti-bullying provisions in Part 6-4B of the FW Act to empower the FWC to make stop orders in relation to sexual harassment at work. This fell short of implementing the recommendation in the Australian Human Rights Commission's *Respect@Work Report* that there should be a *prohibition* on such harassment.

What the Bill proposes is to repeal those amendments, so that Part 6-4B would once again cover only bullying. Instead, a new Part 3-5A would make sexual harassment unlawful, with a dispute resolution framework similar to the one that currently applies to dismissal-related general protections claims. This would see proceedings needing to be brought first in the FWC and then, potentially, the courts.

The new prohibition

As with the 2021 provisions, the operation of Part 3-5A would not be limited to the harassment of employees, but would extend to a broader category of protected persons, utilising definitions from the *Work Health and Safety Act 2011* (Cth).

It would be unlawful for one person to sexually harass another person who is:

- a worker carrying out work for a person conducting a business or undertaking (**PCBU**);
- a persons seeking to become such a worker; or
- a PCBU,

but only if the sexual harassment occurred "*in connection with*" being a worker, seeking to become a worker or being a PCBU.

Unlike the existing provisions in Part 6-4B, there would be no need to establish any link to a "*constitutionally-covered business*". The prohibition would apply throughout Australia, including to non-national system employers, because the Bill's provisions would be giving effect to certain international conventions. The new provisions would not, however, affect the operation of State and Territory anti-discrimination or work health and safety laws.

An employer or other organisation would be vicariously liable for the contraventions of its employees and agents, unless it could prove that it had taken all reasonable steps to prevent the contravention from occurring.

FWC proceedings

Where a person alleged they had been sexually harassed, they or a union acting on their behalf could initiate proceedings in the FWC. This would be subject to an application fee and a discretion on the part of the FWC to dismiss any application brought more than 24 months after the alleged contravention. Provision could be made in the FWC Rules for class action-like joinders of related claims or contraventions.

The FWC would be empowered to conciliate or mediate any sexual harassment dispute submitted to it. It would also still be able to make a "*stop sexual harassment order*", if it considered an applicant needed that protection.

If the FWC were satisfied that all reasonable attempts had been made to resolve a dispute, but without success, it would issue a certificate permitting the applicant(s) to have the matter either dealt with by a court or arbitrated by the FWC.

The FWC would be able to arbitrate a dispute if at least one complainant and one respondent agreed to take that step and jointly notified the FWC within 60 days of the certificate being issued. Any party who withheld consent would be excluded

from the arbitration.

Besides being able to express an opinion on whether sexual harassment had occurred or whether any further action would be appropriate, the tribunal could make orders that an aggrieved person receive compensation or lost remuneration, with no limitation on those amounts. It could also compel a person to undertake any other reasonable act or course of conduct to redress loss or damage suffered by an aggrieved person.

Court proceedings

Remedies for breach of the new prohibition on sexual harassment could be sought from the Federal Court or the Federal Circuit and Family Court. But with the except of an application for an urgent injunction, an aggrieved person could only take their sexual harassment dispute to court if the FWC had issued a certificate of the type mentioned above.

The time limit for court proceedings would generally be 60 days from the issue of the certificate. The court could permit an application to proceed out of time, taking into account the reasons for the delay, whether there would be any prejudice to the respondent(s), whether there were issues if inequity or fairness, and the merits of the matters.

If the FWC had issued a stop order, proceedings for breach of that order would not be subject to the need for any certificate, but could simply be instituted in the Federal Court, the Federal Circuit and Family Court or an eligible State court, under the usual rules for breach of a civil remedy provision.

The remedies available from a court could include any order necessary to remedy the contravention, including the payment of compensation. The court would also, unlike the FWC, be able to impose penalties of up to $66,600 per breach for corporations.

Orders for legal costs would be available only where the application could be shown to have been vexatiously or unreasonably commenced, or where one party's unreasonable act had caused the other to incur costs.

Extension of anti-discrimination provisions

The anti-discrimination provisions of the FW Act are to be expanded to include breastfeeding, gender identity and intersex status as additional protected grounds, for the purposes of:

- the protection of employees against discriminatory treatment or unlawful termination;
- the permissible content of modern awards and enterprise agreements; and
- the FWC's obligation to promote diversity and eliminate discrimination when performing functions or exercising powers under the Act.

In part 4 of our series, Piper Alderman will consider how the Bill will impact bargaining and agreement-making.

Piper Alderman will continue to monitor the Bill and its progress, and will be running a client webinar on 16 November 2022 to discuss the proposed changes and their possible impacts. Click here to register now.