

# Workplace Relations in 2021: Half time report

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Anthony Massaro    Morgan Smithe



## Disclaimer

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The information contained in this presentation is intended as **general commentary only** and should not be regarded as legal advice

Should you require specific advice on the topics or areas discussed, please contact the presenters directly

# Overview

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- Mishandled workplace complaints
- Changes to sexual harassment laws
- Changes relating to casual employment
- Vaccination of staff

# Mishandled workplace complaints



# The risks of mishandling complaints

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- > Chilling effect on staff
- > Negative impact on workplace culture
- > Litigation – claims for damages and economic loss
- > Public relations nightmare
- > Damage to brand as an employer of choice

# Features of a good approach to complaints

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- Respect for the complainant and the respondent
- Prompt action
- Proportionality
- Informal resolution where practicable
- Procedural fairness
- Confidentiality

*Anyone can be the initial contact point*

# Acknowledge the complaint

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- > Confirm that you have received it
- > Demonstrate empathy
- > Seek additional information/clarification
  - > What happened?
  - > What outcome is the complainant seeking?
- > If possible, outline the process that will be followed
- > If not, advise that you will be in touch shortly to outline the process

# Inform the respondent

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- Ideally meet face-to-face first
- Outline the allegations
- If possible, outline the process that will be followed
- If not, advise that you will be in touch shortly to outline the process
- Make it clear that a decision will be made only after the complaint is investigated
- Invite an initial response
- Confirm everything in writing



# 1: Is the alleged conduct reportable/notifiable?

- Some sectors have requirements that certain allegations be dealt with in a particular way
  - Reporting of registered health practitioners to AHPRA
  - Reporting of suspected child abuse to the police
  - Reporting of corrupt conduct to IBAC
- If mandatory reporting or notification obligations apply: follow those
- If they do not apply, or if they do not specify a process, follow internal process

## 2: How serious are the allegations?

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- > Is the alleged conduct unlawful?
- > Does the alleged conduct create a significant safety risk?
- > Does the alleged conduct raise particularly sensitive issues for the organisation?
- > Do the allegations relate to the CEO, senior management or HR?
- > Is the alleged conduct serious enough to lead to dismissal?

If the answer to all of these questions is “No”, an informal resolution may be appropriate

If the answer to any of these questions is “Yes”, a formal investigation is likely to be necessary

# Informal resolution

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- Informal resolution is likely to be successful if:
  - there is broad agreement as to what occurred; or
  - the respondent is amenable to the solution proposed by the complainant; or
  - the alleged conduct is a low level concern
- Informal resolution could involve:
  - discussion between the parties;
  - mediation

# Key elements of an investigation

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- > Clear and specific allegations
- > Consider all relevant evidence
  - > Evidence from the complainant and the respondent
  - > Identify and speak with relevant witnesses
  - > Review relevant documents
- > Draw reasonable conclusions based on evidence
- > Decide appropriate outcomes based on conclusions
- > Ensure procedural fairness

# Standing down

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- > Not always necessary
  - > Can make a return to work impossible
  - > Consider alternatives where available
- > Respondents should be stood down if:
  - > Serious misconduct is alleged
  - > There is a serious health and safety concern
  - > Not doing so risks compromising the investigation
- > Any standing down should be done promptly

# Anonymous complaints

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- > Do not ignore
- > If there is a means to communicate with the complainant, ask for more details
- > Investigate the complaint based on what you have, and what you can get
- > Consider: can you learn anything from this communication?
  - > If so, act

# “This is not a formal complaint”

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“I’m just telling you this so you know – please don’t do anything about it.”

- Respect for the complainant v duties to staff
- Assess the alleged conduct, and determine whether investigation is appropriate
- Offer to investigate, and confirm the complainant’s preference in writing
- Complainant’s wishes do not remove duties – cannot just let poor behaviour go

# Comments in exit interviews

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- Useful information, or vitriol?
- Do not ignore
- Ask for more details
- Assess seriousness
- Investigate or take alternative action to address any genuine issues





# Getting it right

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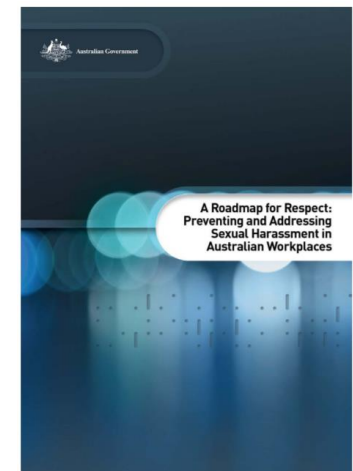
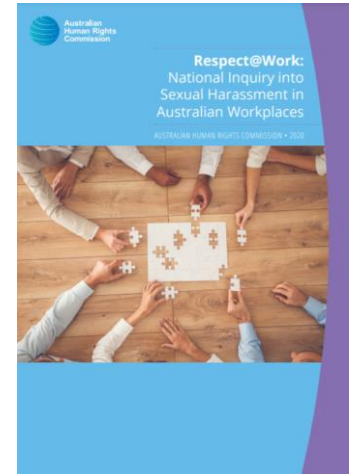
- > All managers, team leaders, Board members need to be across the basic principles
- > All staff need to feel empowered to call out unacceptable behaviour
  - > Compliance training should include bystander action
- > Complaints procedures need to be clear and available
- > Management needs to be visibly on board

# Changes to sexual harassment laws



# The (long and winding) Road to Respect

- > 29 January 2020: AHRC published the Respect@Work Report
- > 8 April 2021: Federal Government published the Roadmap for Respect
- > 24 June 2021: *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* introduced
- > Currently before the Senate



**Image credit:**  
Screenshot from  
Australian Government  
website

# Proposed changes: AHRC Act

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- Time limit for lodging complaints to the Australian Human Rights Commission in connection with sex discrimination increases from 6 months to 2 years
- Reflects the fact that complaints often take a while to come to the surface
- Note: State and Territory Anti-Discrimination bodies have different time limits

# Proposed changes: Fair Work Act

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- > Formal confirmation that sexual harassment can amount to a valid reason for dismissal
- > Sexual harassment now included in definition of “serious misconduct”
- > Expansion of the Commission’s bullying jurisdiction to cover sexual harassment – with the same limitations
  - > Needs to be an ongoing risk of sexual harassment
  - > Orders to stop sexual harassment
  - > No capacity to order compensation

# Proposed changes: Sex Discrimination Act

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- > Prohibits “harassment on the ground of sex”
  - > Unwelcome conduct of a seriously demeaning nature
  - > By reason of the sex of the person harassed, or characteristics which generally pertain or are imputed to persons of that sex
  - > In circumstances in which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated
- > Makes victimisation a civil action, as well as a criminal offence

# Changes relating to casual employment



# New definition of casual employee

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- > Casual employment is when:
  - > a person is offered a job by employer;
  - > the employer makes **no firm advance commitment** that work will continue indefinitely with an agreed pattern of work; and
  - > the person accepts the offer



# ***Workpac v Rossato* [2021] HCA 23**

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## **Mr Rossato was a casual:**

- > Employment was on an assignment basis with casual loading**
- > Mr Rossato was entitled to reject an offer of work**
- > No contractual obligation to offer further work to Mr Rossato**
- > One hour notice requirement for termination**

# NES conversion pathway clarified

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- > Employer may offer, or employee may request, conversion
- > A casual employee will be eligible under the NES if:
  - > they have been employed for at least 12 months
  - > they have worked a regular pattern of hours in the last 6 months
  - > these hours could be worked on an permanent basis without significant adjustment

# Reasonable grounds to not make an offer

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- > Making the offer would not comply with a recruitment or selection process required by law
- > The employer would have to make a significant adjustment to the employee's pattern of hours
- > Within the next 12 months:
  - > The employee's position won't exist
  - > The employee's hours of work will significantly reduce
  - > The employee's days or times of work will significantly change, and not work with the employee's availability

# Timeframes and notice requirements

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- > Strict timeframes apply to offer casual conversation
  - > 27 September 2021 for casuals who commenced before 27 March 2021
  - > 21 days of 12 month work anniversary for other casuals
- > Offers must comply with notice requirements
- > Employees can also request conversion
- > There are exceptions for small business providers

# Why convert?

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## Casual employment

- > No guarantee of regular hours of work
- > Casual loading
- > Flexibility to increase or decrease hours of work
- > No entitlement to annual leave
- > Unpaid leave entitlements in accordance with the NES
- > Limited notice entitlements

## Permanent employment

- > Regular and systematic hours of work
- > No casual loading
- > Less flexibility regarding hours of work
- > Entitlement to paid annual leave
- > Unpaid leave entitlements in accordance with the NES
- > Entitled to notice at end of employment

# Other casual conversion entitlements

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- Entitlement to casual conversion may also arise under an Award or Enterprise Agreement
- NES does not override Award or Agreement provisions that are more generous to employees than those in the NES

# What to do during the transition period

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- > Identify all existing casual employees employed before 27 March 2021
- > Assess those employees for eligibility
- > Provide each employee with a written notice of the outcome
- > Provide the CEIS to all remaining casual employees and any new casual employees

# Vaccination of staff





# Mandatory COVID-19 vaccinations

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- > Aged care workers (from 17 September)
- > Quarantine front line workers (QLD, NSW, WA, SA)
- > Airport workers (NSW)
- > Health service employees and contractors (QLD)
- > Ambulance service employees (QLD)
- > Health care workers (NSW)
  - > First dose by September 30, second by November 30

# Can we require staff to get vaccinated?

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- > COVID-19 vaccinations are not mandatory (today) in any other sectors
- > However, employers can still require vaccination if:
  - > The requirement is permitted by an enterprise agreement, employment contract or other registered agreement, and/or
  - > The employer gives an employee a lawful and reasonable direction to be vaccinated
- > The Qantas approach

# Implementing a vaccine requirement

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- > Consult with staff about implementation
- > Consider a process for managing refusals
- > Equip staff with the knowledge they need to get vaccinated
- > Consider flexible leave to get vaccinated or recover from side-effects

# Refusal to get vaccinated

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- > Ask the employee for their reasons for refusal
  - > eg. Protected attribute under discrimination law
- > Consider whether there are any alternatives to vaccination (eg. alternate work arrangements)
- > Ability to take disciplinary action depends on the facts and circumstances, including:
  - > Workplace policy
  - > Applicable legislation, Enterprise Agreement or Award
  - > Fairness

# Requiring evidence of vaccination status

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- > Employer can require evidence if direction is lawful and reasonable
- > As a general rule, employee consent is required unless collection is authorised by law
  - > Mandatory reporting requirements exist in the Aged Care sector
- > Have regard to privacy obligations
- > Communicate reason for collecting evidence

**Wrap up and questions**



# Contacts

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**Anthony Massaro**

Principal

P: +61 3 9609 1501

E: [amassaro@rk.com.au](mailto:amassaro@rk.com.au)



**Morgan Smithe**

Lawyer

P: +61 3 9609 1529

E: [msmithe@rk.com.au](mailto:msmithe@rk.com.au)



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Russell Kennedy Pty Ltd  
info@rk.com.au  
russellkennedy.com.au

**Melbourne**

Level 12, 469 La Trobe Street  
Melbourne VIC 3000  
PO Box 5146  
Melbourne VIC 3001 DX 494 Melbourne  
**T** +61 3 9609 1555 **F** +61 3 9609 1600

**Sydney**

Level 6, 75 Elizabeth Street  
Sydney NSW 2000  
Postal GPO Box 1520  
Sydney NSW 2001  
**T** +61 2 8987 0000 **F** +61 2 8987 0077

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