



PROHIBITING SEXUAL HARASSMENT IN THE FAIR WORK ACT

What is it, and what is new?

The Fair Work Act (FWA) does not currently prohibit sexual harassment in the workplace and the Fair Work Commission (FWC) has limited powers to deal with sexual harassment matters.

Under the new laws, sexual harassment of workers and prospective workers will be prohibited in the FWA. There is a new dispute resolution function for the FWC, modelled on those for general protections dismissal disputes. Workers will be able to make applications to the FWC and the federal courts in relation to sexual harassment disputes, and the FWC will be able to grant remedies in relation to sexual harassment.

The changes should mean that workers can seek assistance from the FWC early on, have claims dealt with quickly, resolve issues before they escalate further and prevent future conduct. The changes fully implement recommendation 28 of the Respect@Work Report.

What are the key rights and requirements?

- » Workers and prospective workers have protection from sexual harassment by any person, including third parties, in the workplace. 'Worker' is defined broadly to include an individual who performs work in any capacity (as per the Work Health and Safety Act 2011). Breach of this provision attracts a civil penalty.
- » Employers will be vicariously liable for sexual harassment perpetrated by their employees unless they have taken all reasonable steps to prevent it.
- » Both workers and unions can make applications to the FWC in relation to a sexual harassment dispute. Applications can be brought on behalf of multiple workers and applications can be joined together where appropriate. Workers will generally have 2 years to bring an application.
- » Applications can be made to the FWC for a Stop Sexual Harassment Order (SSHO), or to "otherwise deal with the dispute". A SSHO is intended to prevent any future harassment. The provision for the FWC to "otherwise deal with the dispute" is intended to remedy past harm caused by sexual harassment (e.g. through awarding compensation).

- » FWC can make SSHOs where they are satisfied that a person has been sexually harassed by one or more persons, and that there is a risk they will continue to be sexually harassed by that person or persons. Contravention of an SSHO attracts a civil penalty.
- » Applications for the FWC to “otherwise deal with the dispute” can only be arbitrated by consent. If the dispute remains unresolved or there is no consent to arbitrate, the FWC must issue a certificate and the dispute can be progressed in the Federal Courts.
- » Workers may only pursue compensation in one jurisdiction but they may pursue an order to prevent and orders for compensation in separate jurisdictions. For example, it is possible for workers to seek an SSHO under the FW Act and compensation under anti-discrimination laws
- » The new provisions are only available to current workers, not to former workers, therefore reinstatement is not included as a remedy. Former workers can make complaints under the SDA.

Strategic considerations for your union

Coordinate:

- » The changes will give workers significantly more options for avenues to address sexual harassment. What frame can we use to carefully scrutinise and consider the different avenues available to see which ones best suit their members.

Growth:

- » The changes provide workers with a simple, quick and affordable complaints mechanism to resolve disputes about workplace sexual harassment. How do we organise in workplaces around the issue of sexual harassment, especially given the ability to make applications on behalf of multiple workers?

Precedent:

- » The meaning of the stipulation that ‘there is a risk that the person will continue to be sexually harassed’ in order for the FWC to issue a stop sexual harassment order is a key test. Existing case law from the current bullying and sexual harassment jurisdiction should provide some guidance on how it will be interpreted.

**EQUIP
PLAN
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