

LegalTalk Alert

Issue: 13 May 2010

PRICEWATERHOUSECOOPERS 



Employment and Workplace Relations Alert

Government announces amendments to *Sex Discrimination Act 1984 (Cth)*

Authors: Brett Feltham and Tom Norris

On 6 May 2010, the federal Government announced a series of amendments to the *Sex Discrimination Act 1984 (Cth)* (**Act**) which would seek to further promote gender equality and provide stronger protections for Australians against sex discrimination. The proposed changes are part of the Government's response to a report by the Senate Standing Committee on Legal and Constitutional Affairs (**Committee**) into the effectiveness of the Act.

The proposed reforms would essentially:

- (a) establish breastfeeding as a specific ground of discrimination;
- (b) provide greater protection from sexual harassment for student and workers;
- (c) extend protections from discrimination on the grounds of family responsibilities to both women and men in all areas of employment; and
- (d) empower the Human Rights Equal Opportunity Commission (**Commission**) to intervene in cases of family responsibility discrimination.

Background

In December 2008, after 6 months of inquiry into the effectiveness of the Act, the Committee released its report detailing over 40 recommendations. The inquiry came on the back of mounting pressure from unions, industry groups and equal opportunity advocates about the inadequacies of existing laws in addressing systemic sex discrimination and in dismantling barriers to women's equal participation and progress in the workplace.

Proposed Amendments

Establish breastfeeding as a specific ground of discrimination

Under the proposed changes, the Act will be amended to make breastfeeding a specific ground of discrimination. The Government affirmed that while discrimination on the basis of breastfeeding is already captured as direct sex discrimination under subsection 5(1A) of the Act, "making breastfeeding a separate ground of discrimination alongside marital status, pregnancy or potential pregnancy essentially emphasises that breastfeeding is a protected attribute."

Providing greater protection from sexual harassment for students and workers

The Government plans to broaden the stringent requirements used to determine whether an act of sexual harassment has taken place. It plans to achieve this by amending the current definition of sexual harassment in section 28A of the Act to provide that sexual harassment occurs if a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. The circumstances used to determine whether a reasonable person would have anticipated their conduct would have this effect would include:

- the sex, age and race of the other person;
- any impairment that the other person has;
- the relationship between the (other person) and the person engaging in the conduct; and
- any other circumstance of the other person.

LegalTalk

Employment Update

PRICEWATERHOUSECOOPERS 



While not affecting the matters which should be considered by the court in assessing what is reasonable conduct, this statutory guide will essentially direct the court to consider the individual circumstances of the case in question.

The Government additionally plans to introduce greater protection for workers from sexual harassment by customers and other people that they come into contact with during their employment. This is on the basis that workers are equally vulnerable to sexual harassment from customers as from colleagues or employers, and should therefore be afforded the same protections.

In an attempt to increase protection for students, the changes will remove the section 28F requirement that the person responsible for the harassment be at the same educational institution. The proposed amendments will also provide protection to students from sexual harassment regardless of their age.

Extend protections from discrimination on the ground of family responsibilities to both women and men in all areas of employment

The proposed changes will see an extension of protection for those with family responsibilities to include the adverse action provisions contained in the *Fair Work Act 2009* (Cth), which are not limited to situations involving dismissal. The changes will also amend subsection 9(1) of the Act to refer to further international civil and labour rights conventions which create obligations in relation to gender equality. In order to ensure that the Act provides equal coverage to men and women, this amendment will additionally refer to the Committee on the Elimination of Discrimination against Women.

What should employers do once the legislation is passed?

It is recommended that employers ensure that all staff members, particularly human resources staff, understand their obligations. The changes relating to breastfeeding will almost certainly place renewed pressure on employers to make facilities available to breastfeeding mothers.

It should be noted by employers that the proposed amendments are subject to change if and when they are passed through Parliament.

How do these proposed changes affect employees if passed?

If the proposed reforms are passed through Parliament with no significant amendments, employees can expect greater protection in the workplace from sexual harassment. The major winners will be students, workers who are susceptible to sexual harassment by customers and those workers vulnerable to discrimination on the grounds of family responsibilities.

What now?

The Government intends to consult stakeholders and the general public in the drafting of legislation for its proposed reforms. No fixed dates have been set for this process.

Attorney-General, Mr. McClelland has affirmed that the Government will consider other recommendations from the Committee's Report as part of a larger shift towards consolidating anti-discrimination legislation into one single comprehensive law.

For further information please contact your PricewaterhouseCoopers advisor or:

Brett Feltham
Legal Director
+61 (2) 8266 9375
brett.feltham@au.pwc.com

Christie McGregor
Senior Associate
+61 (2) 8266 2606
christie.mcgregor@au.pwc.com