



WHERE TO IN THE WAKE OF #MeToo?

Alexandra Grayson | 18 September 2018 | Newcastle

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Our History

Since our foundation by Maurice Blackburn in 1919, we have proudly built our business believing that we can make a genuine difference in the lives of those who need our help.

As Australia's leading social justice law firm we believe that the law should serve everyone, not just those who can afford it.

My main focus this year is on improving the rights of victims of sexual harassment and promoting cultural change from within organisations (by ensuring better accountability and visibility).

Our Services

- **Employment & Industrial Law**
- **WorkCover**
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- **Comcare**
- **Will Disputes**
- **Abuse Law**
- **Military**
- **Aviation**

Overview

- **Choice of jurisdiction**
- **Meaning of sexual harassment**
- **Time limits**
- **Procedures for bringing a claim**
- **Remedies and damages**

INTRODUCTION – APPLICABLE LAWS

Federal discrimination laws:

Racial Discrimination Act 1975 (Cth);
Sex Discrimination Act 1984 (Cth);
Disability Discrimination Act 1992 (Cth);
Age Discrimination Act 2004 (Cth);
Australian Human Rights Commission Act 1986 (Cth).

State based discrimination laws:

Queensland - *Anti-discrimination Act 1991*;
Victoria – *Equal Opportunity Act 2010*;
New South Wales – *Anti-discrimination Act 1977* (**Focus for today**);
South Australia – *Equal Opportunity Act 2010*;
Western Australia – *Equal Opportunity Act 1984*;
Australian Capital Territory – *Discrimination Act 1991*;
Northern Territory – *Anti-discrimination Act 1992*;

General protections and unlawful termination: *Fair Work Act 2009 (Cth)*

Sex Discrimination Act

The *Sex Discrimination Act 1984* makes it unlawful to discriminate against a person based on a number of attributes:

- **Sex – Section 5;**
- **Sexual orientation – Section 5A (added 1 August 2013);**
- **Gender identity – Section 5B (added 1 August 2013);**
- **Intersex status – Section 5C (added 1 August 2013);**
- **Marital or relationship status – Section 6;**
- **Pregnancy or potential pregnancy – Section 7;**
- **Breastfeeding – Section 7AA (added 12 November 2003); and**
- **Family or carer's responsibilities – Section 7A.**

Sexual Harassment

Section 28A of the *Sex Discrimination Act 1984* (Cth)

1. Conduct of a sexual nature;
 2. Includes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed;
 3. In circumstance where a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated;
- Need to have regards to all the circumstances.
 - **Conduct of a sexual nature** includes make a statement of a sexual nature to a person, or in the presence of a person, whether the statement is made orally or in writing.
 - **Unwelcome conduct** test as to whether conduct is unwelcome focuses on employee to whom conduct is directed.

Reasonable person test

- **Section 28A –**
- **When considering whether an act will meet the definition of sexual harassment you must ascertain whether a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated**
- **This involves an objective consideration of what a reasonable person would have anticipated in all of the circumstances.**
- **The perpetrator's expectation of the reaction of the person harassed, is not relevant. - Ponitowska at [289]**
- **All relevant circumstances should be taken into account when applying this test**

Sexual Harassment

Examples

- Staring or leering;
- Unnecessary familiarity – e.g. deliberately brushing up against or unwelcome touching;
- Suggestive comments or jokes;
- Insults or taunts of a sexual nature;
- Intrusive questions or statements about private life;
- Displaying posters, magazines or screensavers of a sexual nature;
- Sending sexually explicit emails or text messages;
- Inappropriate advances on social networking sites.
- Accessing sexually explicit internet sites
- Requests for sex or repeated unwanted requests to go out on dates
- Behaviour that may also be considered to be an offence under criminal law such as physical assault, indecent exposure, sexual assault, stalking or obscene communications

Sexual Harassment

Conduct of a Sexual Nature

- ***San v Dirluck Pty Ltd* (2005) 222 ALR 91**
 - An employee was subjected to sexual banter when she was asked repeatedly by a fellow employee 'how's your love life' and subjected to other comments such as about her boyfriend and his sexual prowess
- ***Employment Services Australia Pty Ltd v Poniatowska* [2010] FCAFC 92**
 - Employee received sexually explicit email's, text messages and phone calls from a colleague containing requests for sexual relation
- ***Noble v Baldwin* [2011] FMCA 283**
 - An employee was sexually harassed by a co-worker looking frequently at her breasts, making advances and related comments about her breasts
- ***Lee v Smith* [2007] FMCA 59**
 - An employee was subjected to repeated requests for sexual favours, exposed to a pornographic calendar and computer images, sexually assaulted by a co-worker after a work dinner and later victimised by managers and co-workers after making a complaint

Jurisdiction

Australian Human Rights Commission

- **Make complaint to the Australian Human Rights Commission (AHRC) (Section 46P);**
 - Complaint should be made within 6 months of the discrimination taking place;
 - Outside 6 months, AHRC can decline to consider the complaint (Section 46PH);
 - No requirement to serve complaint on Respondent;
 - A trade union can make complaint on behalf of one or more persons (Section 46P);
 - Commission can accept whole or part of a complaint;
- **President can decide to conduct a compulsory conference between the parties**

Jurisdiction

Australian Human Rights Commission

- **Compulsory Conferences**
 - Three hours duration;
 - Compulsory conferences private;
 - Parties not represented unless presiding member consents (in practise, consent is usually given);
 - Applicant provides submissions;
 - Commission does not always request a response from the Respondent;
 - Parties may agree to settle on a 'without admission of liability' basis.

Remedies

Upon making an application to the Federal Court or Federal Circuit Court under the AHRC Act, the Court may make 'any orders it thinks fit': Section 46PO(4).

Orders the Court can make include:

- **Financial compensation:**
 - Order to pay damages > compensation for any loss or damage suffered because conduct
 - Damages for future and past economic loss (e.g. earning capacity). Must be sufficient nexus;
 - General damages, and exemplary or aggravated damages.
- **Non-financial compensation**
 - Declaration and direction not to repeat;
 - Employ or re-employ;
 - Vary the termination of a contract or agreement to redress any loss or damage suffered by an Applicant;
- **Court may also order an interim injunction, pending outcome of proceedings**
- **Costs may be awarded**

Damages

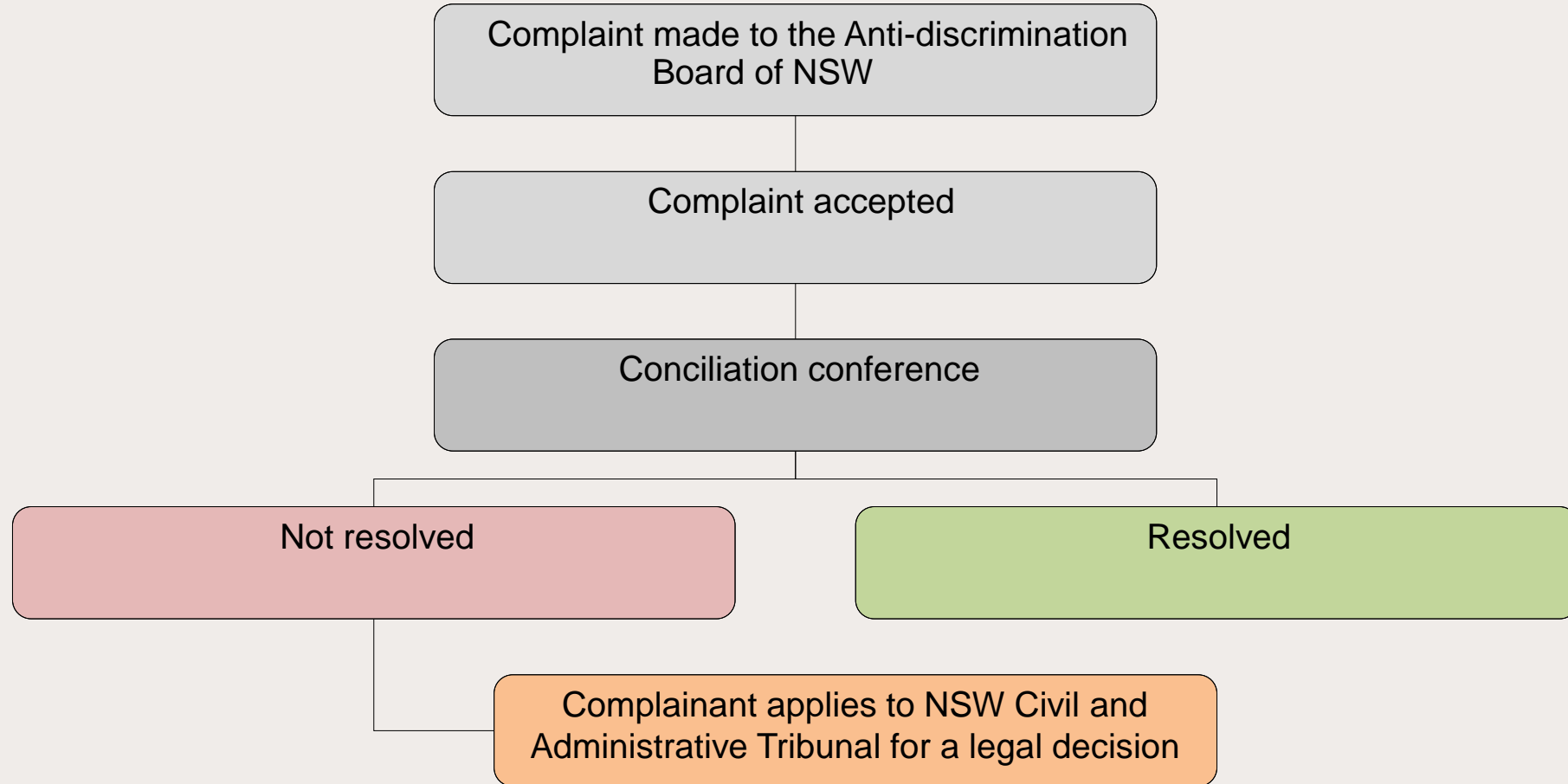
- **Economic Loss**
 - Past and future loss;
 - Expense, or loss of income because of unlawful conduct where it is capable of reasonable precise mathematical calculation.
- **Non-economic loss**
 - Compensation for hurt, humiliation and distress;
 - Not capable of reasonable precise mathematical calculation.
- **Aggravated damages**
 - Compensatory, awarded where conduct particularly egregious and insulting
- **Exemplary damages**
 - In addition to general, aimed at punishing respondent

Costs

- **No specific provisions about costs in federal discrimination matters**
- **Usual position applies > costs awarded against unsuccessful party**
- **Costs risk to initiating proceedings in the federal jurisdiction**

Jurisdiction- *Anti-discrimination Act 1977*

Anti-Discrimination Board (NSW)



Jurisdiction

Anti-Discrimination Board (NSW)

Making complaint – sections 87A-C

Complaint can be made to the Anti-Discrimination Board by a person or an agent for the person (which can include a union). A complaint may allege more than one contravention.

Time limit – Section 89B

Complaint must be made within 1 year of the alleged contravention. The Board has discretion to accept a complaint after 1 year has expired

Jurisdiction

Anti-Discrimination Board (NSW)

The Commissioner may direct a person to take part in a conciliation conference.

It is a civil penalty contravention not to comply with a notice to attend (section 91A(3))

Applying to the Court – section 93A-C

If a conference has been held and the complaint has not been resolved, the complainant may give the Commissioner notice requiring the Commissioner to refer the complaint to the NSW Civil and Administrative Tribunal (NCAT) .

Can also request referral if the Commissioner has not finished dealing with complaint within 18 months after it was made or within 21 days of receiving a notice that the complaint had been declined or settled.

NCAT may allow the complaint to be amended (section 103).

Remedies

Interim orders – section 105

- The President, complainant or respondent may apply to NCAT to make an interim order to do any of the following:
 - (a) preserve the status quo between the parties to the complaint;
 - (b) to preserve the rights of the parties to the complaint; or
 - (c) to return the parties to the complaint to the circumstances they were in before the contravention of the Act alleged in the complaint occurred, pending determination of the matter the subject of the complaint.

McIntyre v Hastings Deering (Australia) Ltd & Anor [2012] QCAT 438

- A person who had made a complaint to the ADCQ alleging discrimination on the basis of family responsibilities by her employer proposing to change her work hours/arrangements, applied to the tribunal for orders to stop the changes pending the outcome of her complaint.
- The tribunal decided that the financial impact of denying the interim relief should prevail over the effects the employer could suffer if it is granted.

Remedies

If the complaint is found to be substantiated in whole or in part, NCAT can make a variety of orders under section 108 of the AD Act -

- an order requiring the respondent to pay to the complainant damages not exceeding \$100,000 as compensation for loss or damage caused by the respondent's conduct;
- an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by the Act;
- Order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;
- order the respondent to publish an apology or a retraction (or both) in respect of the matter the subject of the complaint and, as part of the order, give directions concerning the time, form, extent and manner of publication of the apology or retraction (or both);

Remedies

- in respect of a vilification complaint, order the respondent to develop and implement a program or policy aimed at eliminating unlawful discrimination
- make an order declaring void in whole or in part and either ab initio or from such time as is specified in the order any contract or agreement made in contravention of the Act;
- decline to take any further action in the matter.

Orders and powers of NCAT

- Can extend to conduct of the respondent that affects persons other than the complainant if NCAT considers that such extension is appropriate
- Where a complaint is lodged by a representative body, the power of NCAT to award damages is a power to award damages to the people on behalf of whom the complaint is made, and is not a power to award damages to the representative body

Remedies

Remedies

- The Court can also make pecuniary penalty orders under section 546.

Stephens v Australian Postal Corporation (No.3) [2011] FMCA 999 - Penalty for contraventions involving unlawful termination of employment – termination because of disability and workers' compensation rights penalty of \$25,000 imposed.

Sayed v Construction, Forestry, Mining and Energy Union [2015] FCA 338 – re adverse action based on political opinion, Applicant only awarded \$3,000 in compensation for hurt and humiliation however based on seriousness of contraventions on basis of political opinion to be subject to strong disapproval total penalties of \$45,000 imposed.

- Penalties are often paid to the person prosecuting the case or to the Union.
- Note: this case could not be run in NSW as a general protections case – it would need to be run under the unlawful termination provisions of the Fair Work Act.

Summary

	Federal Discrimination	State Discrimination (NSW)	General Protections	Unlawful termination
Initial complaint/application to be made to...	Australian Human Rights Commission	NSW Anti-Discrimination Board	Fair Work Commission or can be made straight to FCA or FCC if non-dismissal	Fair Work Commission
Time limit to lodge initial complaint	6 months from the date ...	12 months from the date	21 days for dismissal or 6 years from conduct for non-dismissal	21 days from date of dismissal
Conference	Compulsory conciliation conference	Compulsory conciliation conference	Dismissal – compulsory Non-dismissal – if parties agree	Compulsory conciliation conference
Can individuals be represented by another person at the conference?	Only by consent although not usually opposed	Only with permission although not usually opposed	Only with permission although not usually opposed	Only with permission although not usually opposed
Time limit to apply to Court?	If a complaint is terminated can apply to the Federal Court or Federal Circuit Court. Must apply within 60 days.	Can request a referral to NSW CAT within 21 days of decision of Anti-Discrimination Board, or if matter remains unresolved after 18 months or by consent	Dismissal matters - Can apply to FCC or FCA within 14 days of the issuing of a certificate by the FWC. Non-dismissal – no certificate usual 6 years applies.	Can apply to FCC or FCA within 14 days of the issuing of a certificate by the FWC.

Summary

Which jurisdiction is best?

	Federal Discrimination	State Discrimination (NSW)	General Protections	Unlawful termination
Time limit	12 months from the date of conduct	12 months from the date of conduct	21 days for dismissal or 6 years from conduct for non-dismissal	21 days from date of dismissal
Coverage	All employees (exc state and local government and charities etc)	All NSW employees	All national system employees	All non-national system employees e.g. state and local government employees in NSW
Damages	Special damages covering economic losses, general damages and exemplary or aggravated damages, and other non-financial compensation.	Damages capped at \$100,000	No cap on compensation – amounts for economic loss and non-economic loss (hurt humiliation and distress)	No cap on compensation – amounts for economic loss and non-economic loss (hurt humiliation and distress)
Other remedies	Interim injunctions; Declaration and direction not to repeat; Redress for any loss or damage; Employ or re-employ; varying the termination of a contract or agreement to redress any loss or damage suffered by an applicant	Interim orders; orders preventing continuing unlawful conduct; orders to perform any reasonable act to redress loss or damage; orders to publish an apology or retraction and directions regarding this	Reinstatement, injunctions and interim injunctions, orders to maintain the continuity of the person's employment and orders to maintain the period of the person's continuous service with the employer, pecuniary penalty orders	Reinstatement, injunctions and interim injunctions, orders to maintain the continuity of the person's employment and orders to maintain the period of the person's continuous service with the employer, pecuniary penalty orders
Protected Attribute/s	Race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, breastfeeding, national extraction or social origin	Race, sex, transgender, marital or domestic status, disability, responsibilities as a carer, homosexuality, age,	Race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (but only to the extent that the attribute is covered by a federal or state anti-discrimination law)	Race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (applies regardless of whether the attribute is covered by federal or state anti-discrimination law)
Costs	Costs jurisdiction	Parties bear their own costs unless there are special circumstances	Parties bear their own costs unless proceedings are instituted vexatiously etc..	Parties bear their own costs unless proceedings are instituted vexatiously etc..



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