HERBERT SMITH FREEHILLS

AUSTRALIA: THE CALL TO ACTION ON SEX-BASED HARASSMENT AND SEXUAL HARASSMENT

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Legal Briefings – By **Anthony Wood, Wendy Fauvel and Lucy Boyd**

BACKGROUND

A bill to amend the *Sex Discrimination Act 1984* (Cth) (**SDA**), the *Fair Work Act 2009* (Cth) (**FW Act**) and the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) was introduced into the Senate this week (the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021*) (**Bill**). The Bill has been referred to a Senate Education and Employment Legislation Committee for a report to be delivered on 6 August 2021.

The long-awaited Bill implements some (but not *all*) of the recommendations from the Sex Discrimination Commissioner, Kate Jenkins', *Respect@Work* report and is intended to strengthen the existing legal landscape for dealing with workplace sexual harassment and related conduct. Whilst the report lay idle for much of 2020, it was thrust back into the spotlight earlier this year amidst a number of high profile allegations of sexual assault in the political sphere.

This Bill proposes a number of changes to the SDA and the AHRC Act, including:

- **New ground of harassment:** Retaining the existing sexual harassment provisions in the SDA, but adding a new express prohibition against "harassment on the ground of sex" (both of which make up the "*harassment laws*" in the SDA);

- **Expansion of who is covered:** Expanding the application of the harassment laws to cover "workers" and "persons conducting a business or undertaking" (PCBUs) to align to concepts found in Work, Health and Safety (WHS) legislation, and broadening the workplace contexts in which harassment laws apply;

- **Clarifying the application of the SDA to the judiciary, MPs and public servants:** Clarifying the application of the SDA to cover judges, members of parliament and both State and Federal public servants;

- **Extending the timeframe for SDA complaints:** Allowing complainants more time to make complaints under the SDA by only allowing the President of the AHRC to terminate complaints on the grounds of time after 24 months (rather than 6 months); and

- **Victimisation:** clarifying that, in addition to victimisation being a criminal offence, civil actions for victimisation can be brought in the Federal Court and Federal Circuit Court.

As previously flagged in the Government's response to the Respect @ Work report, the Bill does not adopt the recommended positive duty on employers to take reasonable and proportionate measures to eliminate sexual harassment, sex discrimination and victimisation. Notwithstanding this, we expect further steps will be taken by the Respect @ Work Council to promote the issue of workplace sexual harassment at board level, following the Equality across the board: Investing in workplaces that work for everyone report being released last week. We are also seeing an increased regulatory focus on the issue through the existing WHS framework – meaning that the issue will continue to be a key one on the agenda for the foreseeable future.

Other changes to the FW Act in the Bill that are proposed to supplement the changes to the SDA are as follows:

- **Unfair dismissal:** Adding a new legislative note to clarify that sexual harassment can be a valid reason for dismissal in an unfair dismissal context;

- **Expanding the anti-bullying jurisdiction:** Clarifying that a 'stop sexual harassment order' is available, using the existing anti-bullying jurisdiction in the FW Act. Like bullying orders, these orders are intended to stop sexual harassment occurring, and will not be provide for financial compensation; and

- **Compassionate leave:** Varying the existing entitlement to compassionate leave to include circumstances where an employee, or their current spouse or de facto partner, has a miscarriage. These amendments builds on the previous amendments made in 2020 for families dealing with the trauma of still-births, infant deaths and premature births.

A NEW CATEGORY OF UNLAWFUL CONDUCT: PROHIBITION OF HARASSMENT ON THE GROUND OF SEX IN THE SDA

The existing concept of sexual harassment in the Bill remains, and a new category of unlawful conduct is proposed to be introduced into the same areas where sexual harassment is currently unlawful (i.e. in employment, in the provision of goods and services etc.).

"*Harassment on the ground of sex"* is where:

- a person engages in "***unwelcome conduct*** *of a* ***seriously demeaning*** *nature*" in relation to another person by reason of another person's sex (or a characteristic appertaining generally or generally imputed to that person's sex, e.g. gender stereotypes); and

- in circumstances where "*a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be* ***offended, humiliated or intimidated*****"**.

This is intended to capture conduct which falls into the gap between sexual harassment and sex discrimination. That is, conduct which is not *of a sexual nature* (and therefore not sexual harassment), and does not meet the legal test for direct or indirect sex discrimination. However, we consider that in practice, there is likely to be overlap between this provision and the existing sexual harassment and sex discrimination provisions.

The key to the definition is that the conduct because of a person's sex is "*unwelcome conduct*" and is of a "*seriously demeaning nature"*. We expect the term "*seriously demeaning"* will be one to watch as case law in this area develops. The guidance in the Explanatory Memorandum is that this term should have its ordinary meaning and that to 'demean' is to debase or degrade another person. The Bill is not intended to capture mild forms of inappropriate conduct based on a person's sex that is not of a sufficiently serious nature to meet the threshold of offensive, humiliating or intimidating as well as seriously demeaning.

The second element of the definition brings in the objective test of the 'reasonable person', which mirrors the test already found in the definition of sexual harassment in the SDA.

The Respect @ Work report refers to this type of conduct as "sexist harassment," citing sexist remarks as an example. It is not uncommon for claims in this area of law to take something of a "kitchen sink" approach by asserting any and all potential causes of action no matter how remote. Consequently, we suspect that the introduction of this new prohibition may not move the needle in harassment litigation – other than to raise public awareness about the conduct that is unacceptable in the workplace.

Notably, the Bill does not implement the Report's recommendation for a prohibition against the creation of a sexually hostile work environment, picking up language from UK and EU legislation. No explanation has been provided by the Government regarding this – however, it is presumed that the Government considered this conduct was already covered by the existing prohibitions.

What are the consequences for breaching sex-based harassment laws?

Complaints about harassment on the ground of sex would be dealt with in the same way as sex discrimination and sexual harassment complaints. That is, complaints will be subject to the AHRC's investigation and conciliation processes and, if not resolved at this stage, complainants may then bring a civil claim for damages in court. As for other breaches of the SDA, employers could be vicariously liable for the actions of their employees or agents and individuals could also be subject to personal liability if breaches are proven.

ALIGNMENT WITH WHS LAWS AND EXPANSION OF THE APPLICATION OF HARASSMENT LAWS IN THE SDA

The other key aspect to the Bill is to expand the operation of harassment laws (i.e. sexual harassment and harassment on the ground of sex) to all those who participate in the world of work (in a manner recommended by the Respect @ Work report which is broader than the current regime). The expansion is proposed by the SDA adopting the WHS terms 'worker' and 'PCBU' in the harassment laws.

For instance, in the employment context, the harassment laws are proposed to apply to the following:

- a PCBU harasses a worker or a prospective worker in that business or undertaking (e.g. host operation against labour hire workers at that workplace);
- a worker in the business of undertaking harasses a fellow worker or prospective worker in that business or undertaking (e.g. employees against labour hire workers, volunteers against employees etc.).

While there is overlap in these provisions with the existing framework in relation to the sexual harassment, the concept of 'worker' will pick up volunteers, interns and self-employed individuals, who previously were not captured by the SDA.

In addition, where there is no working relationship between the person and a PCBU or worker, these expanded provisions propose that the conduct may nevertheless be captured by the harassment laws as long as there is a "*connection*" with one of the persons being a worker or a PCBU. For instance, this could apply to:

- a PCBU or worker against another person (e.g. a customer, a supplier, or other member of the public) (or vice versa);

- an employee or an employer against another person (or vice versa).

> The "*connection*" that is needed does not necessarily mean that the worker, PCBU, employee or employer is performing their work duties at the time the conduct occurs. Rather, the connection requires some form of conduct or activity, or visiting of a particular place, as a result of the person being a worker, PCBU, employee or employer. For instance, this may apply to work-related discussions at a restaurant, out-of-hours conduct if the parties only have a professional relationship, to give some examples.[1]

This proposal means that harassment laws will operate to both protect employers and employees, and workers and PCBUs - and hold them liable - in a broader range of working interactions. Whilst there is likely to be some overlap with the existing provisions of the SDA in relation to sexual harassment in the provision of goods and services, these changes could expand the potential vicarious liability of employers in relation to a broader array of harassment behaviour.

JUDGES, MEMBERS OF PARLIAMENT AND PUBLIC SERVANTS NO LONGER EXEMPT FROM THE SDA

The Bill proposes to clarify that the SDA applies to judges, members of parliament and both State and Federal public servants. Unlike the other amendments, these changes were not recommended in the Respect @ Work Report,[2] and have come off they came off the back of public concern about allegations of sexual harassment in the judicial and political spheres.

SO, WHAT DOES THIS MEAN FOR YOUR BUSINESS?

Whilst the proposed changes to the SDA, the FW Act and AHRC Act are by no means a dramatic overhaul of the current legislation, if this Bill is passed, it will encourage employers to take swift action in relation to a targeted review of their workplace behaviour policies, procedures, and training. Taking action in this space will go some way to protecting employers from vicarious liability. Specifically, employers will need to ensure that their policies and training:

- address the new prohibition against harassment on the ground of sex;

- are updated to align to the broader range of individuals that can be subject to the harassment laws;

- detail mechanisms for complaints to be made against persons who are not employees or workers (e.g. customers, suppliers or members of the public);
- review existing complaints procedures to ensure harassment complaints are dealt with comprehensively and swiftly, particularly given the Fair Work Commission's new role in this space; and
- are updated to deal with the new grounds for compassionate leave in relation to miscarriages.

Looking at the bigger picture, we expect further regulatory focus from the State and Federal WHS regulators, and further developments to occur in setting the expectations on boards to lead in this space. For instance, Safe Work Australia's new guidelines in relation to sexual harassment, and the AHRC's Equality across the board: Investing in workplaces that work for everyone report provide recent examples of the continuing focus in this area. Given that harassment is expect to continue to be on the agenda for some time, now is the time for employers to take a holistic look at their organisation and make changes to their structures and systems to better manage this risk.

For more information on the actions which are already being taken by best practice employers to address this issue, please see contacts below.

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1. Explanatory Memorandum to the Bill at 183.
2. Other than to remove the s.105 exemption in relation to State public servants.

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If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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