BRIEFING NOTE

Prohibiting Sexual Harassment at Work – changes to the Fair Work Act

14 February 2023, ***BN10***

Introduction

Despite sexual harassment being unlawful under the *Sex Discrimination Act 1984* (Cth) (**SD Act**) for 30 years, it remains pervasive and prevalent across all industries. The ACTU's 2018 National Survey on Sexual Harassment[1] showed that employer responses to incidences of sexual harassment are frequently ineffective, inappropriate and inadequate, and that employees who experience sexual harassment are often treated less favourably or forced to leave their jobs. Only 27% of those who had experienced sexual harassment ever made a formal complaint, and just over 40% told no one at all. The two most common reasons given for not making a formal complaint were a fear of negative consequences (55%) and a lack of faith in the complaint process (50%). More than a quarter of those who did complain reported receiving less favourable treatment by their employer as a consequence, including being forced to leave or resign, being bullied, or having their hours or shifts reduced. Of the 27% of people who did complain, 56% were 'not at all satisfied' with the outcome, 43% said their complaint was ignored or not taken seriously, and 45% said there were no consequences for the perpetrator. This demonstrates the need for workers to have access to options for early and urgent intervention to stop sexual harassment, resolve disputes, and allow victim-survivors to stay in their jobs.

Currently, the *Fair Work Act 2009* (Cth) does not prohibit sexual harassment in the workplace (whereas the SD Act does). The Fair Work Commission (**FWC**) has very limited powers to deal with sexual harassment matters (under the same flawed provisions that apply to bullying at work), as it can only issue 'stop sexual harassment orders' to prevent future harassment occurring for certain types of employees, and has had no ability to remedy the harm caused by past sexual harassment. These powers were only introduced recently by the former Coalition government in 2021, in partial implementation of the Respect@Work recommendations (pursuant to the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) (**Respect@Work Act 2021**). Prior to the Respect@Work Act 2021, the FW Act had no specific sexual harassment provisions at all. Workers have not been properly protected from sexual harassment under our industrial relations laws.

The recently enacted *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**) addresses these issues by taking sexual harassment out of the stop bullying provisions (Current Part 6-4B) and inserting new provisions dealing with sexual harassment into new Part 3-5 of the FW Act. These provisions will prohibit sexual harassment of workers and prospective workers in

[1] ACTU, 'Sexual Harassment in Australian Workplaces: Survey Results' (Report 2018)

a business or undertaking, with a breach of the provisions attracting a civil penalty. They will also provide for the granting of remedies when sexual harassment occurs. These changes should hopefully 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.

Commencement Date

These changes become operative on 6 March 2023. If a worker experiences sexual harassment at work prior to 6 March 2023, the old provisions regarding sexual harassment in the FW Act will apply to them (despite having been repealed by the SJBP Act). These includes sexual harassment that has occurred at work on or after 6 March 2023 if it is part of a course of conduct that began before 6 March 2023.[2] The new prohibition on sexual harassment (contained in s527D) does not apply in relation to the sexual harassment of a worker if it is part of a course of conduct that began before 6 March 2023.[3]

Any orders that were in force pursuant to previous s789FF(1), concerning an order by the FWC to prevent a worker from being sexually harassed, prior to 6 March 2023 continues to be in force as if that section had not been repealed.[4]

Prohibition of Sexual Harassment

Pursuant to the new prohibition of sexual harassment in s527D (1), a person (**the first person**) must not sexually harass another person (**the second person**) who is a worker or seeking to become a worker in a business or undertaking, or a person conducting a business or undertaking, if the sexual harassment occurs in connection with the second person being a person in one of those categories. A breach of this provision will attract a civil penalty. [5] The prohibition also applies to sexual harassment perpetrated by third parties in the workplace (such as customers, patrons, clients, service users, patients, residents, visitors, suppliers, contractors, volunteers, students and parents) as it covers conduct by a 'person.'

Worker is defined broadly to be consistent with the *Work Health and Safety Act 2011* (Cth) (**WHS Act**) to include an individual who performs work in any capacity, including as an employee, contractor, subcontractor, outworker, apprentice, trainee, student gaining work experience, or volunteer.[6]

A person is a worker in a business or undertaking if they carry out work for a person conducting a business or undertaking.[7]

'Employee' and 'employer' have their ordinary meanings.[8]

Under the previous sexual harassment provisions, only certain workers who worked in a constitutionally covered business had access to stop sexual harassment orders.

[2] FW Act Sch 1 Part 13 Div 6 cl 60 (1)
[3] FW Act Sch 1 Part 13 Div 6 cl 60 (3)
[4] FW Act Sch 1 Part 13 Div 6 cl 60 (2)
[5] New s527D (1) FW Act
[6] New s527D (2) FW Act
[7] New s527D (3) FW Act
[8] New s527B FW Act. See also s15(1) for the ordinary meanings of "employee" and "employer".

Vicarious liability

S527E makes employers and principals vicariously liable for conduct done by their employees or agents in connection with their employment or duties as an agent. If an employee or agent of the principal engages in conduct in connection with their employment or duties that contravenes the prohibition in s527D (1), the employer or principal will be liable for their conduct, unless the employer or principal proves that it took all reasonable steps to prevent the employee or agent from engaging in such conduct.[9]

Employers are not liable for the conduct of third parties and other workplace participants (such as independent contractors, apprentices, trainees, students and volunteers) under the FW Act, meaning that any remedy involving compensation for third party sexual harassment would be very difficult to obtain, as the third party would need to be individually pursued. Options do however exist under the new positive duty on employers to eliminate sexual harassment which can apply to third parties in certain circumstances under the recently amended Sex Discrimination Act (See the *ACTU briefing on Respect@Work – the Positive Duty to prevent sexual harassment and other changes to the SDA*, for more information).

However, workers can of course seek stop orders in relation to the conduct of third parties.

Sexual Harassment Disputes

New Dispute Resolution Function for FWC

Part 3-5 creates a new dispute resolution function for the FWC, modelled on those for general protections dismissal disputes.

If a person alleges they have been sexually harassed by one or more other persons, they can apply to the FWC (or a union entitled to represent their industrial interests can apply on their behalf)[10] under s527F to do either or both of the following:

- Make an order (a stop sexual harassment order) under s527J;
- otherwise deal with the dispute.[11]

A person who is a defence member within the meaning of *Defence Force Discipline Act 1982* at the time the sexual harassment occurred cannot make an application to the FWC for a stop sexual harassment order.[12]

Procedural rules made pursuant to s609 may provide for the making of applications by two or more people acting jointly, or a single union entitled to represent the industrial interests of two or more people, if those applications are made in relation to the same alleged contravention or related alleged contraventions. The procedural rules may also allow for the joinder of disputes, the withdrawal of parties to the dispute, and the treatment of a dispute as if there were two or more different disputes (instead of a single dispute).[13]

The FWC can dismiss applications where they are made more than two years after the contravention or the last of the contraventions,[14] consistent with the timeframes provided for in the SD Act.

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[9] New s527E FW Act
[10] New s527F (2)
[11] New s527F (1)
[12] New s527F (3)
[13] New s527F (4)
[14] New s527G

In most cases, the FWC must first deal with a dispute by conciliation. If it remained unresolved, parties can proceed to consent arbitration or make an application to the Federal Courts.

Stop sexual harassment orders

If an aggrieved person makes an application under s527F which includes an application for a stop sexual harassment order, and the FWC is satisfied that:

- The aggrieved person has been sexually harassed by one or more persons; and
- There is a risk they will continue to be sexually harassed by the person or persons;

then the FWC can make any order it considers appropriate (other than an order requiring payment of money) to prevent the aggrieved person from being sexually harassed by that person or persons.[15]

The FWC must start to deal with any application for a stop sexual harassment order within 14 days of the application being made. For example, it may start to inform itself of the matter under s590, conduct a conference under s592 or hold a hearing under s593.[16]

In considering the terms of a stop sexual harassment order, the FWC must take into account the following matters, if the FWC is aware of them:

- Any final or interim outcomes arising out of an investigation into the matter that has been or is being undertaken by another person or body;
- Any procedure available to the aggrieved person;
- Any final or interim outcomes arising out of any procedure available to the aggrieved person to resolve grievances or disputes; and
- Any matters that the FWC considers relevant.[17]

The FWC can dismiss an application for a stop sexual harassment order if the FWC considers that the application might involve matters that relate to Australia's defence, national security, an existing or future covert operation of the Australian Federal Police, or an existing or future international operation of the Australian Federal Police.[18]

Contravention of a stop sexual harassment order is a civil remedy provision.[19]

A person can make an application for a stop sexual harassment order and commence proceedings under work health and safety laws. Ordinarily, s115 of the WHS Act and the corresponding provisions of other work health and safety laws would prohibit more than one application or proceeding, but this prohibition is removed for stop sexual harassment orders.[20]

Dealing with sexual harassment dispute in other ways

If an application made under s527F to deal with a dispute does not solely consist of an application for a stop sexual harassment order, then the FWC must deal with the dispute with means other than arbitration – i.e. by mediation or conciliation, making a recommendation or

[15] New s527J (1)
[16] New s527J (2)
[17] New s527J (3)
[18] New s527J (4); see also new s527M, new s527N, new s527P and new s527Q.
[19] New s527K
[20] New s527L

expressing an opinion.[21] Any conference conducted for the purpose of dealing with the dispute must be conducted in private.[22]

If the FWC is satisfied that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful, then the FWC must issue a certificate to that effect. If the FWC considers, taking into account all the materials before it, that the dispute does not have reasonable prospects of success in an arbitration or court application, the FWC must advise the parties of this.[23]

Arbitration

If a certificate has been issued, the parties can proceed to consent arbitration – i.e. arbitration by the FWC is only available where both parties agree to it. If there are multiple respondents, not all of them have to agree – it is enough that at least one of the respondents agrees. However, the FWC must remove any parties from the dispute who have not agreed to arbitration. The notification must be given to the FWC within 60 days of the certificate being issued (or within such period as the FWC allows on application).[24]

Subject to the above, the FWC can deal with the dispute by arbitration, and can do the following:

- Make one or more of the following orders:[25]
    - An order for the payment of compensation to an aggrieved person;
    - An order for the payment of lost remuneration to an aggrieved person;
    - An order requiring a person to perform any reasonable act, or carry out any reasonable course of conduct to redress loss or damage suffered by an aggrieved person;

- Express one or more of the following opinions:[26]
    - That a respondent has sexually harassed one or more aggrieved person in contravention of the prohibition;
    - That a respondent has contravened the prohibition because of the operation of the vicarious liability provisions in s527E (1);
    - That it would be inappropriate for any further action to be taken in the matter.

Contravention of an order of the FWC is a civil remedy provision.[27]

Sexual harassment court applications

A person can only make a court application in relation to a sexual harassment dispute if the FWC has issued a certificate and it is brought within 60 days of the certificate being issued; or if the application includes an application for an interim injunction.[28] A person must not make a sexual

[21] New s527R (1)
[22] New s527R (2)
[23] New s527R (3)
[24] New s527S
[25] New s 527S (3) (a)
[26] New s 527S (3) (b)
[27] New s 527S (4)

[28] New s527T

harassment court application if the FWC has been notified that the parties agree to the dispute being arbitrated, unless the application includes an application for an interim injunction.[29]

Workers can seek both stop sexual harassment orders to prevent future harassment, and remedies for past harm, such as compensation. They can pursue all aspects of a sexual harassment complaint through the FWC (with arbitration by consent only) or in the Federal Courts pursuant to the new FW Act provisions if they wish to. However, workers will also retain the ability to initiate action under relevant anti-discrimination laws in the Australian Human Rights Commission or in a state or territory tribunal or court. Pursuing a stop sexual harassment order in the FWC will not prevent workers from also seeking compensation in relation to the harm caused by sexual harassment. However, workers will only be able to pursue compensation in one jurisdiction – so they will need to choose between the FW Act and applicable state/territory/federal anti-discrimination law. It is possible for workers to seek stop sexual harassment orders under the FW Act and compensation under anti-discrimination legislation such as the Sex Discrimination (SD) Act.[30]

Considerations for any application

Workers now have significant flexibility and choices about which jurisdiction they bring a sexual harassment complaint in. Unions will need to carefully scrutinise and consider the different legislative regimes to see which avenue or avenues will best suit the circumstances of their particular members. One consideration is that civil penalties are now available under the FW Act in relation to sexual harassment, whereas they are only available under the SD Act in relation to victimisation.

The amendments to the FW Act provide workers with a simple, quick and affordable complaints mechanism to resolve disputes about workplace sexual harassment. This should assist in ensuring workers can seek assistance early on and resolve issues before they escalate further. This is a vast improvement on the present situation, where workers' only option for redress is to pursue a lengthy and costly claim in the courts. However if the worker is seeking both stop sexual harassment orders and compensation, and the parties do not agree to consent arbitration, these matters will still end up in the Federal Courts, and be subject to many of the same issues.

Unfortunately, the requirement for consent arbitration will inevitably limit the utility of these provisions and the ability of workers to seek remedies through the FWC, as in practice most employers and respondents will not consent to arbitration by the FWC, in the hope that the worker will give up rather than proceed to a Federal Court (a common occurrence in general protections claims, where consent arbitrations are exceedingly rare). This may limit the number of claims made due to the time, cost and resources involved in bringing federal court claims, and result in less decisions being made and a general lack of jurisprudence in this area.

In order for the FWC to make a stop sexual harassment order, it has to be satisfied that a person has been sexually harassed by one or more persons, and that there is a risk that they will continue to be harassed by that person or persons. This means that the FWC can't consider a general risk that the person will continue to be sexually harassed by others (eg by other employees or other third parties) and can't make orders dealing with that. Unfortunately, this limits the FWC's ability to make broadly applicable orders that address the culture of and risks present in the workplace and that could significantly reduce the risk of future harassment.

[29] New s734A

[30] New s734B

Unions will need to look to the new positive duty under the SD Act to drive employer action on that front.

Finally, Part 3-5A is only available to current workers, not to former workers (and hence reinstatement is not included as a remedy). Former workers can of course make complaints under applicable anti-discrimination law.

Making the most of new laws

The laws relating to sexual harassment have now changed significantly and give workers significantly more rights and protection under the FW Act. However, changing the words of the FW Act isn't the end of the story. The true application of the new legislative provisions will not be fully determined until they have been tested by the FWC and the courts. This means that it's really important that the union movement selects and runs cases which support our preferred interpretation of the legislation and defend against cases which do not. Making sure that we run the best "test cases" to make sure the laws are operating for working people will require careful co-ordination and information sharing across the union movement.

Some of the key questions of interpretation that will be tested in early cases include the meaning of 'there is a risk that the aggrieved person will continue to be sexually harassed' in order for the FWC to issue a stop sexual harassment order. Existing case law from the current bullying and sexual harassment jurisdiction will provide guidance on this question.

It is also worth noting that at the FWC is easier to access than the courts, this provides a new benefit to Union members that can be promoted and emphasised in campaigns. [i]

[i] *The information in this document does not constitute legal advice and should not be taken to include all requirements or obligations relevant to the entitlement(s).*