

## **The Agenda podcast by Lewis Silkin: New duty to prevent sexual harassment: are employers doing enough?**

**Abi Frederick:**

Hello, everyone. Thanks for joining us and welcome. You're listening to a podcast from the employment team at Lewis Silkin. I'm Abi Frederick and I'm joined today by my colleague, James Walters.

**James Walters:**

Thanks Abi and hello everyone. It's good to be here and I'm looking forward to this as we're to be talking about something that's sure to be at the top of everyone's to-do list for the autumn.

**Abi Frederick:**

That's right. So today's podcast is all about the new duty and it comes in from the 26th of October this year to prevent sexual harassment. The Equality and Human Rights Commission recently published some draft updated guidance on how to comply with the new duty, but there is some consultation ongoing and we're expecting a final version next month. It seems like we've been talking about this for ages actually, as it comes from some recommendations that were made back in 2018, but it is finally about to happen.

**James Walters:**

Yeah, it does feel like it's taken ages to get here. So today we'll be looking at what preventing sexual harassment actually looks like in practice, how to create a speak up culture and how much of a business risk this really is. We're also going to have some insights from Australia where they've had a similar duty since December. Sarah Clarke, a lawyer practicing in Australia, spoke about this at our international conference earlier this year. And we'll be hearing some key things that she had to say about it then.

**Abi Frederick:**

OK, so how about we start with what prevention actually means? So the duty is to take reasonable steps to prevent sexual harassment. So employers have to act before anything happens. What are your thoughts on that?

**James Walters:**

Well, yes, that's right. It's about actually doing something to prevent the problem in the first place. Now, that's easy to say, but doing it is quite hard. And what's really important is that there's no one thing that can be done to prepare for this. Businesses need to roll out a whole host of things, it's partly about effective training and raising awareness, partly about policies, and it's also partly about risk assessment and by that, mean understanding where the risks are in your business and then taking action to address them. It can't just be a desk-based exercise, you've got to actually speak to your people, find out where the risk areas are, and take steps to address them. Thinking for a moment then about what's happened in Australia, it seems that the new law has driven a focus on risk assessment and there's been engagement at leadership level in a way that's not really been seen before. Sarah had some interesting observations about this, so let's hear from her now.

**Sarah Clarke:**

I think perhaps to start with it what is significantly different is the engagement of leadership, this has been profound; in my experiences Boards and Executive Leaders are now really engaged, when I go and do training for those cohorts it's a very different discussion to what it was three or four years ago. They are

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much more engaged, have much more input into their organisation's considerations of these risks and mitigation measures than implemented. I think fundamentally there is an integration of these issues into existing Governor's frameworks so that there is proper accountability for identified risks and the steps in place to address them. Secondly, we've seen the development of cross-functional teams or project teams who have been put in place to identify gender place harms and these kinds of risks across organisations and really looking at them holistically. So there has definitely been a move away from siloed approaches for example where you generally have a HR or a safety team looking at these matters or indeed not looking at them at all, whereas there are now these cross-functional teams that really get to the heart of some of these issues in an organisation. Thirdly, from that project team is the development of the risk assessment, this is a really big shift in space; as many of the audience will know of a safety based risk assessment which looks at physical harms within a workplace, we're now seeing the development of a very detailed risk assessment based around the gender based harms, looking at the likelihood of those harms occurring within a workplace, and then looking at the appropriate mitigation measures to be put in place. These are incredibly powerful tools and, in my experience, have really sharpened the focus of organisations to look at within their workplace and I think I would finally say, a close examination of the complaints process and the fairness and appropriateness of dealing with really sensitive matters. The commission has really highlighted in its reports and its guidance material, the importance of the complaint's materials being really person-centered and really carefully managed how important that is in fostering trust in your people that they will be treated fairly and sensitively should they choose to speak out about a matter within their workplace.

**Abi Frederick:**

I think what Sarah says is really interesting and I can definitely see this additional engagement being a trend which turns up in the UK too. Just listening to that, I've got a couple of thoughts. One is that it's always important to have engagement of leadership for successful diversity and inclusion initiatives and that can be difficult to achieve. Certainly when I've been dealing with clients, I've come across reports of kind of skepticism or impatience from senior management on this but it sounds as if the new duty in Australia has really focused people's minds. Without wishing to be cynical, the threat of some sort of financial penalty or an investigation can often do that quite effectively. Secondly, I think the use of risk assessments in relation to sexual harassment is quite interesting. has quite a different health and safety environment, so they're very commonly used there but they haven't been used quite so much here. Might this change? I think it could do. It's quite a practical and not overly complicated way to be proactive about preventing sexual harassment rather than reactive. EHRC guidance does already refer to risk assessments, but there may be more focus now that we've got the new duty, and we actually have to show that we're taking steps to prevent the harassment.

**James Walters:**

Yeah, that's right. Well, my view is that risk assessments are going to become a really big thing. I'd be really surprised if we don't see almost all employers using them. It's interesting because I don't think that many employers are doing this at the moment, even in areas like retail and hospitality, where employees interact with the public so employers don't have as much control. And so there's a greater risk of sexual harassment. The biggest focus area though we're hearing about from clients is training for staff and we're being asked to do a lot of that. What we're doing ranges from new full -blown anti -harassment training courses where nothing has been done before with an emphasis on covering off the duty to prevent sexual harassment to shorter courses focused on sexual harassment where an employer's already got training programs in place. One tricky question is whether to focus efforts on just sexual harassment or widen it to cover other types of harassment too. And there's not an easy answer to that.

I can see how some employers might want to be trying to achieve a gold standard and so try to cover everything, but it's obvious here that a single generic diversity and inclusion training is unlikely to do the job. There needs to be a focus on sexual harassment specifically. And so for employers who try to cover

everything, there's a real risk their training doesn't actually help to mitigate the specific risk of sexual harassment at all. I think what we can really say here is that training needs to be situational based on examples from your own workplace, doing that's going to ensure that it's relevant and brings issues to life for your people and it will help them to remember what they've been told. I'm sure we've all been in training where we switched off within minutes and might as well have not been there. You can't afford for that to happen with this type of training, and you need to consider different types of courses for different audiences. Managers need to know how to handle complaints and employees need to know generally what harassment means. So as a minimum, I'd recommend general awareness training and speak up training for all staff and more detailed training for managers and leaders on how to spot and deal with issues.

**Abi Frederick:**

Yeah, I think that's I think that the point you make about focusing on just sexual harassment or not is quite an interesting one. I've definitely had scenarios in the past with clients where they've decided to focus on a particular strand of diversity and there have been criticisms from other groups that other people have been forgotten. So I think that is quite an interesting one. And the point about the different training for different levels of staff, that brings us back again to the importance of leadership in all this and the different standards that might be expected. Again, Sarah Clark has had some thoughts on this, which she shared based around the leadership standard that has been set by Australia's Human Rights Commission. So we'll just have a listen to what she says.

**Sarah Clarke:**

So perhaps to give you a real example of what this might look like, if we were to look at the Leadership standard for example, the commission really clearly sets out in the guidance material that in order for cultural change to happen in an organisation, people in positions of leadership are absolutely vital to setting the tone and modelling expected standards of behaviour and the kind of things they are looking for, is a clear understanding from leaders for their obligations under the key legislation and to have up to date knowledge about unlawful conduct and have very tailored leadership training and evidence of this occurring, endeavours to keep leaders abreast of developments is absolutely critical according to the commission so that might look like quarterly updates to executive level people or even the Board. Ensuring that appropriate measures for prevention and response to relevant unlawful conduct are developed and the commission talks about the development and response plan which is underpinned by a comprehensive risk assessment of gender based harms within an organisation and leaders being very visible in their commitment to safe, respectful and inclusive workplaces.

**James Walters:**

So it sounds like leaders in Australia are taking it all very seriously, but that's not entirely surprising, is it, if there's an increased risk to the business? So let's look now at how much of a business risk there really is here. The first thing to say is that sadly, there's obviously still a lot of sexual harassment out there. I mean, to be honest, sometimes I think it's worse than pre -COVID is some people just seem to have completely forgotten how to behave at work. In a nutshell though, all organisations are at risk if they don't comply with the new duty. That said, and this is in no way meant to downplay how seriously businesses should be treating this, but purely legal risks are limited. For example, in an employment tribunal, A successful sexual harassment claim is required before any legal penalty and that penalty is up to a 25 % increase to harassment compensation. So it's not draconian and it's not a huge stick to beat businesses with to get them to engage. But EHRC involvement may be more significant.

**Abi Frederick:**

Yeah, that's right, James so I think the EHRC will be taking a keen interest in this. So it does have various powers to enforce the duty to prevent sexual harassment. So that includes investigation of potential breaches, serving notices, requiring employers to take specific steps, and even having the employer enter

into a binding agreement to take certain steps. And at the most extreme end, they could issue an injunction against an employer to restrain them from certain acts. All of that said, like many government bodies, the commission has only limited resources. So they may only focus on some types of employers based on sector or size. But I think general public awareness may prompt more complaints directly to the EHRC, and that's going to be difficult and a pain for employers to deal with. One further point, and perhaps one of those other points which will focus the mind of leaders and managers in the business, there is the possibility for enhanced media scrutiny and reputational risk arising from EHRC enforcement or investigation action the very duty to prevent sexual harassment will increase the focus on this even more than has been caused by the #MeToo movement. And we might start seeing questions, for example, in tenders about what a business does to prevent sexual harassment in the same way as we currently see questions, more general questions on diversity.

**James Walters:**

Okay, I agree. And I think that brings us to a good moment to look at the EHRC draft updated guidance in more detail. Now there's a new section on what it calls the preventative duties, so clearly signposting the preventative aspect of this, if we haven't hammered home that enough already. And there's a striking amount of focus being placed on third party harassment. In fact, two out of three of the new examples are actually focusing on that area. Employees can't currently make a claim in the employment tribunal for harassment by third parties except obviously in some rare circumstances where the employer is directly at fault. So while there's no legal teeth to deal with this, the draft guidance shows that the EHRC clearly intends to enforce it. I suppose that brings the issues of reputation or damage that you were just talking about, Abi, of really to the fore on that. What's all of this going to mean in practice? Well, it's difficult for employers, obviously, to control the behavior of their own employees, let alone the behavior of third parties. So I think the particular risk areas are where employees are dealing with customers and members of the public more generally. So employers who operate shops, restaurants, sporting venues, basically anywhere that's open to the public are going to be more at risk. And you can't train third parties who you don't employ. You can use signage, but is that going to put people off? It's not great if the first thing you met with when you enter a shop is a warning not to sexually harass staff. Commercial contracts can be amended to help a little by including express requirements where employees are working with employees from another company that's going to go some way to discharging your responsibilities under the duty. Also being more robust and not tolerating inappropriate behavior, even from very important clients or customers will also be good evidence of an employer discharging the duty. Ultimately though, is it realistic to think that you can actually stop this kind of behavior happening?

**Abi Frederick:**

Yeah, the third party angle is really tricky, isn't it? I can see that where you've got formal commercial arrangements and you've got parties working together, so employees of two different companies working together, there's going to be more focus in commercial contracts. So that each party has to train their own employees and put in steps to make sure their own employees don't harass the employees of the other of the other party. But ultimately, will people who are inclined to act inappropriately and I suppose this goes for an organisation's own employees, are they going to modify their behaviour based on clauses in a commercial contract or training? It's really hard to say. I think the most important thing for the employer is that they have taken reasonable steps to prevent it. And I think one important aspect obviously is to make sure that employees feel safe to report any incidents to their employer. So at least they can then try to stop the same thing from happening again. We hear quite a lot about a speak up culture, trying to foster that speak up culture. But I mean, what does that really mean and how do we create one? Again, leadership is important in showing that the employer is generally committed to supporting the employees. There need to be multiple channels for reporting concerns. example, apps, employee resource groups, trained guardians, and employers need to not be too restrictive about reporting. So, for example, an employer can't insist that a

particular form is filled out. And if employees are sort of worried or having trouble making the report, then the employer needs to ensure that assistance is available to help put together that complaint if needed.

One idea that a number of our clients have been talking to us about is the use of staff surveys to find out if there are any problems and to help them decide what prevention steps are needed. Again, this is something actually already covered in the EHRC guidance. The surveys can be anonymous and, you know, we think it's a good idea not just to ask about incidents that people have actually experienced or seen happening, but also about the extent to which they feel confident in speaking up and reporting their concerns. And if they don't, what is it that stops them from doing that? So, you know, to a certain extent, having the survey is actually in itself a powerful way to encourage people to speak up as well as, you know, a means of gathering useful information. I mean, if any organisation really wants to push the boat out on this kind of thing and do all it can, I can see this being catalyst for a full sort of cultural workplace audit, which incidentally, we can also help.

**James Walters:**

Yeah, I think that's right. I mean, I the best way to get information about what is really going on is to speak to your people. Obviously, though, in a way that makes them feel safe to speak up. And so it's one area where I've sort of seen issues recently is in exit interviews, which many employers have with employees when they leave. It's often used as a good way to gather information about what's going well, what's not going so well. But the problem at that point, I think, in regards to the to the duty that we're talking about is that we're reporting what's already happened and at that point it's too late. And it is often going to be, you know, a prelude to a grievance being raised and you're dealing with a grievance that's being raised as somebody's leaving the business, which is a headache as I'm sure we all know. It's better to ask regularly during employment so that when issues come up, they can be dealt with as they come up. I think at the point that someone's leaving, I think that ship has sailed.

**Abi Frederick:**

Yeah, definitely. That's a really good point. Complaints raised on exit can be very tricky to deal with.

Well, I think we're nearly out of time on this. So I just wanted to finish with a quick look at what might come up in the future. So we still don't know a vast amount of detail about Labour's proposed employment reforms, but we understand that they are intending to raise the bar again to all reasonable steps to prevent harassment. Some of you might remember that was the original proposal for the current duty, but it was watered down. Query whether that will make much of a difference in practice you know, arguably it's always possible to say that not all steps have been taken. So let's see what happens there. Labour has also said they plan to reintroduce liability for third party harassment. So as James mentioned, that's not currently a legal duty. But again, as he said, there's a lot of focus on it in the guidance. If this does happen, there'll also be a corresponding uplift for successful third party harassment claims if the duty to prevent the third party harassment hasn't been complied with.

**James Walters:**

Yeah, we'll of course keep you posted on our website when we have the final EHRC guidance and any other developments. I'm sure if you're signed up to our emails, you'll get those dropping into your inboxes as well. Continuing the diversity and inclusion theme, we'll have another podcast coming out in September on Neurodiversity. So do look out for that one coming soon. And thanks very much, everyone, for joining us today.

**Abi Frederick:**

Thanks for listening.

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