Stop Sexual Harassment Orders: A New Approach to an Old Problem in Australian Workplaces

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Consistently, research has shown that Australian women are encountering sexual harassment in the workplace. Sexual harassment complaints are one of the most common type of complaints received by the Australian Human Rights Commission (« AHRC »). In a 2018 survey, the AHRC found that in the 12 months prior, 23% of women experienced sexual harassment at work and that 72% of Australians have been sexually harassed at some point in their lives.

Sexual harassment is prohibited by national legislation and laws in each State and Territory. The laws operate very similarly in that a person who has experienced sexual harassment is required to lodge a complaint at the AHRC or the equality agency in their State or Territory (except in Victoria where they can choose to lodge the complaint either at the agency or at the tribunal). The equality agency will attempt to resolve the claim through alternative dispute resolution. If that fails, the complaint can be litigated but this is often a long and expensive process. Most complaints settle or they are withdrawn. O’Connell describes the process as a « passive, backward-looking system that potentially amplifies the very harm the person has already experienced ».

Recently, a comprehensive inquiry into the persistence of sexual harassment in the workplace has resulted in changes which redirect the law towards a preventative approach. One of those changes was to invest the Fair Work Commission (« FWC ») with the power to make an order to stop sexual harassment, which this note considers before considering what the government should focus on reforming next.

4 K. O’Connell, « 72% of Australians have been sexually harassed. The system we have to fix this problem is set up to fail », The Conversation, 26 June 2020: https://theconversation.com/72-of-australians-have-been-sexually-harassed-the-system-we-have-to-fix-this-problem-is-set-up-to-fail-141368
I - RESPECT@WORK

In 2018, against the backdrop of the global #MeToo movement, the Australian government asked the national human rights institution, the AHRC, to conduct an inquiry into the prevalence of sexual harassment in the workplace and to prepare a list of recommendations for addressing the problem.

The Respect@Work report was tabled before Federal Parliament in March 2020. The report contains 55 recommendations for improving the legal framework and redirecting the existing approach to one aimed at preventing sexual harassment and addressing the cause instead of responding to the problem on an individual basis. This approach would shift the burden away from the individual employee who experienced sexual harassment and place it on the employer, which is the institution best placed to bring about change in the workplace.

The Respect@Work report proposed a system which would be better equipped to respond to sexual harassment and prevent it. To do so, it recommended a framework that is « victim-centred, practical, adaptable for businesses of all sizes and in all industries, [and] designed to minimise harm to workers »². There is not scope in this note to cover all of the findings or the report’s extensive recommendations but it is important to highlight the overall theme of the report as it sets the context for the subsequent changes to federal industrial relations law, which this note examines. The next section considers one of the preventative measures which has already been implemented.

II - AN ORDER TO STOP SEXUAL HARASSMENT

The Respect@Work inquiry heard from participants that they « want a broader range of options to stop sexual harassment, especially less adversarial options »². Respect@Work recommended that the national industrial tribunal, the FWC be given the power to make an order to stop sexual harassment. The FWC already had the power to make « stop bullying orders » so this new power would complement the bullying jurisdiction. Respect@Work recommended this because it viewed stop orders as less adversarial than court proceedings and said these orders would give the applicant and the employer « an early intervention redress mechanism »².

In late 2021 the then Morrison government responded to the findings in Respect@Work and it committed to some legislative changes. This included giving the FWC the power to make an « Order to Stop Sexual Harassment » (OSSH). This proposal, which was

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6 Respect@Work, p. 34.
7 Respect@Work, p. 525.
8 Respect@Work, Recommendation 29.
9 Respect@Work, p. 525.
implemented in later 2021\textsuperscript{11}, brought sexual harassment into the industrial relations sphere for the first time\textsuperscript{12}.

Under the new provisions in the \textit{Fair Work Act 2009} (Cth) (« FW Act »), a worker who reasonably believes that they are being sexually harassed at work, whether by one person or a group of people, can apply for an order to stop the sexual harassment. The FWC is required to deal with an application for an OSSH within 14 days after the application is made\textsuperscript{13}. « Worker » is defined broadly and includes employees, contractors, apprentices, trainees, volunteers, and students who are completing working experience at an organisation\textsuperscript{14}.

Sexual harassment is defined as an unwelcome sexual advance or request for sexual favours or unwelcome conduct of a sexual nature in circumstances in which a reasonable person would anticipate that the worker would be offended, humiliated or intimidated\textsuperscript{15}. To make a OSSH, the FWC must be satisfied that the worker has been sexually harassed at work and that there is a risk that the worker will continue to be sexually harassed at work\textsuperscript{16}.

When it introduced the proposed changes the government said the aim was not to punish the wrongdoer or to compensate the victim; the aim of the OSSH is to protect workers from future harm and enable « normal working relationships to resume »\textsuperscript{17}. That being so, the FWC cannot order the payment of monetary compensation\textsuperscript{18}. To be compensated for the harm they experienced, the worker needs to lodge a sexual harassment claim under an equality law at the AHRC or their local equality agency\textsuperscript{19}.

The FWC can make any order it considers to be appropriate to prevent the worker from being sexually harassed at work\textsuperscript{20}. Orders may be made against the individual who engaged in sexual harassment and their employer. The range of orders which can be made include ordering an individual to stop specified behaviour, changing working arrangements, requiring the employer to monitor behaviour, training and reviewing an employer’s policies\textsuperscript{21}. If a person contravenes an order, they may be subject to financial penalties which are currently up to AUD $13,320 for an individual and AUD $66,600 for a body corporate\textsuperscript{22}.

\textsuperscript{11} Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 (Cth) ss 49-50.
\textsuperscript{12} Although s 351 of the FW Act prohibits sex discrimination, it does not prohibit sexual harassment. Sexual harassment is unlawful under equality laws: see eg \textit{Sex Discrimination Act 1984} (Cth) s 28A. Respect@Work recommended that the FW Act should also prohibit sexual harassment but this has yet to be implemented. The FW Act was amended in 2021 to state that engaging in sexual harassment can be a valid reason for dismissal: s 387.
\textsuperscript{13} FW Act s 789FE.
\textsuperscript{14} FW Act s 789FC(2).
\textsuperscript{15} The FW Act uses the definition found in federal sex discrimination law: see s 28A of the \textit{Sex Discrimination Act 1984} (Cth).
\textsuperscript{16} FW Act s 789FF(1)(b)(ii).
\textsuperscript{17} Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 (Cth), p. 36 [120].
\textsuperscript{18} FW Act s 789FF.
\textsuperscript{19} See eg \textit{Australian Human Rights Commission Act 1986} (Cth), s 46P.
\textsuperscript{20} FW Act s 789FF(1).
\textsuperscript{21} Revised Explanatory Memorandum, Fair Work Amendment Bill 2013 (Cth), p. 36 [121].
\textsuperscript{22} FW Act s 789FG.
The OSSH is a unique way of responding to workplace sexual harassment because it offers workers an expeditious, less costly non-adversarial option of addressing sexual harassment than the individualised complaints-based approach found in equality laws. Furthermore, this new mechanism is aimed at prevention. It seeks to address the unlawful behaviour early on and preserve the worker’s employment. This is reflected in the Explanatory Memorandum in which the government said the aim of the OSSH is to « prevent the risk of future harm »23.

III - A PROACTIVE APPROACH

The OSSH offers an innovative mechanism for tackling sexual harassment in the workplace but neither this nor the other changes the previous federal government introduced have fundamentally changed the law. The individual worker who has experienced sexual harassment still bears the burden of doing something about it, whether that is applying for an OSSH or lodging a sexual harassment complaint at an equality agency.

Employers are required to educate their employees about what is and what is not acceptable in the workplace to avoid being held vicariously liable for unlawful conduct and this is expected to be enough to change behaviour. The findings in Respect@Work and revelations of other high-profile allegations of sexual harassment24 suggest it is not.

Currently, there are no mechanisms in Australian industrial laws or equality laws that require employers to be proactive. Respect@Work recommended introducing a positive duty which requires employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible25. The report recommended that the AHRC should be given the power to enforce compliance with the duty including by conducting inquiries into systemic practices of sexual harassment and sex discrimination25. Currently the AHRC does not play any role in enforcing the law. Prior to its election in May 2022, the incoming Labor government committed to implementing the remaining recommendations from Respect@Work27. If it fulfils that promise, this will be a significant shift in the way sexual harassment is addressed in Australia.

23 Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth), p. 6 [23].
25 Respect@Work, Recommendation 17. Victoria is the only Australian jurisdiction to include a duty of this nature but it is not enforceable: see Equal Opportunity Act 2010 (Vic) s 15.
26 Respect@Work, Recommendation 18.