



WHITE PAPER

March 2023

Australian Reforms Tackle Psychosocial Hazards, Including Sexual Harassment, in the Workplace

In the wake of recent government inquiries into alleged bullying and harassment, including sexual harassment, in Australian workplaces, Australian legislatures and work health and safety regulators have become increasingly focused on the psychological health and safety of workers. These developments have highlighted the need for employers to better understand and proactively manage psychosocial hazards in the workplace in order to safeguard the psychological, as well as physical, health and safety of all persons in the workplace. As Australian lawmakers and regulators continue to focus on the issue, we are seeing, and will continue to see, increased obligations and regulatory scrutiny of the actions required of persons conducting a business or undertaking to safeguard the psychological health and safety of workers. We outline some of the more significant recent legislative reforms, with a particular focus on workplace sexual harassment as an example of this broader trend.

OVERVIEW

Psychological health and safety in the workplace is governed concurrently by State and Territory work health and safety (“WHS”) legislation, the Fair Work Act 2009 (Cth) (“Fair Work Act”), and Federal and State anti-discrimination laws, including the Sex Discrimination Act 1984 (Cth). All Australian States and Territories save for Victoria have adopted the model WHS laws (“model WHS laws”) developed by the national policy body, Safe Work Australia.

Under the model WHS laws, a person conducting a business or undertaking (“PCBU”) has a duty to ensure the health and safety of workers while they are at work. “Health” is defined broadly to encompass psychological health. In addition, the Fair Work Act and State and Federal anti-discrimination laws prevent workplace discrimination on the basis of protected characteristics including age, race, sex, and mental disability or illness.

While the statutory framework is designed to provide multiple avenues of protection and redress for employees in relation to matters that may impact their psychological health, psychosocial hazards have not been well understood historically by PCBUs as a workplace issue. Safe Work Australia defines a “psychosocial hazard” as anything that may cause psychological harm. In the workplace, such hazards may include bullying, conflict, job demands, lack of role clarity, harassment (including sexual harassment), remote or isolated work, poor physical environment, and inadequate reward and recognition. As this is a broad-ranging, non-exhaustive list, and an array of factors both within and external to the workplace can impact psychological health, managing psychological health as a workplace issue is complex and challenging for any organisation.

Nevertheless, difficulty in navigating the issue is not a defence for an employer or organisation that fails to meet its legal obligations to ensure its workers’ health and safety. Indeed, hefty penalties can be imposed. By way of example, the High Court of Australia recently allowed the appeal in *Kozarov v State of Victoria* (2022) 273 CLR 115; [2022] HCA 12, resulting in a damages award of \$435,000 against the State for its failure to provide a safe system of work to an employee of the Specialist Sexual Offences Unit of the Office of Public Prosecutions, who suffered a psychological injury as a result of her vicarious trauma through her exposure to the trauma suffered by the

victims in the cases she was managing. Further, the consequences of not “getting it right” are more than legal, and may include significant impacts on the people, culture, and performance of the organisation.

As Australian legislatures and WHS regulators continue to focus on the issue, we are seeing, and will continue to see, increased obligations and regulatory scrutiny on the steps that PCBUs are taking to safeguard the psychological health and safety of workers. We outline below some of the more significant recent legislative reforms, with a particular focus on workplace sexual harassment as an example of this broader trend.

CATALYSTS FOR REFORM

In February 2019, a report in relation to the first independent review of the content and operation of the model WHS laws, conducted by Marie Boland, was publicly released. Among the 34 recommendations outlined in the [Boland Report](#) were recommendations that:

- The model WHS Regulations be amended to address how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks; and
- Incident notification provisions should provide for a notification trigger for psychological injuries.

In March 2020, the report prepared by the Australian Sex Discrimination Commissioner, Kate Jenkins, as a result of the National Inquiry into Sexual Harassment in Australian Workplaces, was publicly released. The [Respect@Work: Sexual Harassment National Inquiry Report \(2020\)](#) (“Respect@Work Report”) found that workplace sexual harassment is pervasive across Australian workplaces, with a 2018 National Survey having found that one in three workers who had been in the workforce in the previous five years had experienced workplace sexual harassment. Observing that both workers and employers found the interaction between the various Federal, State, and Territory anti-discrimination laws, workplace relation laws, and work health and safety laws complex and difficult to navigate, the Respect@Work Report recommended the adoption of a new regulatory model that recognizes that the right of workers to be free from sexual harassment is a human right, a workplace right, and a safety right.

Various States and industries have also conducted their own reviews and subsequent reports in this area. These include the [Independent Review into Commonwealth Parliamentary Workplaces](#) in November 2021 and the [Review of Sexual Harassment in Victorian Courts](#) in 2021. In Western Australia, an industry-specific inquiry was conducted into sexual harassment in the FIFO Mining Industry by the parliamentary Community Development and Justice Standing Committee. On 23 June 2022, the Committee released its report, [Enough is Enough: Sexual harassment against women in the FIFO mining industry](#) (“Enough is Enough Report”), which found that the mining industry has perpetuated a culture that fails to protect women from sexual harassment. The Enough is Enough Report set out 24 recommendations to address gender and power imbalances in the industry and establish internal and external options for reporting of complaints.

LEGISLATIVE REFORM

In the wake of the above inquiries and reports, significant legislative reforms have been implemented at the Federal, State, and Territory levels to address psychosocial hazards, including sexual harassment, in the workplace.

Respect@Work Legislation

A commitment to implement all 55 recommendations in the Respect@Work Report was part of the Labor government’s election platform under the leadership of Australia’s current Prime Minister, Anthony Albanese, who came to power in May 2022.

On 28 November 2022, the Australian Parliament passed the [Anti-Discrimination and Human Rights Legislation Amendment \(Respect at Work\) Bill 2022 \(Cth\)](#), with Royal Assent given on 12 December 2022 (“Respect@Work legislation”). The key reforms enacted by the Respect@Work legislation include:

- The introduction of a positive duty on employers and PCBUs under the *Sex Discrimination Act 1984* (Cth) to take reasonable and proportionate measures to eliminate, as far as possible, sexual harassment, sex-based discrimination and harassment, hostile work environments, and related victimisation. This duty became effective on 13 December 2022, and operates concurrently with existing WHS laws;
- The imposition of a lower threshold for an applicant to establish “harassment on the ground of sex” under the *Sexual Discrimination Act* by requiring that the relevant conduct be “demeaning”, no longer “seriously demeaning”;
- The conferral of expanded powers on the Australian Human Rights Commission (“AHRC”) under the *Australian Human Rights Commission Act 1986* (Cth) to monitor, assess, and enforce compliance with the positive duty by employers and PCBUs, including the power to conduct inquiries, issue compliance notices, and enter into enforceable undertakings. Notably, these enforcement provisions take effect on 12 December 2023; and
- The introduction of a mechanism by which a representative body (e.g., a trade union) that has lodged a complaint in the AHRC on behalf of one or more persons who claim to have experienced unlawful discrimination may file a representative application (i.e., a class action) in the Federal courts if the representative complaint is terminated. These provisions operate concurrently with the class action provisions under the *Federal Court of Australia Act 1976* (Cth).

The passage of the Respect@Work legislation builds on the changes introduced in 2021 by the previous Liberal Federal Government that amended the *Fair Work Act* to include a new anti-harassment jurisdiction and new definitions of “sexually harass” and “sexually harassed at work”, and to clarify that sexual harassment can be a valid reason for dismissal of the harasser.

Work Health and Safety Laws

On 1 October 2022, New South Wales implemented the [Work Health Safety Amendment Regulation 2022 \(NSW\)](#) to amend the *Work Health Safety Regulation 2017* (NSW). The amendments provide that a PCBU must manage psychosocial risks in the same way that other risks to worker health and safety (i.e., risks to physical health and safety) are dealt with under the *Work Health and Safety Act 2011* (NSW). The amendments also provide greater clarity on the meaning of psychosocial hazard, psychosocial risks, and specific control measures for dealing with such hazards and risks as recommended in the Boland Report.

No other States or Territories have yet amended their WHS legislation to specifically address psychosocial hazards in the workplace, although certain legislatures are considering reforms.

In February 2022, Victoria issued an exposure draft of the *Occupational Health and Safety Amendment (Psychological Health) Regulations (Vic)* to address psychological health. If implemented, the proposed regulations would introduce three significant reforms: (i) the imposition of express duties on all employers in Victoria to identify and control risks associated with psychosocial hazards; (ii) periodic reporting obligations for employers with 50 or more employees in respect of any complaints or incidents of psychosocial hazards; and (iii) penalties for non-compliance. Public consultation in relation to the proposed regulations closed in March 2022 and are being considered by the government.

In addition, in July 2022, the Victorian Government announced it will restrict the use of non-disclosure agreements (“NDAs”) in the resolution of workplace sexual harassment cases. Several states in the United States have passed or implemented legislation to this effect; Victoria, however, is the first Australian State to commit to doing so. This development is consistent with guidance issued by the Respect at Work Council in December 2022, *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* (“Guidelines”), which encourages that confidentiality clauses be considered on a case-by-case basis; that they be limited in scope and duration; and that the complainant should have access to independent support and advice.

In Western Australia (“WA”), the State Government has announced its support in principle for the recommendations in the *Enough is Enough Report* and has committed to:

- Bring WA’s definitions of sexual harassment in line with other Australian jurisdictions by removing the disadvantage test, which currently requires sexual harassment complainants to prove both that they were harassed and that challenging the behaviour would or did disadvantage them in their employment; and
- Develop a new Code of Practice for the mining and construction industries to provide minimum standards that PCBUs must consider in the interests of the health and safety of workers living regionally and remotely.

WHS Codes of Practice

Work health and safety regulators are also focused on improving the psychological health and safety of persons in Australian workplaces.

In May 2021, SafeWork NSW published practical guidance to PCBUs on how to manage psychosocial hazards in its *Code of Practice: Managing Psychosocial Hazards at Work*. Safe Work Australia published a similar model Code of Practice in July 2022, reiterating that under the model WHS laws, it is incumbent on PCBUs to eliminate or minimise psychosocial risks so far as is reasonably practicable. Under the model WHS laws, adherence to Codes of Practice can assist a duty holder to demonstrate the discharge of their duties. Such Codes of Practice are admissible in legal proceedings under the model WHS laws to assist the Court in determining what measures are reasonably practicable in the circumstances to which the relevant Code relates.

OVER THE HORIZON

Looking ahead, we anticipate further legislative reforms to combat psychosocial hazards and sexual harassment in the workplace. We also expect heightened vigilance and enforcement by WHS regulators in connection with these new and restated affirmative duties of employers and PCBUs.

Employers should take positive steps to ensure that their systems, policies, and procedures are compliant with these recent reforms and that relevant personnel have received appropriate training. Additionally, employers and organisations should conduct meaningful reviews of the workplace and its culture, including matters such as gender balance, power disparities, and remote working arrangements. This is particularly important for employers and organisations in industries that have been specifically identified as posing significant risks to workers’ psychological health and safety.

We also expect that a corollary to the expanded scope of employer and PCBU duties in regard to psychological health and safety will be an increase in the number of single plaintiff complaints and claims, as well as representative complaints in the AHRC and class actions in some cases utilising the new laws introduced as part of the Respect@Work legislation.

Another area for reform on the horizon is prohibiting the use of NDAs in settling sexual harassment and other misconduct claims, which is an emerging ESG issue.

THREE KEY TAKEAWAYS

1. Employers and PCBU's should take steps to ensure that key personnel are aware of new obligations under the Respect@Work legislation and the WHS laws in jurisdictions in which they operate.
2. There is likely to be increased scrutiny, investigations, and enforcement actions taken by key workplace regulatory bodies including State-based WHS regulators and the Fair Work Ombudsman, in conjunction with an increase in single plaintiff complaints and claims and, potentially, representative complaints and class actions.
3. Employers, PCBU's, directors, and officers should ensure that a compliance review is undertaken of existing systems, policies, and procedures, as well as existing frameworks for complaints, investigations, and disciplinary action, to ensure that the organisation is compliant with the law and to identify areas where improvements can be made.

LAWYER CONTACTS

Adam Salter

Perth/Sydney

+ 61.8.6214.5720 / + 61.2.8272.0500

asalter@jonesday.com

Jennifer Chambers

Sydney

+ 61.2.8272.0706

jchambers@jonesday.com

Matthew W. Lampe

New York

+ 1.212.326.8338

mwlampe@jonesday.com

Elizabeth McRee

Chicago

+ 1.312.269.4374

emcree@jonesday.com

Noella Silby and Holly M. Gretton contributed to this White Paper.

Jones Day publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our "Contact Us" form, which can be found on our website at www.jonesday.com. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm.