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IR UPDATE

Respect@Work – Changes to Sex Discrimination and Harassment Laws.

Recent changes to the law mean employers have new responsibilities regarding sexual harassment and sex discrimination in the workplace. By December this year, the Australian Human Rights Commission (AHRC) will also have new powers to enforce compliance with those obligations and the existing laws.

The most significant changes are the introduction of a new 'positive duty' and expansion of the liability for breaches.

POSITIVE DUTY

The 'positive duty' is a significant change. It means that Persons Conducting a Business or Undertaking (PCBUs), including employers, are now obliged to 'take reasonable and proportionate measures to eliminate unlawful discrimination, including sexual harassment, as far as possible'. This reflects the reforms' general approach. Instead of being a reactive system built around complaints, the new focus is on requiring employers to take active measures to prevent discrimination and harassment in the first place. Even if nobody makes a complaint, an employer can still be in breach of the law.

'Reasonable and proportionate measures' are not defined in the amendments, but courts will almost certainly apply the same test that they currently use for determining when employers are liable for the actions of their employees ('vicarious liability'). The test will also mirror those of 'reasonably practicable' measures for work health and safety purposes or chain of responsibility. This means they will vary depending on the size of a business and the

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resources available to it. The downside is that there is no real certainty as to what measures will be enough.

HOSTILE WORKPLACE ENVIRONMENT

One of the changes codifies the existing legal obligation on employers to eliminate 'hostile workplace environments'. This means an environment that is 'offensive, intimidating or humiliating by reason of sex (or related characteristics)'. Examples would include displaying pornographic or obscene material, and sexual banter or offensive jokes. Although courts have previously ruled that the obligation exists, it is now expressly written into the legislation. Because it is also subject to the positive duty, that means it is unlawful to allow a hostile workplace to develop even if there are no complaints. The test will be a 'reasonable person' test very similar to the one in the current definition of 'sexual harassment' in the *Sex Discrimination Act*. That means it won't matter what the person engaging in the conduct that creates

the environment would or does expect, only whether a reasonable person would have anticipated the possibility that the conduct would create a hostile environment.

ACCESSORIAL LIABILITY

The existing accessorial liability provisions for sex discrimination have been extended to cover sexual harassment. That means managers and executives can potentially be held personally liable, alongside the business, for harassment as well as discrimination.

NEW POWERS FOR THE AHRC

From 12 December 2023, the AHRC will have powers of enforcement and investigation to enable it to police the new positive duty. Those powers are largely the same as those available to the Fair Work Ombudsman and include the ability to issue compliance notices, agree enforceable undertakings, and apply for court orders.

TAKEAWAYS

Although the AHRC powers are not yet in force, the other new provisions are. Members should be considering what systems, including policies and training, they have in place to prevent harassment and discrimination. Responsibility for those measures should be clearly assigned to specific staff members who have the power to implement them. Although the changes might look intimidating, especially to smaller businesses with few resources, every step you can take will help reduce the risk.

The AHRC has created a new Respect@Work website which has some useful resources for employers including free online training. ●