

This week, the federal government introduced legislation that implements a further seven of Sex Discrimination Commissioner Kate Jenkins' Respect@Work recommendations, including a positive duty for employers to prevent workplace sex discrimination, harassment and victimisation.

The new Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Bill) creates a new positive duty obligation on employers to prevent sexual harassment and discrimination in the workplace.

Attorney-General Mark Dreyfus said, "The focus on prevention of workplace sexual harassment and discrimination also shifts responsibility from those who experience that discrimination and harassment, to those who are best placed to prevent it: employers."

The Bill also proposes to increase the power of the Australian Human Rights Commission to:

- Enforce the positive duty obligation
- Conduct inquiries into compliance
- Make recommendations to achieve compliance
- Give compliance notices specifying actions to address non-compliance
- Apply to the courts for an auditor to direct compliance with notices
- Accept and publish enforceable undertakings in relation to compliance with statutory provisions

The new Bill follows earlier remarks in July 2022 in which the attorney-general said the government now has the opportunity to take "bold and decisive action" to make workplaces safe and harassment-free, by imposing a positive duty on employers to prevent sexual harassment in the workplace.

"Enough is Enough" – Western Australia's Workplace Health and Safety Reforms

In June 2022, a Western Australian Parliamentary Committee reported on the sexual harassment of women in the "fly-in-fly-out" (FIFO) mining industry. Last week, the Western Australian government announced a variety of workplace health and safety reforms in response to the committee's "Enough is Enough" report.

The new workplace health and safety reforms for the Western Australian FIFO mining sector represent a significant change for employers in the resources industry.

FIFO Mining Sector

The Western Australian Department of Mines, Industry Regulation and Safety (DMIRS) will prepare a new Code of Practice (Code) concerning FIFO accommodation requirements. The Code will establish a new "minimum standard" to ensure the safety of workers in remote residential accommodation facilities.

The Code will require FIFO accommodation facilities to improve the physical security and safety infrastructure of site accommodation. This will include, among other things:

- Maintaining a "stronger" security presence on-site
- Installing CCTV vision
- Installing duress alarms
- Installing "better" lighting
- Installing hotel-style locks on all doors

The details of the new Code are still under development. However, it is clear that the overriding purpose is to ensure there is a greater responsibility on the employer, as the provider of accommodation, for the after-hours behaviour of employees in remote accommodation facilities.

WorkSafe Changes

DMIRS will be responsible for the establishment of a new "culturally appropriate expert group" within WorkSafe WA to investigate, assess and deal with reports of sexual harassment and assault offences in the resources sector. This is in response to calls from mining industry representatives that DMIRS was drastically under-resourced in terms of dealing with and investigating sexual assaults.

New Discrimination Laws

The Western Australian government is also preparing new legislation to replace the Equal Opportunity Act 1984 (WA) (EEO Act) (the WA Bill). The changes are an acknowledgment that WA's EEO Act has lagged behind most other jurisdictions and an update is necessary to bring the state in line with the discrimination laws in the rest of the country.

Several key reforms are to be included in the WA Bill, such as:

1. Removing the "disadvantage test" for sexual harassment complainants currently contained in section 24(3)(a) of the EEO Act. This section required a victim to demonstrate that they were sexually harassed and by objecting to the sexual harassment, they were disadvantaged in their employment.
2. Strengthening equal opportunity protections for LGBTIQ+ staff and students in religious schools.

3. Providing anti-discrimination protections to those who are transgender, gender-diverse or non-binary without the need for recognition from the Gender Reassignment Board.
4. Extending the prohibition against sexual and racial harassment to members of Parliament and Parliament staff, judicial officers and court staff, local government councillors and staff, and unpaid or volunteer workers.
5. Protecting family and domestic violence victims from discrimination.
6. Introducing anti-vilification laws.
7. Strengthening victimisation provisions.

The WA Bill is expected to be considered by the Western Australian Parliament early in 2023.

Considerations for Employers

The announcements by Attorney-General Mark Dreyfus and the Western Australian government will result in major changes to discrimination laws that will impact many employers across Australia.

Employers will soon have a duty of care to actively take all reasonable steps to prevent sexual harassment in the workplace. While traditionally this may be limited to behaviour that occurs in the workplace, it is highly unlikely that behaviour that occurs after-hours or outside the workplace will be excluded from the duty.

Therefore, what reasonable steps do employers need to take to prevent sexual harassment?

Employers should start with a review of the following questions:

- Has a dedicated budget been allocated to provide sexual harassment training for all employees?
- Have cultural and behavioural expectations been clearly communicated to employees?
- Have geographical and physical considerations of the workplace been considered?
- Is there a sexual harassment policy and how often are staff trained on the policy?
- Are employees clear on what constitutes sexual harassment?
- What processes are in place to deal with sexual harassment complaints?
- Is appropriate behaviour modelled by management throughout the workplace?
- Does the employer undertake regular audits to monitor the incidence of sexual harassment in the workplace?
- Can staff report early concerns about unwelcome behaviour before it becomes a serious sexual harassment complaint?

Our Labour & Employment team regularly advises on the above questions and can support employers with sexual harassment prevention strategies.

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