HERBERT SMITH FREEHILLS

LANDMARK RESPECT AT WORK BILL PASSED IN AUSTRALIA

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Legal Briefings – By **Wendy Fauvel**, **Lucy Boyd** and **Josephine Mammone**

On 28 November 2022, the landmark *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (**Bill**) passed both houses of Parliament and is now awaiting royal assent.

The key amendments in the Bill as passed by both houses of Parliament are as follows:

- **Positive duty**: The introduction of a positive duty in the *Sex Discrimination Act 1984* (Cth) (SDA) on employers and PCBUs (**duty holders**) to take reasonable and proportionate measures to eliminate, as far as possible, unlawful sex discrimination, sexual harassment, sex-based harassment, work environments that are hostile on the ground of sex, and victimisation in relation to these matters;
- **New prohibition on subjecting others to hostile workplace environments on the grounds of sex**: The creation of a new prohibition against conduct that subjects another person to a hostile workplace environment on the ground of sex, and adding a new object of the SDA as eliminating, so far as is possible, discrimination involving workplace environments that are hostile on the grounds of sex; and
- **Class actions**: Amendments that allow for representative bodies (such as unions) to make representative applications in the Federal Courts (also known as 'class actions') on behalf of one or more individuals who have experienced unlawful discrimination.

Some of these amendments, such as the introduction of the positive duty, are a long-time coming. Since the Respect @ Work report was released in March 2020, we have seen best practice employers focussing on continuously improving their systems and processes and challenging the status quo, to minimise the risk that sexual harassment and other unlawful discrimination will arise in their workplaces. Increasingly, we are seeing employers not just address this as a 'compliance' or legal issue and are seeing these steps as critically important to providing a safe workplace with a positive and productive culture to employees and others who work in their workplaces. Such actions are also increasingly being seen as crucial to discharging an employer's ESG obligations.

On the other hand, the introduction of a specific mechanism for class actions for unlawful discrimination in the Federal courts does give rise to the risk that there may become increasing litigation in this space. However, it is difficult to see how such proceedings will be practical or effective in workplace discrimination matters which are typically highly individualised. The amendment may also have a negative impact on the trend amongst employers towards transparency in relation sexual harassment and unlawful discrimination, given the heightened litigation risk which that transparency may bring. This would be unfortunate given the considerable progress which has been made towards accountability and transparency in recent years.

Whilst many employers have long been preparing for these changes, the passing of the Bill marks a significant shift to the regulatory and legislative landscape for addressing sexual harassment. For those employers who have not yet examined their existing systems and governance mechanisms for these issues, the Bill serves as a call to action to start this process, sooner rather than later.

OTHER KEY AMENDMENTS

The other key amendments addressed in the Bill as passed by both houses of Parliament include the following:

- Conferring functions on the **Australian Human Rights Commission (AHRC) to monitor, assess and enforce compliance with the positive duty in the SDA**;
- Inserting new provisions to provide the AHRC with a **broad inquiry function to inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination** if requested to do so by the Minister, or of the AHRC's own volition;
- **Extending the timeframe for making complaints of age, disability and race discrimination to the AHRC** by only allowing the President of the AHRC Act to terminate the complaints on the grounds of time **after 24 months** (rather than 6 months), aligning with the timeframe for complaints made under the SDA;
- Amending the *Workplace Gender Equality Act 2012* (Cth) **to require Commonwealth Public Sector reporting to the Workplace Gender Equality Agency** (in line with the private sector);
- **Clarifying that victimising conduct can form the basis of a civil action for unlawful discrimination (in addition to a criminal complaint)** under the *Age Discrimination Act 2004* (Cth) (**AD Act**), *Disability Discrimination Act 1992* (Cth) (**DD Act**) and the *Racial Discrimination Act 1975* (Cth) (**RD Act**);
- **Lowering the threshold for an applicant to establish 'harassment on the ground of sex' in the SDA** by removing the requirement for the conduct to be

'seriously' demeaning, (requiring the conduct to 'demeaning' only); and

- Amending the **objects of the SDA to provide for 'substantive equality' between men and women** rather than 'equality of opportunity'.

POSITIVE DUTY TO ELIMINATE UNLAWFUL SEX DISCRIMINATION ETC.

The introduction of the Federal positive duty on duty holders reflects the primary recommendation of the Respect @ Work Report (Recommendation 17). This reform is aimed at shifting the responsibility away from victims of unlawful discrimination to raise complaints, by creating a positive obligation for duty holders to take proactive measures to eliminate such conduct in the first place.

Notably, the duty in the Bill expands the scope of the recommended duty (and the existing duty in Victorian legislation) to cover new prohibitions against sex-based harassment (introduced by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021*), the prohibition against subjecting someone to a workplace environment which is hostile on the ground of sex (proposed by the Bill), and victimisation in relation to those matters.

To facilitate enforcement of the positive duty, the Bill inserts new provisions in the AHRC Act to enable the AHRC to monitor, assess and enforce compliance with the positive duty in the SDA, including powers to conduct inquiries, issue compliance notices, apply to the Federal courts for compliance orders, and enter into enforceable undertakings. These functions commence 12 months after Royal Assent.

However, in assessing compliance, the Bill specifies a number of matters to be taken into account, namely:

- the size, nature and circumstances of the duty holder's business or undertaking;
- the duty holder's resources, whether financial or otherwise;
- the practicability and the cost of elimination steps; and
- any other relevant matter.

The positive duty will operate concurrently with the requirement under the work health and safety laws to provide, so far as is reasonably practicable, a safe working environment for workers.

Many employers have already taken significant action to address sexual harassment and discrimination, which will well prepare them for taking steps to discharge this positive duty. For those who haven't yet reviewed their framework, the time to do so is now given the positive steps that are required by the positive duty in the Bill.

PROHIBITION AGAINST WORKPLACE ENVIRONMENTS THAT ARE HOSTILE ON THE GROUND OF SEX

This new prohibition implements Recommendation 16(c) of the Respect @ Work Report, which was driven by a finding that sexual harassment is more likely to occur in workplace environments which are "sexually charged or hostile". The Revised Explanatory Memorandum to the Bill suggests that "*conduct such as displaying obscene or pornographic materials, general sexual banter, or innuendo and offensive jokes*" could contribute to sexually hostile workplace and result in unlawful discrimination, such as sexual harassment.[1]

The Bill provides that this provision is breached if:

- a person engages in conduct in their workplace, or another person's workplace; and
- the second person is present at the same time as or after the conduct occurs; and
- a reasonable person, having regard to all the circumstances, would have anticipated the possibility of the conduct resulting in the workplace environment being offensive, intimidating or humiliating to a person of the sex of the second person by reason of:
    - the sex of the person; or

- the characteristic that appertains generally, or is generally imputed, to persons of the sex of the person.

Whilst this amendment is significant in that it creates a new category of prohibited conduct, in reality, conduct which falls within this category could be already captured by existing SDA prohibitions against sexual harassment, sex-based harassment or sex discrimination (or all of these prohibitions) in many situations. The introduction of this provision is intended to cover any 'gap' that may be present in the SDA for this type of conduct. It is unlikely that the introduction of this provision would have a significant impact on claims and litigation under the SDA, but it will have a broader impact in providing clarity and awareness on what is unacceptable conduct in the workplace.

REPRESENTATIVE APPLICATIONS (OR 'CLASS ACTIONS')

This amendment implements Recommendation 23 of the Respect @ Work Report, and enables a representative body that has lodged a complaint on behalf of one or more persons who have experienced unlawful discrimination in the AHRC, to make a representative application to the Federal courts. The provisions will operate in addition to the existing class actions provisions under Part IVA of the *Federal Court of Australia Act 1976* (Cth) and are intended to be a more accessible mechanism for representative proceedings in the anti-discrimination context.

The Bill specifies proposed conditions for representative applications including that:

- there is an ability for a person to 'opt out' of the representative action;
- a class member cannot make a separate application in relation to the same claim unless they have opted out;
- a representative action cannot be settled without court approval; and
- a representative application may not be made without the written consent of each person on whose behalf the application is made.

The Revised Explanatory Memorandum provides an example of a representative action, describing a scenario where an employment advocacy centre brings a representative action on behalf of four women within an organisation who have been demoted on their return from parental leave.[2]

The Bill initially proposed to insert cost protection provisions in the *Australian Human Rights Commission Act 1986 (*Cth), adopting a 'costs neutrality' approach, where each party generally bears their own costs in unlawful discrimination proceedings. However, the cost protection provisions were ultimately removed from the Bill before it was re-introduced to the House of Representatives, meaning that costs will generally 'follow the event' and the unsuccessful party will be ordered to pay the costs of the successful party. Notably, the door is not completely closed on this reform - the provisions have been referred to the Attorney-General's department for review, and the Government will legislate the department's recommended cost model as soon as possible.

If you have any questions about what these changes mean for your business, please do not hesitate to get in touch.

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1. Revised Explanatory Memorandum, paragraph 6.

2. Revised Explanatory Memorandum, paragraph 326.

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KEY CONTACTS

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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