BRIEFING NOTE

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Respect@Work Act: Positive Duty to Prevent Sex Discrimination and Other Reforms to the Sex Discrimination Act

14 February 2023, ***BN9***

Introduction

On 12 December 2022, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect@Work) Act* 2022 (**Respect@Work Act**) received Royal Assent. The Act implements some of the key recommendations of the Respect@Work Report published by the Australian Human Rights Commission (**AHRC**) following *its National Inquiry into Sexual Harassment in Australian Workplaces*. The Respect@Work Act delivers on crucial reforms to the *Sex Discrimination Act 1984* (Cth) (**SD Act**) and related legislation that were advocated for by unions and others for many years. In particular, the introduction of a positive duty to prevent sex discrimination and sexual harassment, and the ability for the AHRC to enforce that positive duty should finally start to see the burden of tackling sexual harassment shifted from individuals to employers, duty holders and the AHRC.

The Respect@Work Act implements a further eight recommendations from the Respect@Work Report . Together with the SJBP Act, the final legislative recommendations made by the Respect@Work Report have now been implemented.

Summary of changes introduced by the Respect@Work Act

The Respect@Work Act amends the **SD Act** and other federal legislation to deliver on key recommendations of the Respect@Work Report.

The major changes included are:

- new provisions in the SD Act that prohibit conduct that subjects another person to a workplace environment that is hostile on the grounds of sex – implements recommendation 16(c) of the Respect@Work Report;
- the introduction of a positive duty in the SD Act on all employers and persons conducting a business or undertaking (PCBU's) to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and sex-based harassment, hostile environments and victimisation at work – implements recommendation 17 of the Respect@Work Report;
- new provisions in the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) which enable the AHRC to monitor and assess compliance with the positive duty – implements recommendation 18 of the Respect@Work Report;

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- new provisions in the AHRC Act to provide the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination – implements recommendation 19 of the Respect@Work Report;
- amendments to the AHRC Act that enable representative bodies such as unions to make representative applications on behalf of people who have experienced unlawful discrimination in the federal courts – implements recommendation 23 of the Respect@Work Report;
- amendments to the *Workplace Gender Equality Act 2012* (Cth) (**WGE Act**) to require the Commonwealth public sector to report to the Workplace Gender Equality Agency (**WGEA**) – implements recommendation 43(a) of the Respect@Work Report;
- amendment to the objects clause of the SD Act to state that an object of the SD Act is to 'achieve substantive equality between men and women' – implements 16(a) of the Respect@Work Report;
- amendment to s28AA of the SD Act (prohibition of harassment on the ground of sex) to remove reference to conduct of a 'seriously' demeaning nature – implements the intent of recommendation 16(b) of the Respect@Work Report;
- amendments to make changes that were made to the SD Act in 2021 applicable across all federal anti-discrimination legislation, including clarifying that victimisation can form the basis of a civil action for unlawful discrimination as well as a criminal complaint, and extending the time period for making complaints from 6 months to 2 years.

Commencement Date

With one exception, all of the provisions of the Respect@Work Act came into operation on 13 December 2022.

The provisions that give the AHRC new enforcement and investigative powers commence 12 months after Royal Assent, on 12 December 2023. This means that the positive duty applies from 13 December 2022, but the Commission cannot enforce the positive duty until 12 December 2023.

Schedule 1 – Hostile Workplace Environments

Schedule 1 of the Respect@Work Act inserts new provisions that expressly prohibit conduct that subjects a person to a hostile workplace environment on the ground of sex. The objects of the SD Act have been amended to include the object of "to eliminate, so far as is possible, discrimination involving subjecting persons to workplace environments that are hostile on the ground of sex."[1]

What is a Hostile Workplace Environment?

A workplace can be sexually charged or hostile, and can cause people to feel unwelcome or excluded, even if the specific conduct is not directed at a particular person. This kind of environment can increase the risk of other forms of unlawful discrimination such as sexual harassment.[2] Prior to the Respect@Work Act, there was no specific protection for workers from hostile workplace environments, and the new provisions address that.

[1] New s3 (ca) SD Act
[2] Revised Explanatory Memorandum [6]; Respect@Work Report pp458-459

New section 28M makes it unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex.[3] S28M provides that a person (the first person) subjects another person (the second person) to a workplace environment that is hostile on the ground of sex if:

- the first person engages in conduct in a workplace where the first person or the second person (or both) work; and
- the second person is in the workplace 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 their sex, or characteristics generally associated with or ascribed to their sex.[4]

The non-exhaustive list of circumstances to be taken into account when determining whether or not a workplace is a hostile workplace environment include the seriousness of the conduct; whether the conduct was continuous or repetitive; the role, influence or authority of the person engaging in the conduct; and any other relevant circumstances.[5]

Conduct includes making a verbal or written statement.[6] The conduct does not need to be directed at a specific person – rather all conduct that results in an offensive, intimidating or humiliating environment for people of a particular sex (e.g. women) is prohibited.

Workplace has the same meaning as in the *Work Health and Safety Act 2011* (Cth) (**WHS Act**).[7] Section 8 of the WHS Act defines workplace as:

"*a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work*."[8]

The use of the words 'person' and 'second person' means that this provision will broadly cover any conduct that occurs in the workplace, including conduct by third parties such as customers, clients and contractors. The second person does not have to work in the workplace for the protection to apply, but might be present in the workplace when the conduct occurs or after it occurs.

The reasonable person test is an objective test. Unlike s28A of the SD Act, which prohibits sexual harassment, it does not also contain a subjective component (s28A includes consideration of whether the conduct was unwelcome when determining whether a person has been sexually harassed, as well as the reasonable person objective test). A subjective component is therefore not necessary to establish that a workplace environment is hostile, although a person's subjective response may be something that is taken into account.

[3] New s28M (1) SD Act
[4] New s28M (2) SD Act
[5] New s28M (3) SD Act
[6] New s28M (4) SD Act
[7] S4 (1) SD Act
[8] S8 WHS Act. S8 provides that 'place' includes a vehicle, vessel, aircraft or other mobile structure, and any waters and any installation on land, on the bed of any waters or floating on any waters.

Workplace environment can be hostile for two or more reasons; sex does not have to be dominant reason

A workplace environment can be offensive, intimidating or humiliating to a person by reason of their sex (or characteristics that are generally associated with or ascribed to their sex) if it is offensive, intimidating or humiliating for two or more reasons that include the sex or the characteristic, whether or not the sex or the characteristic is the dominant or substantial reason.[9] If there are other reasons the workplace is hostile (and even where they are the dominant or substantial reasons), this won't defeat a claim being made, as long as one of the reasons has to do with the sex or characteristic of a person.

Examples of hostile working environments and implications of the change

Conduct that makes workplace environments hostile on the grounds of sex may include:

- general sexual banter, innuendo or offensive jokes
- the display of obscene, sexualised or pornographic materials
- petty nuisance calls
- sexual harassment and discrimination on the grounds of sex.[10]

Now that there is an express prohibition on hostile workplace environments, employers will be required to address any behaviours in the workplace which have the potential to result in a hostile workplace environment. Preventing hostile workplace environments will also be part of the new positive duty employers and PCBUs have to prevent sex discrimination and sexual harassment.

Considerations

Workers and unions can now bring complaints (individual or representative) to the AHRC about hostile workplace environments. Whilst a subjective component is not necessary to establish that a workplace environment is hostile, a person's subjective response may still have relevance. Unions may wish to include evidence in complaints that a person found the particular conduct to be offensive, intimidating or humiliating. Other relevant factors could include the profile and gender composition of the workforce, power imbalances, and factors making workers vulnerable such as age, gender, racial or cultural background.

Schedule 2 – Positive Duty

What is the positive duty?

Schedule 2 of the Respect@Work Act inserts a new Part IIA in the SD Act, which introduces a positive duty for employers and persons conducting a business or undertaking (**PCBU**) to prevent certain discriminatory conduct. New s47C provides that an employer or a PCBU (**duty holder**) must take reasonable and proportionate measures to eliminate, as far as possible, sex discrimination, sexual harassment, sex-based harassment, hostile workplace environments, and victimisation at work. The positive duty to eliminate all of these types of discriminatory conduct

[9] New s8A SD Act
[10] Revised Explanatory Memorandum [6]; Respect@Work Report pp458-459

applies to conduct engaged in by the duty holder, their employees, workers and agents, as well as third parties in some circumstances (see below).[11]

This means the duty applies not only to employers in respect of their employees, but to all PCBUs in respect of workers in the business or undertaking. This includes companies, unincorporated bodies or associations, not for profits, sole traders, partnerships and self employed persons. It also applies to a broad category of workers, including employees, contractors, subcontractors, labour hire workers, outworkers, apprentices, trainees and volunteers.

The duties that employers/PCBU's have under the WHS Act or any State or Territory work health and safety laws are not limited or affected by the new positive duty in the SD Act.[12]

Third party conduct

The positive duty to eliminate sexual harassment, sex-based harassment, hostile workplace environments, and victimisation at work also extends to conduct engaged in by any person[13], and therefore includes anyone present in the workplace who does not have an employment or worker type relationship with the employer or PCBU. This includes third parties such as customers and patrons (in industries including hospitality, retail, transport and public services), patients, clients, residents, service users and visitors (in industries including healthcare, disability and aged care, and community and public services), students and parents (in the education industry), and contractors, suppliers, volunteers and visitors (in many industries).

This is a significant inclusion in the positive duty, and means employers and PCBUs will need to take proactive action in relation to third party sexual harassment.

Determining whether duty holder has complied with positive duty

In determining whether a duty holder has complied with the positive duty, the following matters are to be taken into account:

- 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 cost of measures to eliminate the conduct; and
- any other relevant matter. [14]

This means that the content of the positive duty, and the meaning of 'reasonable and proportionate measures' are adaptable, and will vary depending on the kinds of considerations listed above.

- These relevant factors will provide important guidance for users of the legislation. Unfortunately, the factors are limited to considerations of the duty holder's circumstances, and do not include any specific considerations from an employee or worker perspective, any factors relevant to people who may experience discrimination and harassment (such as the benefits of implementing the measures and the consequences of failing to implement the measures), or any consideration of specific risks or drivers of sexual harassment in the particular industry or workplace. Of course,

[11] New s47C (1)-(3)
[12] New s47C (7)
[13] New s47C (4)
[14] New s47C (6)

there is a catch all in 'any other relevant matter.' Unions could seek to draw attention to these matters, as well as to the extent to which a duty holder has complied with any relevant guidelines published by the AHRC.

The profile (including any vulnerable groups)[15] and culture of the workforce and any systemic issues or risks present are relevant factors. For example, if there is a high proportion of workers from culturally and linguistically diverse backgrounds, a reasonable and proportionate measure might be that policies are translated into relevant languages and training is delivered in those languages. Other examples of relevant considerations and risks that may require specific measures to address include a male dominated workforce, third party harassment, insecure work, power imbalances, and work design and systems of work (such as risks inherent in physical spaces, rostering practices, requirements to work in isolation, etc).

Vicarious liability

Taking all reasonable and appropriate measures to prevent unlawful conduct is likely to be relevant to finding whether employers are vicariously liable for unlawful acts done by their employees or agents under s106 of the SD Act. However, the vicarious liability test is differently worded, in that it provides that an employer will not be liable for unlawful conduct of their employees/agents if they took all reasonable steps to prevent them from doing those things. Therefore, it won't necessarily follow that if an employer is found to comply with the positive duty, that they will also be found to be not liable for the conduct, and vice versa.

An employer cannot be held vicariously liable for the conduct of its employees, agents or third parties in the workplace relating to the positive duty.

Functions of the AHRC in relation to the positive duty

The Respect@Work Act amends the AHRC Act to give the AHRC the following new functions in relation to the positive duty:

- To prepare and publish guidelines for complying with the positive duty
- To promote an understanding and acceptance, as well as public discussion about the positive duty
- To undertake research and educational programs in relation to the positive duty
- To do anything incidental or conducive to the performance of the above functions.[16]

In performing the above functions, the AHRC must have regard to the cultural diversity of Australian workplaces, and the need for guidelines and other materials to be available in multiple languages.[17]

Compliance with the positive duty

The Respect@Work Act will amend the AHRC Act to enable the AHRC to inquire into, and ensure compliance with, the positive duty,[18] through issuing compliance notices and entering into enforceable undertakings. This is the main enforcement mechanism under the new framework,

[15] In addition to gender, certain workers are more likely to be harassed than others, including young workers, LGBTQI workers, Aboriginal and Torres Trait Islander workers, workers with disability, workers from culturally and linguistically diverse backgrounds, migrant workers and workers on temporary visas, and people in precarious or insecure work: Respect@Work Report, page 19.
[16] New s35A AHRC Act
[17] New s35AA AHRC Act
[18] New s35A (d) – (e) AHRC Act, see Schedule 2, Part 2, item 22 of Respect@Work Act

and represents a significant expansion of the powers of the AHRC, which has not previously had enforcement powers. These new enforcement powers come into effect from 12 December 2023, to give employers and PCBUs 12 months to understand their obligations and begin to comply with the positive duty.[19]

The AHRC will be able to initiate action to address unlawful discrimination, rather than relying on individuals making complaints, where it 'reasonably suspects' non-compliance. This can be based on information or advice provided by other agencies or regulators, impacted individuals or media reporting. Under its new compliance powers, the AHRC can:

- inquire into employer/PCBU compliance with the positive duty if the AHRC reasonably suspects non-compliance;[20]
- provide recommendations to the employer/PCBU to prevent a repetition or continuation of a failure to comply with the positive duty;[21]
- give a compliance notice specifying actions that an employer/PCBU must take, or refrain from taking, to address their non-compliance, including a reasonable period within which specified action must be taken or refrained from being taken;
- apply to the Federal Court or the Federal Circuit and Family Court of Australia for enforcement of a compliance notice; and
- enter into enforceable undertakings with employers/PCBUs regarding actions and compliance.

Inquiry into non-compliance and recommendations

Consistent with existing provisions in the AHRC Act, the AHRC will not be able to inquire into an intelligence agency's compliance with the positive duty.[22] If the President reasonably suspects that an intelligence agency is not complying with the positive duty, the President must refer the matter to the Inspector-General of Intelligence and Security.[23]

When the AHRC is inquiring into a person's compliance with the positive duty, it must give the person a written notice stating the grounds on which it has commenced the inquiry, and must give the person a reasonable opportunity to make oral and/or written submissions to the AHRC in relation to their compliance.[24] In conducting an inquiry, the AHRC has powers to obtain information and documents and compel attendance to examine witnesses (failure to comply is an offence).[25]

If the AHRC finds a person is not complying with the positive duty as a result of an inquiry, the AHRC must notify the person in writing of its finding and reasons for the finding, and may notify the person of any recommendations to prevent a repetition or continuation of the failure to comply.[26]

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[19] Revised Explanatory Memorandum [23]
[20] New s35B AHRC Act, see Schedule 2, Part 2, item 23 of Respect@Work Act
[21] New s35E AHRC Act, see Schedule 2, Part 2, item 23 of Respect@Work Act
[22] New s11 (3A) AHRC Act, see Schedule 2, Part 2, item 20 of Respect@Work Act
[23] New s11 (3B) AHRC Act, see Schedule 2, Part 2, item 20 of Respect@Work Act. The Respect@Work Act also amends the Inspector-General of Intelligence and Security Act 1986 (Cth) to allow the Inspector-General to inquire into any matter that may relate to compliance with the positive duty by an intelligence agency – see Schedule 2, Part 2, item 25 of Respect@Work Act.
[24] New s35C AHRC Act, see Schedule 2, Part 2, item 23 of Respect@Work Act
[25] New s35D AHRC Act, see Schedule 2, Part 2, item 23 of Respect@Work Act
[26] New s35E AHRC Act, see Schedule 2, Part 2, item 23 of Respect@Work Act

Compliance notices

The AHRC can also give the person a written compliance notice, which must set out brief details of the failure to comply and the actions that the person must take (or refrain from taking) to address the failure. The notice must also specify a reasonable period of time of at least 21 days within which the person must take the action. If the President considers it appropriate, the notice can also specify a reasonable period in which the person must provide evidence that they have taken the action. A compliance notice cannot be issued if the President has accepted an undertaking from a person in relation to the positive duty (unless the undertaking is withdrawn, cancelled or expired).[27]

Employers/PCBUs can request that a compliance notice is reconsidered by the President. A request needs to be in writing, set out the reasons, and be made within 21 days. The President can also reconsider a compliance notice on their own initiative if satisfied there is a sufficient reason to do so. After reconsidering, the President must either affirm, vary or revoke the compliance notice, and give written notice to the person of their decision and the reasons for it.[28]

Employers/PCBUs can also seek review of a compliance notice in the Federal Courts, on the grounds that they have not failed to comply as set out in the notice, or that the notice does not comply with the requirements in s35F (2) or (3). The application for review must be made within 21 days of receiving the compliance notice, or 21 days of it having been reconsidered by the President. The court may stay the operation of the notice if it considers appropriate, and after reviewing the notice, may confirm, vary or cancel it.[29]

The AHRC can seek to enforce a compliance notice by applying to the Federal Courts for an order where the President considers that the person has not complied with the notice (and it is not otherwise being reconsidered by the AHRC or reviewed by the courts). If the court is satisfied that the person has not complied with the notice, the court can make an order directing the person to comply with the notice, and any other order the court considers appropriate.[30]

Enforceable undertakings

The AHRC may enter into enforceable undertakings with employers/PCBUs. The Respect@Work Act makes the positive duty in s47C of the SD Act enforceable under Part 6 of the *Regulatory Powers Act 2014* (Cth) (**RP Act**). Part 6 of the RP Act creates a framework for accepting and enforcing undertakings relating to compliance with various provisions. The President may publish enforceable undertakings on the AHRC's website.[31]

Workers cannot make individual complaints about breach of the positive duty

Unfortunately, there is no ability for workers or unions to make complaints or bring claims regarding non-compliance with the positive duty. All of the enforcement options lie with the AHRC. Individuals, or trade unions on their behalf, can only make complaints (pursuant to s46P of the AHRC Act) if they are aggrieved by acts, omissions or practices alleged to be unlawful discrimination. Individual complaints can only be brought once conduct that is alleged to be unlawful discrimination has occurred – not prior to any unlawful discrimination actually occurring. Unlawful discrimination is defined in s3(1) of the AHRC Act and includes any acts, omissions or practices that are unlawful under Part II of the SD Act. The definition of unlawful

[27] New s35F AHRC Act, see Schedule 2, Part 2, item 23 of Respect@Work Act
[28] New s35G AHRC Act, see Schedule 2, Part 2, item 23 of Respect@Work Act
[29] New s35H AHRC Act, see Schedule 2, Part 2, item 23 of Respect@Work Act
[30] New s36J AHRC Act, see Schedule 2, Part 2, item 23 of Respect@Work Act
[31] New s35K AHRC Act, see Schedule 2, Part 2, item 23 of Respect@Work Act

discrimination does not extend to acts, omissions or practice that are unlawful under the new Part IIA of the Act that contains the positive duty.[32]

The only circumstance in which workers and unions can bring a complaint in relation to the positive duty is if it is alleged that a worker has been victimised because they made an allegation that a person has contravened (or proposes to contravene) a provision of Part IIA of the SD Act – i.e., alleged that they have not complied with the positive duty, or that they propose not to.[33] Victimisation is an offence under the SD Act, and so in addition to workers and unions being able to bring civil proceedings for a breach of s47A, employers can also be prosecuted for an offence under s94.[34]

So how can workers and unions use the positive duty?

The only circumstance in which workers and unions can bring a complaint in relation to the positive duty is if it is alleged that a worker has been victimised because they made an allegation that a person has contravened (or proposes to contravene) a provision of Part IIA of the SD Act – i.e., alleged that they have not complied with the positive duty, or that they propose not to.[35]

Other than the above situation, workers and unions cannot bring complaints. However, there are significant opportunities to use the positive duty to get employers and PCBU's to address systemic risks and issues and drive concrete action, to win stronger protections in industrial instruments through bargaining, and to work with employers on developing best practice industry guidance. There are also organising opportunities in educating and empowering members and delegates to be active on this issue in the workplace and holding employers to account. As employers and PCBUs are taking steps now to understand and comply with the positive duty, in preparation for the compliance powers of the AHRC to take effect on 12 December 2023, unions and workers have an opportunity to engage or campaign to shape what actions employers and PCBU's take.

Workers and unions can also inform the AHRC if they feel an employer or PCBU is not complying with the positive duty. The AHRC is able to initiate an inquiry into a person's compliance with the positive duty if it 'reasonably suspects' that a person is not complying.[36] The AHRC may form this view based on information or advice provided by other agencies or regulators, information disclosed by impacted individuals, media reporting etc.[37] Unions often have knowledge of systemic issues in an industry or workforce that individual workers do not have, and are well placed to provide that information to the AHRC. Unions should utilise this ability to provide information to the AHRC to encourage them to investigate and enquire into noncompliance with the positive duty by particular employers or industries.

Workers are protected from victimisation if they give (or propose to give) any information or documents to a person who is exercising or performing any power or function under the SD Act or the AHRC Act.[38]

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[32] In addition, s110 of the SD Act provides: "Except as expressly provided by this Act, nothing in this Act confers on a person any right of action in respect of the doing of an act that is unlawful by reason of a provision of Part II or IIA."
[33] S 47A (2) (h); s94 (2) (h) SD Act
[34] S94 SD Act
[35] S 47A (2) (h); s94 (2) (h) SD Act
[36] New s35B AHRC Act, see Schedule 2, Part 2, item 23 of Respect@Work Act
[37] Revised Explanatory Memorandum [21]
[38] S94 (2) (c)

Implications of the change – what will the employers and PCBUs be required to do?

The positive duty was one of the key recommendations of the Respect@Work Report, aimed at shifting the legal paradigm from a complaints based model to a proactive approach where employers are required to prevent sexual harassment and sex discrimination in the workplace, rather than just respond to it once it has already occurred. This will mean that employers and PCBUs will be required to proactively take steps to prevent conduct occurring in the first place.

Some examples of what reasonable and proportionate measures may look like (noting what is required to comply with the positive duty will vary depending on the duty holder's circumstances) include:

- Identifying and assessing the workplace and industry specific drivers of sexual harassment, including risks inherent in physical spaces and systems of work;
- Putting prevention plans in place, implementing control measures to address identified risks, and regularly reviewing how well they are working;
- Consulting with workers on their experiences and concerns, risks and control measures, as well as the organisation's identification, prevention and response efforts;
- Implementing appropriate policies and procedures in consultation with workers that deal with matters such as how complaints are handled, how investigations are conducted, how risks are identified and assessed, and how control measures will be monitored, implemented and reviewed;
- Delivering training and education on a regular basis to all workers on respectful workplace conduct, sexual harassment, and their role in prevention and response;
- Training relevant staff to respond to reports and queries appropriately;
- Providing information and a range of reporting options for workers that are trauma informed;
- Providing appropriate support to workers that is accessible, trauma informed and tailored to the needs of the individual;
- Ensuring investigation processes are transparent, timely and independent;
- Not requiring workers reporting sexual harassment to commit to blanket confidentiality or non disclosure obligations;
- Ensuring workers who report sexual harassment do not suffer victimisation or adverse action;
- Regular reporting to management and boards on workplace culture and sexual harassment;
- Collecting and analysing data that informs the organisation's immediate responses as well as long term prevention efforts;
- Participating in industry wide initiatives.

The AHRC and the Respect@Work Council has developed the Good Practice Indicators Framework for Preventing and Responding to Workplace Sexual Harassment, which is available on the Respect@Work website. It contains intended outcomes and indicators of good practice for employers when seeking to prevent and respond to sexual harassment. The Framework takes a holistic approach that is adaptable for employers of different sizes and in different

industries, and contains both 'simple' and 'mature' measurements, allowing employers of different sizes to assess their performance against each indicator.

The guidance is designed to assist employers to prevent and respond to workplace sexual harassment. It is not designed to be a comprehensive statement on what employers need to do to comply with the positive duty, and employers will not be expected to do everything in the Framework in order to comply. Whether a particular employer or PCBU has complied with the positive duty or not will be a matter for the AHRC and the courts to determine. However, the Framework will be helpful to workers and unions in driving employer action. There is also a significant opportunity for unions to supplement this Framework with industry specific guidance that develops best practice for prevention and response in particular industries.

Schedule 3 – Inquiries into systemic unlawful discrimination

Schedule 3 of the Respect@Work Act amends the AHRC Act to give the AHRC new functions to inquire into any matter that may relate to systemic unlawful discrimination or suspected systemic unlawful discrimination.[39] These functions commenced from 13 December 2022. Again, the AHRC cannot inquire into actual or suspected systemic unlawful discrimination of an intelligence agency.[40]

Systemic unlawful discrimination is defined to mean unlawful discrimination that: affects a class or group of persons; and is continuous, repetitive or forms a pattern.[41]

In conducting an inquiry, the AHRC has powers to obtain information and documents and compel attendance to examine witnesses (failure to comply is an offence).[42]

The AHRC can perform these functions when requested to do so by the Minister, or it appears desirable to the AHRC to do so.[43]

The AHRC must not make an adverse finding about a person unless it has given a reasonable opportunity to the person to make oral and/or written submissions in relation to the matter.[44] The AHRC may report to the Minister in relation to the inquiry, publish a report in relation to the inquiry, or both. The AHRC may include in its report any recommendations it has for addressing the matter.[45]

Although the AHRC had existing powers to inquire into systemic issues in relation to human rights and unlawful discrimination these inquiry powers were confined in scope and the AHRC could not conduct inquiries on its own motion. These new provisions will allow the ARHC to commence an inquiry when requested to by the Minister or on its own motion, such as where an organisation has requested it do so or it has become aware of issues relating to an organisation or sector. The Commission will be able to inquire into instances of unlawful discrimination within individual businesses as well as instances of unlawful discrimination across multiple businesses within a broader industry or sector. It will also be able to inquire into businesses where it is suspected that unlawful discrimination may be occurring.[46]

[39] New s35L (1) AHRC Act
[40] S11 (3C) AHRC Act
[41] New s35L (2)
[42] New s35N AHRC Act
[43] New s35M AHRC Act
[44] New s35P AHRC Act
[45] New s35Q AHRC Act
[46] Revised Explanatory Memorandum [27] –[28]

Schedule 4 – Representative applications

Schedule 4 of the Respect@Work Act amends the AHRC Act to allow representative bodies, such as trade unions, to progress a complaint on behalf of one or more affected persons from conciliation at the AHRC to an application to the Federal Courts. This is a separate mechanism to existing representative proceedings ('class actions') that can be brought pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth). This addresses a previous gap in the law, whereby representative complaints could be brought to the AHRC, but if they were terminated, there was no ability to progress those representative complaints in the courts.

New section 46PO(2A) now provides that an application to a court may be made by an affected person/people in relation to the terminated complaint on their own behalf, or on behalf of that person/people and one or more other affected persons in relation to the terminated complaint. An application can also be brought by a person or trade union who lodged the terminated complaint on behalf of one or more affected persons.[47]

In order for a representative application to be made, there must be written consent from each person on whose behalf the application is made. An application must describe or otherwise identify the persons on whose behalf the application is made, include a statement by the person making the application certifying that each person has consented in writing to the making of the application on their behalf, and specify the nature of the relief sought.[48]

A person who is part of a representative application cannot bring a separate application about the same subject matter unless they opt out of the representative application. A court must fix a date before which a person can opt out, and can extend that date on application. The hearing of the proceeding must not commence earlier than the date a person may opt out of the proceeding, except with leave of the court. A representative application may not be settled or discontinued without the approval of the court. If the court gives approval, it may make orders as are just with respect to the distribution of any money paid under a settlement or paid into the court.[49]

These amendments do not apply to any complaints that were terminated prior to 13 December 2022.[50]

The ability to bring representative applications on behalf of workers to the Federal Courts without having to use the class action provisions is a significant change and one which unions are well placed to take full advantage of.

Schedule 6 – WGEA reporting

Schedule 6 of the Respect@Work Act amends the WGE Act to require the Commonwealth public sector to report to WGEA annually on six gender equality indicators, bringing it into line with the reporting requirements for the private sector. The definition of relevant employer has been expanded to cover Commonwealth companies and entities that employ 100 or more employees in Australia.[51] Law enforcement or security agencies do not need to include any information in a public report that is operationally sensitive or which could prejudice the security, defence or international relations of Australia if published.[52]

[47] New s46PO (2A) AHRC Act
[48] New s46POA AHRC Act
[49] New s46POB AHRC Act
[50] Schedule 4, item 9 of Respect@Work Act
[51] New s4 WGE Act
[52] New s13 (3A) and (3B) WGE Act

Commonwealth companies and entities must now prepare a public report in respect of the period of 12 months commencing on 1 January 2022, and after that, in respect of each consecutive period of 12 months.[53] Reports from Commonwealth companies and entities will be due within 2 months after the day determined by WGEA.[54]

Schedule 7 - Victimisation

Schedule 7 of the Respect@Work Act amends several federal anti-discrimination Acts to clarify that victimising conduct can form the basis of a civil action for unlawful discrimination in addition to a criminal complaint. Last year, the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) (**Respect@Work Act 2021**) amended the SD Act and the AHRC Act to clarify that victimisation could form the basis of both a civil action for unlawful discrimination, as well as a criminal offence under the SD Act. The other federal anti-discrimination Acts - the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, and the *Racial Discrimination Act 1975* – have now also been amended to clarify this. The amendments make it clear that the Federal Courts have jurisdiction to hear an application of unlawful discrimination under the AHRC Act, where the alleged unlawful discrimination is an act of victimisation brought as a civil action.[55]

Schedule 8 – Other amendments

Amendment to timeframes for making a complaint under anti-discrimination legislation

Schedule 8 of the Respect@Work Act amends the AHRC Act to provide that complaints made under the *Age Discrimination Act 2004*, the *Disability Discrimination Act 1992*, and the *Racial Discrimination Act 1975* may only be terminated by the AHRC if more than 24 months have passed since the alleged unlawful conduct took place.[56] Previously, the AHRC had discretion to terminate complaints under these acts more than six months after the alleged unlawful conduct took place. These changes are consistent with amendments made by the Respect@Work Act 2021 that allowed 24 months to pass before termination of a complaint under the SD Act, and these changes mean that complainants will generally have two years to bring complaints to the AHRC instead of six months under all federal anti-discrimination laws.[57]

Objects of the SD Act

Schedule 8 of the Respect@Work Act amends the SD Act so that its objects now include the achievement of 'substantive equality between men and women' so far as is practicable, replacing the old object of 'equality of opportunity.'[58]

This is a significant improvement, as substantive equality is concerned with both equal outcomes and opportunities. The concept of 'substantive equality' has no settled legal meaning, but includes at least a redistributive dimension (aims to redress disadvantage and historical disadvantage) and a transformative dimension (such as permitting the creation of rules for extraordinary treatment of those with a protected attribute).

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[53] New s13A (2A) WGE Act
[54] S13B WGE Act
[55] See Revised Explanatory Memorandum [39] – [41]
[56] S46PH (1) (b) AHRC Act
[57] See Revised Explanatory Memorandum [42]-[43]
[58] S3(e) SF Act

Lowered threshold for finding of harassment on grounds of sex

Schedule 8 of the Respect@Work Act amends the SD Act to change the definition of harassment on the ground of sex (sex based harassment) in s28AA. The prohibition in s28AA captures unwelcome conduct that is engaged in by reason of someone's sex (or characteristics associated with or ascribed to that sex) but is not necessarily sexual – for example, a comment that people of one sex are stronger or weaker than another sex, or have particular strengths or weaknesses. This prohibition was introduced by the Respect@Work Act 2021.

There is no longer a requirement for the alleged perpetrator to have engaged in unwelcome conduct of a "seriously demeaning" nature – all that is required now is that the unwelcome conduct was of a "demeaning" nature. [59] This lowers the threshold requirements for a find of harassment on the grounds of sex, and ensures that the provision does not impose an unnecessarily high threshold on applicants.[60]

Review of Act

The changes made by the Respect@Work Act will be independently reviewed to consider whether the changes are operating effectively, and whether the AHRC has capacity to carry out the functions relating to compliance with the positive duty. The review must commence as soon as practicable after 2 years from the commencement of the provisions relating to the AHRC's compliance powers (i.e. 2 years after 12 December 2023.). A written report must be provided to the Minister within 9 months of commencement of the review, and the Minister must cause a copy of the report to be tabled in both Houses of Parliament within 15 sitting days after the report is given to the Minister.[61]

Unfinished business - costs

Originally, the Respect@work Bill contained Schedule 5 which sought to amend the cost provisions in the AHRC Act to adopt a 'cost neutrality' approach. This was in response to recommendation 25 of the Respect@Work Report, although differed from the original recommendation. After significant debate on this issue, Schedule 5 was removed from the Bill and the costs provisions in the AHRC Act will remain the same whilst the Attorney-General's department holds an inquiry into the issue to determine the best costs model for anti-discrimination matters. This inquiry is expected to begin public consultation in February 2023 and report by May 2023.[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).*

[59] S28AA (1) (a)
[60] See Revised Explanatory Memorandum [46]
[61] S4 *Anti-Discrimination and Human Rights Legislation Amendment (Respect@Work) Act* 2022