



The Work Couch

NAVIGATING TODAY'S TRICKY PEOPLE CHALLENGES TO
CREATE TOMORROW'S SUSTAINABLE WORKPLACES

Episode 4 – Sexual harassment in a post #MeToo era (Part 1) with Kelly Thomson and Aaron Goonrey

Ellie Hi and welcome to the Work Couch Podcast. Your fortnightly deep dive into all things employment. Brought to you by the award-winning Employment Team at Law Firm RPC we discuss the whole spectrum of employment Law with the emphasis firmly on people. Coming up in this episode in the first part of our podcast mini-series on sexual harassment in a post-#MeToo era we're going global and we're going to take a look at the differences and commonalities between the UK and Australian legal regimes on sexual harassment in the workplace. My name is Ellie Gelder, I'm a senior editor in the Employment Equality and Engagement Team here at RPC and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curve balls that it brings to businesses today. We hope by the end of the podcast you'll feel better prepared to respond to these people challenges in a practical, commercial and inclusive way. Today we're exploring the law on sexual harassment in a post-#MeToo era. It's just over five years since the hashtag #MeToo went viral but it's actually 16 years since the #MeToo movement which was originally established to provide support to survivors of sexual violence was founded in the US by Tarana Burke. Unfortunately, despite the far reaching impact of the #MeToo movement and increasing demand for change sexual harassment remains a serious issue in the workplace today. According to research undertaken by the Scottish TUC in 2022 45% of women have experienced sexual harassment at work while a third of women have experienced sexual harassment at work within the last year and a staggering 85% of women said that their report and experience was not taken seriously or dealt with appropriately. So as this is a global issue underpinned by various cultural and socioeconomic factors we thought we'd take a look at the law on sexual harassment in another part of the world, in fact the other side of the world, specifically Australia, to see how legal protection in the UK measures up in comparison. How is Australia legislating to ensure that there is adequate protection at work from sexual harassment and how does that compare to what the UK law provides in terms of legal redress and employer obligations? RPC is very proud to be a member of TerraLex, an invitation only network of top law firms around the world that connect with each other so their clients can benefit from a truly global service. One TerraLex firm that RPC works closely with is Australian firm Lander & Rogers and I'm delighted to be joined on the Work Couch today by Aaron Goonrey, partner at Lander & Rogers and our very own employment partner and ESG lead Kelly Thomson. Hi both, thank you for joining me today on the Work Couch. It's quarter past eight UK time for Kelly and I and I think quarter past seven or thereabouts for you Aaron?

Kelly Hi Ellie.

Aaron Alright.

Kelly I haven't had a coffee yet and I'm assuming Aaron's had about 15 by this point if he's anything like me.

Ellie Thank you so much for joining me today at opposite ends of the day. Aaron can I just start by asking you what is the legal definition of sexual harassment in Australian employment law?

Aaron Yeah. It's I assume very similar to the UK. The Sex Discrimination Act and the Fair Work Act which are the two principal pieces of legislation in relation to both sexual harassment in the workplace and also in regards to the Fair Work Act which regulates many employment terms and conditions. They define sexual harassment as when a person makes an unwelcome sexual advance, an unwelcome request for sexual favours or engages in other unwelcome conduct of a sexual nature in relation to a person. This occurs in circumstances where it is possible that the person harassed would be offended, humiliated or intimidated.

Ellie Okay. So Kelly how does that compare to the definition here in the UK that's the one contained in the Equality Act 2010?

Kelly	Yeah it's actually very similar as Aaron said there are some kind of subtle differences but the way it's defined in the Equality Act and it's Section 26 if you're that way inclined, it's where a person engages in unwanted conduct of a sexual nature so very similar to the Australian position I think and that conduct has either the purpose or the effect so that "or the effect" is quite important because it doesn't require an intention to harass, yeah is it similar in Australia Aaron?
Aaron	Intent, we don't regard intent.
Kelly	Yeah that's interesting. So it's either the purpose or the effect of violating another person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person. So very similar. The other bit that the Equality Act provides for in terms of a sort of extended definition I suppose around sexual harassment is where somebody rejects or submits to harassment and then is treated less favourably as a result of that so essentially you know if somebody was kind of moved departments or dismissed or anything like that as a result of having rejected advances or submitted to advances that's sort of specifically, if I can put my teeth in, called out as well.
Ellie	So interesting that both focus on the effects on the alleged victim rather than any intent by the alleged harasser. And sexual harassment isn't always going to be at the workplace even if it is related to work so it could be at a work party or it could be online and we saw online sexual harassment hit an all time high during lockdown here in the UK which arose out of the increase from working from home. So Kelly tell us a bit about the online perspective.
Kelly	Yeah and I think it's, it's that point about the pandemic sort of exacerbating or kind of emphasising the fact that the workplace more and more extends beyond bricks and mortar walls and even for those who work in a sort of traditional kind of office role. The ways in which employees use social media, messaging apps you know networking sites, emails etc they're all very relevant to this issue and to the legal risk as well as the, the sort of personal risk. The Fawcett Society in the UK at the end of 2021 published a report that was around tackling sexual harassment in the workplace and they found that it was about 45% of women that they'd surveyed, they'd only looked at women's experience, 45% had experienced harassment online through sexual messages, cyber harassment, sexual calls and almost a quarter of those who'd been sexually harassed said that that had increased or escalated since the start of the pandemic while they were working from home so its own epidemic within an epidemic if I can put it like that but I'd be really interested you mentioned Ellie around the sort of parties piece of the jigsaw and I'd be really interested in Aaron's experience on that because certainly for me the vast majority of cases I've seen from a sexual harassment perspective have involved alcohol and some sort of social event.
Ellie	Yeah. Aaron tell us about how you come across it in your line of work defending these kinds of claim, are they often cropping up in terms of like Kelly said work parties where alcohol's involved.
Aaron	We have a similar issue in Australia in terms of the workplace is beyond the bricks and mortar. It's beyond the four walls of an office or an office environment and we've had it for some time where and there are a number of cases about it and invariably it does involve alcohol and I'm sure you're the same Kelly but please correct me if I'm wrong, one of our busiest times of year is the festive season. And it's pretty much party season here in Australia. It's gotten earlier as well in terms of, when companies are having these events and it tends to start in around November when companies are having them. And invariably we are finding that there are a lot of complaints at those events and particularly during the pandemic because we had a number of lockdowns and then things would be lifted and then you'd have another lockdown and then things would be lifted and I think that created a bit of a melting pot in terms of aberrant behaviour with people who in many cases forgot about the respect that one should show to others in the workplace because they had been locked down and then they had invariably conducted themselves in an inappropriate way at a party.
Ellie	Yeah it's almost like a perfect storm for sexual harassment to take place. Aaron what would you say to those who might say that harassment protection has actually gone too far and the fact is actually good old banter at work just isn't allowed anymore? How do you advise clients to respond to that point of view that invariably must come up?
Aaron	It does depend on what the banter is. It's such an interesting subject because to me banter may be amusing and to someone else it may be something completely different particularly when you're talking in a sexual harassment way about innuendo and, or inappropriate jokes and in terms of that amusement factor where you have a group of people and there are these cases that I'm aware of in the UK where you have cases where people argue it as a defence and you know it's just banter. In Australia particularly when the banter is of a sexual nature or sexist in

	nature it's, it is probably considered unforgivable particularly given the reforms that we've had in this country in relation to sexual harassment and misconduct.
Ellie	Yeah that's really interesting. We'll talk about that in a moment the legal developments that have taken place in Australia and Kelly I'd also be interested to hear your view on this one as I know the team is often called on to roll out anti-harassment training to a range of clients and we do sometimes hear people ask don't we, but what can I say at work because I'm worried about saying anything slightly jokey now.
Kelly	Yeah. I'd say a few things to that. I'd echo what Aaron said about you know the whole point of this really is kind of understanding that your perception of the world isn't, isn't necessarily everybody's and bringing that to your interactions with people. I think the first thing I would say and it's a sort of techy point but I'd say that the law certainly in the UK has a break built into it so we talked a little bit about it not needing to be intentional harassment to be unlawful but where it's a situation where harassment wasn't intended, offence wasn't intended but it had that effect then the law expressly sort of builds in this check and balance really to say well look was it reasonable to have that effect. So the law does not sort of stop you saying anything that's, that's a kind of misconception if I can put it like that. But I think I'd also make a couple of broader points. One is this isn't a question of I can't do this now versus I could do this then. It was never okay to harass somebody, period.
Ellie	Yeah.
Kelly	The fact it might have been more tolerated for years that's not a good thing. I think of it as more like some sort of dystopian past then, a kind of golden era that we should try to return to. And even from just a purely legal perspective the law we're talking about in the UK has been in place for a long time so it was always our obligation, this is just about understanding our obligation. But actually to be fair when people ask that question I don't, I don't think they tend to be sort of wistfully reminiscing about the times when they could, you know harass without impunity. I think it more, I think it more comes from a place of being sort of worried about being cancelled and I do think there's something in that, you know I say this as I would, Aaron and I, I think we both regard ourselves as DEI practitioners and I wouldn't pass blame to him but I certainly take, take some on behalf of that as a discipline because I think we've built a lot of this stuff and we've not necessarily brought people with us on the "journey" of kind of understanding this stuff. So if you're a white middle aged, middle class, straight able bodied man in a company yeah you're more likely to be very senior but you're probably less likely to have had any meaningful involvement in developing the company's sort of DEI strategy and I think that means you kind of feel, kind of feel left behind and like you don't know what your role is in it but we'd also say that's not an excuse to disengage, you know we've all got individual responsibilities to create inclusive environments and to Aaron's point to recognise that our experience and perception of the world is just that, it's not everyone's and try and kind of understand and close that empathy gap.
Ellie	Absolutely yeah empathy's key in the whole DEIB, big piece isn't it. So Aaron let's dive into the law now. Your team recently wrote a brilliant article on the substantial changes to the law on sexual harassment in Australia. Specifically the Anti-Discrimination And Human Rights Legislation Amendment (Respect at Work) Act 2022. I understand it's sort of referred to now as the Respect at Work Act. And so I understand it influenced a number of recommendations in the Respect at Work Report. That was released following the national enquiry into sexual harassment in Australian workplaces. And I think the use of that word respect is so interesting as it really goes back to the effect that someone's behaviour can have on someone else.
Aaron	Yeah, I agree. The report itself came out at the same time that the pandemic hit. So, had the pandemic not arrived at the time that it did I think it would have gotten a lot more fanfare. It's just regrettable that at the time that it was 2020 that the report was released, because it was ground-breaking in the sense that it was a world first enquiry in relation to workplaces that were investigated, and it was an enquiry that was led by the sex discrimination commissioner Kate Jenkins. And it really, it was quite profound in terms of its findings and off that report came certain reforms and most recently we have had significant changes with the Respect at Work Act which has introduced a number of different things and it's dawning I think on a lot of other people around the world that this is a world first in terms of what we are introducing and the way that we are looking at sexual harassment because sexual harassment I think previously was looked upon as being something that fell within the discrimination realm and now in Australia it is being looked at from a work health and safety perspective. It's putting a different optic in relation to how we look at sexual harassment and it is fascinating to see employers and employees engage on it from a work health and safety perspective as opposed to looking at it from an unlawful discrimination perspective because everyone has the right to go to the workplace in a safe and healthy way. And the other thing which I say to people, I actually find it remarkable as well, it's the first time that the law has actually specifically prohibited sexual harassment in the workplace. Prior to that it was considered unlawful but now it is actually actually prohibited by law.

Ellie	So that's a massive shift, really interesting how it is being approached as a health and safety matter and I guess its changing the view that employers have on it and perhaps that pushes it up the agenda now compared to if it belongs in the discrimination realm.
Aaron	Yeah. Well, in Australia the health and safety agenda item is very much at the top when you are delivering board papers, when they talk about health and safety, because there is director and officer liability associated with work health and safety breaches, so where you are talking about personal liability it tends to make its way up the top in terms of a broad agenda item. Now you talk about it in relation to sexual harassment, it has to be a number one, or at least up there, as a top one, two or three agenda item for boards to consider.
Ellie	Yeah. So that's very different from the UK isn't it Kelly.
Kelly	Yeah.
Ellie	Just to say we'll include a link on our podcast page to Aaron's team's resources, because you've got lots of detail on the Act's many provisions.
Aaron	Yes.
Ellie	One area I'd just like to pick up on is the fact that the Respect at Work Act imposes an obligation on employers to eliminate sexual harassment in respect of quite a broad category of workers so does that mean they have to prevent sexual harassment by third parties like customers or suppliers?
Aaron	Yes. You would have to take, because the standard now is where you are in control of our workplace then you are responsible for the work health and safety at that workplace. And that is in many jurisdictions within Australia. Work health and safety is not necessarily a national law. Each of the states and territories has their own laws about this but it is mostly uniform with the exception of a couple of jurisdictions. And in that regard when you talk about work health and safety and you talk about an employer, we refer to it as a person conducting a business or undertaking. So it's a very broad definition, it's not just an employer, it's whoever is in charge of that particular site or workplace, whatever it is.
Ellie	Right.
Aaron	They are responsible for the work health and safety of anyone who goes on that site. So, and we've spoken about this before, Kelly and Ellie, in terms of the customer who goes into a shop and may abuse the shop attendant. The employer or the person conducting a business or undertaking as we call them in Australia under work health and safety legislation would be responsible for the employee who has copped that abuse. And that therefore means that when you look at sexual harassment the "employer", using inverted commas on that, would be responsible for a third party coming in and acting in an inappropriate and sexually harassing way.
Ellie	And Kelly, in July 2021 the UK government also announced its intention to introduce a new duty on employers to prevent sexual harassment in the workplace and that included explicit protection against third party harassment in the workplace. And the UK government has since given its backing to a private members bill to bring that new duty into effect by actually changing the existing law, the Equality Act 2010. So, we're not at the same stage as Australia yet but despite our governments having very different political stances there are changes afoot here in the UK as well.
Kelly	Yeah, that's right. I mean it has been a very long time coming, it was back in 2018 that the UK government committed to consulting on a) a mandatory duty to prevent harassment; and b) on sort of strengthening protection against third-party harassment as you mentioned. I should also say we used to have legislation dealing with third-party harassment but it was repealed so we're kind of trying to get back to where we were before which sounds like the title of a song but anyway. So, the government then did run that consultation which closed in 2019, it wasn't reported on until 2020, I think something happened in the interim but I can't quite remember.
Kelly	So, it was back in 2021 that we had this commitment to introducing these duties quote "as soon as parliamentary time allows" unquote. So what we've got right now is a private members bill but it is backed by the government and by opposition as well. And essentially it would create new liabilities for employers because the employer would be at law treated as having harassed their employee if the employee is in the course of their employment harassed by a third-party, so exactly the examples you were just talking about, customers and clients. It would, there would be a sort of get out of jail card for the employer I guess if they had taken all reasonable steps to prevent the third-party harassment sort of shifting the burden on stopping it happening in the first place under the employer. So, similarities with what you were describing Aaron.

Aaron	We had the same thing here.
Kelly	You did, yeah, okay.
Aaron	In terms of preventing, the systems, the old system is being described as being reactive and to that extent in Australia if you took reasonable steps to prevent the sexual harassment from occurring that would be a defence.
Kelly	Yeah.
Aaron	And now you have to not only take preventative steps but you have to be pro-active in preventing sexual harassment from occurring in respect of any possibility that it may come in with a customer or a client or a supplier or the delivery person who is dropping things off. You really – there's no error in terms, or there shouldn't be any error in terms of how an employer approaches it. They have to fill out all those gaps as it were.
Kelly	That's interesting because that is the other bit of the private members bill in the UK, is both this kind of obligation, this sort of liability for third-party harassment unless you have taken all reasonable steps and then the flip of it, as you've just described, a corresponding duty to take all reasonable steps to prevent sexual harassment. And the proposal is that that corresponding duty to take all reasonable steps will be enforced by the Equalities and Human Rights Commission here so it will sort of be an enforcement piece rather than a compensation piece, albeit that their suggestion is that tribunals could uplift, sort of increase any compensation an employee who brought a sexual harassment claim was awarded. It's to sort of penalise for not discharging that overarching duty as well. So lots of similarities I think if it goes through in its current form anyway.
Ellie	And Aaron, we know there is a real issue which I mentioned at the start of victims of workplace sexual harassment not speaking up. And the TUC here in the UK has reported that four out of five employees don't report harassment to their employer because of a fear of reprisal and further victimisation. So, I wondered how is that sort of idea of psychological safety, feeling like you can speak up, how is that moving up the D&I agenda in Australia?
Aaron	We now are seeing, again because of the way that jurisdictions work in Australia, we are seeing that states are adopting psycho-social safety regimes, where they are saying in essence employers must do certain things to ensure the psycho-social safety of employees. And so that has gone pretty much hand in hand now with the respect at work reforms that we have seen in terms of employers being required to do more to ensure the psycho-social safety of employees and others who fall within the boundaries of their control given we have this broad definition of a person conducting a business or undertaking. And so we are seeing a lot, a lot more in that space and I think it comes out of a number of things, not to harp on about the pandemic, but I think that that has assisted in regulators going in fact we need to do more to ensure the mental wellbeing of people. And we see a very large group of people making compensation claims based on mental health injuries that they have incurred in the workplace. As opposed to, you know, the traditional physical injuries that people expect in usual workers compensation matters. There is a lot more going on in the mental wellness and mental health injury space as we see now in Australia.
Ellie	And Kelly, a key ingredient to having that speak up culture at work is, that concept of active allyship and calling out that inappropriate or that offensive behaviour, and it actually reminds me of a time at the beginning of my career at a client meeting when the client made an inappropriate remark about me in front of me to my supervisor, some could have described it as laddish banter but it was humiliating and offensive and I'll never forget my supervisor at the time, he called out that remark there and then, told the client not to speak to me that way and demanded an apology, which the client did by the way. So way before we used that term allyship, the same concept applies and that goes back to your point about, you know, harassment's never been okay, and it was just a powerful signal for me, as a junior employee, that that kind of behaviour isn't okay even if it is by a client. So, my supervisor's actions could have gone either way, luckily for me he chose not to be a bystander.
Kelly	Yeah. I'm so sorry that happened, that sounds grim Ellie. But gold star to your supervisor for what in the lingo you might call an upstander rather than a bystander. I totally agree with you, I think active allyship, it's a really powerful tool in sort of creating and sustaining inclusive cultures. I think what we could do a lot better in many of our organisations is educate people about what that actually means in practice I don't even care what name we call it, like you said, it doesn't, your supervisor wouldn't have heard of the word allyship I'm sure, he was being a good person, right, standing up for someone else even when, especially when, actually, you're not personally affected. And if you are, you know, interested in the sort of reading around it there's lots of literature about different kinds of allyship and it doesn't, it's not always being loud extroverted sort of standing in the way of the oncoming bullets or something, you may feel able to do that to intervene in the moment like your supervisor did

and that's incredibly powerful, but you can be an ally without doing that if that's not who you are or the position you have got in your organisation or you feel uncomfortable, there's lots of different ways including being a kind of confidante even, a supporter, sort of helping people kind of process and deal with things that have happened or issues that are concerning them and does next steps, that is equally active allyship as the sort of in the moment responses.

Ellie Absolutely. And just to quote research by the TUC again, seven in ten LGBTQ+ workers and disabled women workers have experienced at least one form of sexual harassment at work and nearly a third of young workers have experienced sexual harassment often from third parties. So businesses really need to just take into account those intersectional challenges.

Kelly Yeah, that's hugely important, I think. The research is really clear that the more marginalised identities you have the more inequity you are likely to experience, the more barriers you are likely to experience. There's a really good article I was reading in the Harvard Business Review about race and seniority so just to pull out some examples that I thought were very kind of stark, black men are far more likely to have been sexually harassed by a colleague than men of other ethnicities, and this was in the States by the way this research, among Asian women that they surveyed who said they had been harassed, nearly a third said that the perpetrator was actually a junior colleague, not somebody senior which is the kind of prototypical scenario, certainly I have experienced in practice in terms of claims and things. So, I suppose the message is, if you are looking to eradicate this and you are looking to discharge that obligation that you have or might be about to have if you are in the UK as an employer, you need to understand the specifics of the problem you are solving for in your organisation not base it on sort of assumptions or generalisations about who is at risk of being harassed and who is at risk of being a harasser.

Ellie So we have heard that there are similar patterns in how workplace sexual harassment arises in Australia and the UK and the legal protections while at very different stages in terms of implementation they ultimately derive from the same objectives, so to ensure workers feel safe and they feel they are treated with respect at work. Aaron, can we just finish with your key takeaways for dealing with allegations of sexual harassment?

Aaron So, in my view employers should critically assess what steps they need to take within their organisation to prevent and prohibit sexual harassment. And this isn't advice that I necessarily just give to Australian employers, this is the advice that I would give to any employer who operates anywhere regardless of the country or the culture that you are operating in. Employers who want to be known as being not just employers of choice but ethical and good employers, particularly when we are looking at the war for talent I would strongly recommend that companies look at providing avenues for that speak up culture. Reviewing and updating policies, I can harp on about that all day long. Some employers take it on board others don't. They need to clearly say what the company stance is and in Australia it is actually a requirement that they need to say that sexual harassment is prohibited and it is unlawful. Reviewing and updating procedures, as I said before in terms of speak up procedures to actually bring complaints to the fore so that the company can deal with them. Developing and targeting effective discrimination and harassment training, rolling it out periodically, making sure that it's from the top down, not that it's from the bottom up. And ensuring that all staff and anyone who comes into your workplace, whatever that workplace looks like, is aware that discrimination and harassment of any kind is prohibited and how people who do come into your workplace can raise issues in relation to complaints or grievances about discrimination or harassment.

Ellie And Kelly, what would you like to add to those points that Aaron's mentioned?

Kelly Yeah, I'll pick up on that point around dealing with allegations when they arise if that is okay, Ellie, and I think the first thing I would say is always take it seriously. Investigate it thoroughly and sensitively, this is perhaps one of the most emotive of human experiences and you've got to be really mindful of that and let that understanding drive the process. I do genuinely think it is really important to take legal advice early on to ensure you manage the process properly and discharge your obligations to all of the different people involved. You need lawyers ideally who understand the kind of human element, I've definitely seen investigations in these sorts of issues go horribly kind of wrong where lawyers have, for example, taken a really adversarial approach from the outset.

Kelly

The other thing I would say is how important it is to kind of learn the lessons and implement the changes, you know, don't put the report in a drawer without kind of testing and going is there a cultural thing at play here? I think if you say you've got a zero tolerance to harassment, that means zero, like even the people who make the most money for the business, even the people who are the most senior, even the figureheads. So, if you're not going to apply it to those people don't say it because I always think kind of culture is made as much as anything in those difficult decisions where you are weighing perhaps the commerciality piece as to what this person immediately makes my business versus all of these issues and I think you've got to, got to kind of engage with that when you make those decisions.

Ellie

Thank you so much both of you, Aaron and Kelly, that was a fascinating whistlestop tour of the law on sexual harassment in Australia and the UK, and I think it gives us all hope that by strengthening those laws and protecting workers really meaningful progress can be made in stamping out those toxic workplace cultures where harassment features. And going back to what Kelly and Aaron were saying about the intricacies of dealing with those allegations, do look out for the second part to this podcast series when we'll be joined by our wonderful employment associate, Macaela Joyes explaining the practicalities of dealing with allegations of sexual harassment. If you would like to revisit anything we discussed today you can access transcripts of every episode of the Work Couch podcast by going to our website www.rpc.co.uk/theworkcouch. Or if you have questions for me or any of our speakers or perhaps suggestions for topics you would like us to cover on a future episode, please get in touch by emailing us at theworkcouch@rpc.co.uk, we'd really love to hear from you. And finally if you enjoyed this episode we would be really grateful if you could spare a moment to rate, review and subscribe and please spread the word by telling a colleague about us. Thank you all for listening and we hope you will join us again in two weeks.



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