

RESPECT@WORK RESPONSE INTRODUCED

Date: 3 August 2021

By: Michaela Moloney, Amber Harrington, Greta Marks

NATIONAL INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES

It has been a long journey to bring the issue of sexual harassment in workplaces to the forefront of legislative change, commencing with the announcement of a National Inquiry into Sexual Harassment in Australian Workplaces in 2018. This culminated in the Respect of Work Report (the Report) being released by the Sex Discrimination Commission in March 2020.

The Report found that workplace sexual harassment in Australia is both prevalent and pervasive, and that the current legal and regulatory system is insufficient to effectively address sexual harassment in the workplace.

The Report, through 55 recommendations, proposed widespread changes to how sexual harassment is handled in the workplace including in relation to improving training, education and awareness in relation to respectful relationships, methods of reporting, and initiatives around support, advice and advocacy.

Some three years after the initial Inquiry was announced, we are finally seeing some of those recommendations brought to life through the new Respect@Work Bill. However many are concerned that the changes proposed may not be enough to effectively address the issue. Indeed, some are asking, "is the limited nature of the changes a missed opportunity to have significant impact, at least in terms of achieving a legal and regulatory system sufficient to effectively address this widespread workplace issue?"

LEGISLATIVE AMENDMENTS

On 24 June 2021, the Federal Government introduced into the Senate the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (the Bill). The Bill seeks to implement six of the 55 recommendations from the Report by making a number of amendments to the Fair Work Act (FW Act).

So what is currently proposed?

ANTI-SEXUAL-HARASSMENT ORDERS

An expansion of the Fair Work Commission's (FWC) anti-bullying jurisdiction is proposed, that will allow it to also make orders to stop sexual harassment in the workplace.

In practice this means that workers who are sexually harassed at work may apply to the FWC for an order to stop sexual harassment under section 789FF of the FW Act.

The FWC must be satisfied that the harassment has occurred to make an order, and orders will not be available in cases where there is no risk of harassment occurring again (e.g., when the person who harassed the worker is no longer employed at the workplace).

Orders can include any terms the FWC considers appropriate to prevent the worker from being bullied and/or sexually harassed at work, and it is immaterial whether the sexual harassment at work occurred before or after commencement of the amendments. As is currently the case for bullying orders, the FWC does not have ability to award compensation.

DEFINITION OF SEXUAL HARASSMENT

The Bill inserts definitions of 'sexually harass', and 'sexually harassed at work' into section 12 of the FW Act, adopting the definition provided by section 28A of the Sex Discrimination Act (SD Act).

This is unwelcome conduct of a sexual nature that occurs in circumstances where a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated by the conduct.

This amendment effectively broadens the scope of the FW Act to cover matters relating to sexual harassment that were more traditionally dealt with in anti-discrimination tribunals.

VALID REASON FOR DISMISSAL

The Bill amends section 387 of the FW Act to clarify that sexual harassment in connection with the person's employment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable.

The Fair Work Regulations will also be amended to broaden the definition of serious misconduct to include sexual harassment. This amendment will come into effect immediately after the Bill is passed.

AMENDMENTS TO THE SEX DISCRIMINATION ACT

The Bill also makes various amendments the SD Act, including in particular:

- The objects of the SD Act will be updated 'to achieve, so far as practicable, equality of opportunity between women and men';
- Inserting a new provision making it expressly clear that it is unlawful to sexually harass, or harass, on the grounds of sex which is intended to codify the position at common law and address confusion identified by the Report in relation to the existing provisions;
- Clarifying that it is unlawful for a person to commit an act of victimisation against another person;
- Expanding the scope and coverage of the SD Act by adopting the broader terms 'worker' and 'person conducting a business or undertaking' to protect all workers from sexual harassment and sex-based harassment, including paid and unpaid workers, and those who are self-employed; and
- Removing the current exemption of state public servants.

COMPASSIONATE LEAVE FOR MISCARRIAGES

In addition to the recommendations from the Report, the Bill amends the FW Act to provide a definition for "miscarriage", and enables an employee to take paid compassionate leave if they, or their spouse or de facto

partner, has a miscarriage before 20 weeks (noting that compassionate leave is already available where a child is stillborn at or after 20 weeks).

STAKEHOLDER RESPONSE IS VARIED

The Bill has been referred to the Senate Education and Employment Legislation Committee (the Committee) to provide a report by 6 August 2021. The Committee has received 42 submissions from a range of unions, employer groups, legal centres, organisations and commissions.

While generally welcomed as a step in the right direction, the Bill has attracted criticism that it does not go far enough to address a number of the Report's recommendations.

Prevalent themes in submissions include that the Bill should:

- Allow the FWC to award compensation or penalties, and provide a mechanism for workers who have already left a workplace due to sexual harassment to access the regime;
- Include a positive duty on employers under the SD Act to take reasonable measures to eliminate sex discrimination, sexual harassment and victimisation, in addition to existing WHS duties;
- Give the Sex Discrimination Commissioner enhanced powers to commence investigations into problematic workplaces;
- Amend the FW Act to expressly prohibit sexual harassment; and
- Include provisions that permit unions and other representative bodies to bring a complainant's case before the FWC and the courts.

If the Bill is passed, the FWC has requested that the introduction of the anti-sexual harassment jurisdiction commence at least two months after Royal Assent to enable the FWC time to optimise its capacity to deal with an expected influx of applications. Notably, the FWC sought a similar delay for the introduction of the anti-bullying regime and the expected influx did not eventuate.

WHAT'S NEXT?

Subject to the receipt of the Committee's report, the Senate is expected to reconvene to debate the Bill in early August 2021.

We will provide a further update once the Bill has passed through both houses, including any further amendments along the way.

KEY CONTACTS



MICHAELA MOLONEY
PARTNER

MELBOURNE
+61.3.9640.4430
MICHAELA.MOLONEY@KLGATES.COM



AMBER HARRINGTON
SENIOR ASSOCIATE

BRISBANE
+61.7.3233.1205
AMBER.HARRINGTON@KLGATES.COM



GRETA MARKS
SENIOR ASSOCIATE

MELBOURNE
+61.3.9205.2066
GRETA.MARKS@KLGATES.COM



PAUL HARDMAN
PARTNER

BRISBANE
+61.7.3233.1248
PAUL.HARDMAN@KLGATES.COM



STEPHEN HARDY
PARTNER

SYDNEY
+61.2.9513.2464
STEPHEN.HARDY@KLGATES.COM



NICK RUSKIN
PARTNER

MELBOURNE
+61.3.9640.4431
NICK.RUSKIN@KLGATES.COM

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