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21 July 2021

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Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

Australian Lawyers for Human Rights (**ALHR**) is grateful for the opportunity to provide this submission to the Senate Standing Committee on Education and Employment (the **Committee**) in respect of its Inquiry into the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (the **Bill**).

ALHR commends the changes proposed to be introduced by the Bill; however, we are concerned that the amendments do not go far enough to implement the sweeping and widespread reforms necessary to address sex-based harassment in Australian workplaces.

About ALHR

ALHR was established in 1993 and is a national association of Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees and specialist thematic committees. Through advocacy, media engagement, education, networking, research and training, ALHR promotes, practices and protects universally accepted standards of human rights throughout Australia and overseas.

1. Introduction

- 1.1. The Bill currently before the Committee seeks to amend the *Sex Discrimination Act 1984* (the **SD Act**), the *Australian Human Rights Commission Act 1986* and the *Fair Work Act 2009* (the **FW Act**).
- 1.2. The Bill implements a number of recommendations put forward by the Sex Discrimination Commissioner in the Respect@Work Report. The purpose of the Respect@Work Report, which was announced in June 2018 and published in 2020, was to investigate how Australian workplaces can improve prevention and responses to sexual harassment.
- 1.3. The Respect@Work Report outlined 55 recommendations with a goal to reduce workplace sexual harassment and create safer, more respectful and productive Australian workplaces.
- 1.4. The Bill gives effect to the Government's commitments in relation to Recommendations 16, 20, 21, 22, 29 and 30 of the Respect@Work Report, including:
 - 1) clarifying the object of the SD Act to include the goal of achieving substantive equality between men and women;

- 2) amending the SD Act to not only prohibit sexual harassment, but also sex-based harassment;
- 3) changing the limitation period for complaints to the Australian Human Rights Commission relating to sex discrimination and harassment from 6 months to 24 months;
- 4) expanding who is considered a “worker” and what is considered a “workplace” under the SD Act, as well as ensuring that members of parliament and their staff, members of the judiciary and their staff and all public servants are all subject to the SD Act in the same way as other workers;
- 5) empowering the Fair Work Commission to make orders to stop sexual harassment in the workplace;
- 6) amending the FW Act to clarify that engaging in sexual harassment is a valid reason for the termination of a person’s employment; and
- 7) clarifying that victimisation under the SD Act can form the basis of a civil action for unlawful discrimination.

1.5. In addition to the Government’s commitment to implement Recommendations 16, 20, 21, 22, 29 and 30 of the Respect@Work Report, the Bill also varies the existing entitlement to compassionate leave in the FW Act to include miscarriage as a permissible occasion.

1.6. ALHR supports the proposed legislative amendments and commends the Bill for expanding on existing protections against sex-based harassment. However, we endorse the view of the Australian Human Rights Commission raised in its submission dated 9 July 2021¹ that there are additional amendments that should be made to further strengthen, simplify and streamline the laws dealt with by the Bill. These additional amendments are outlined below within ALHR’s recommendations.

¹ Australian Human Rights Commission submission to the Respect@Work Amendment Bill dated 9 July 2021, available at https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/RespectatWork/Submissions

2. International Human Rights Law and Sexual Harassment

- 2.1. Sexual harassment is a form of sex-based discrimination that constitutes gender-based violence. Article 2 of the United Nation's *Declaration on the Elimination of Violence against Women*) provides that:

Violence against women shall be understood to encompass, but not be limited to, the following:...

- b) *Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, **sexual harassment and intimidation at work**, in educational institutions and elsewhere, trafficking in women and forced prostitution;*² (emphasis added).

- 2.2. Articles 2, 5, 11, 12 and 16 of the *Convention on All Forms of Discrimination against Women (CEDAW)* require States parties to act to protect women against violence of any kind occurring within the family, at the workplace or in any other area of social life.³

- 2.3. The Committee on the Elimination of Discrimination Against Women (the **CEDAW Committee**) in its *General Recommendation No. 19* recognised that '[e]quality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace'.⁴ It further recognised the potential health and safety problem that sexual harassment in the workplace presents. The CEDAW Committee has called on States parties to take all legal and other measures that are necessary to provide effective protection of women against gender-based violence including sexual harassment in the workplace.

² Declaration on the Elimination of Violence against Women, GA Res 48/104 (20 December 1993) available at: <https://www.ohchr.org/en/professionalinterest/pages/violenceagainstwomen.aspx>

³ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 12 (1989): Violence Against Women*, available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_5831_E.pdf

⁴ Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 19 (1992): Violence Against Women*, UN Doc A/47/38, available at https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/INT_CEDAW_GEC_3731_E.pdf

- 2.4. In Australia, the SD Act gives effect to our international human rights obligations under CEDAW to promote equality between women and men, including by making sexual harassment unlawful.⁵
- 2.5. In light of the principles outlined above, ALHR is concerned that the proposed Bill falls short of effectively implementing Australia’s international obligations under CEDAW and makes the following recommendations.

3. Recommendations

- 3.1. ALHR submits that the Bill should go further to fully and effectively implement the recommendations of the Respect@Work Report and Australia’s international human rights law obligations. Accordingly, ALHR recommends that the Bill be amended to incorporate consideration of the following key points:

1) **Clarity around the limitation period for complaints**

Whilst increasing the limitation period in which complaints under the SD Act can be made is welcomed, we note that this change creates a disparity with other discrimination complaints. If this is not the intention of the Bill, then greater clarity is required.

2) **Achieving equality of opportunity between men and women**

Whilst the Bill incorporates Recommendation 16, it does so only in part. ALHR is concerned that the Bill does not achieve what is recommended in relation to the amendment of the “objects, definitions and coverage” of the SD Act. In addressing the objects of the SD Act, the report states:

“The Commission agrees that a comprehensive understanding of equality should underpin the Sex Discrimination Act and that explicitly stating this as an object of the legislation can assist in clarifying its underlying purposes and foundational principles, and provide guidance to both the community and the courts.

⁵ Australian Human Rights Commission, *Australia’s Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, Independent Report to the Committee on the Elimination of Discrimination against Women (5 July 2010) available at: <https://humanrights.gov.au/our-work/sex-discrimination/australias-implementation-convention-elimination-all-forms>

*Accordingly, the Commission recommends amending the Sex Discrimination Act to state in the objects clause ‘to achieve **substantive equality** between men and women.[emphasis added]*⁶

However, the proposed amendment to the object clause of the SD Act provides only: “to achieve, **so far as practicable**, equality of opportunity between men and women.” This is a lower legal threshold than the Commission’s recommendation that the objects include: “to achieve **substantive equality**”. ALHR is concerned that in practise this weakens the protections against discrimination that will be afforded by the Bill and fails to meet the standard set by international law, including CEDAW. Furthermore, the Bill does not make it clear how “as far as practicable” will be measured.

The Bill should be underpinned by a comprehensive understanding of the drivers of gender inequality and gender-based discrimination, and consistent with international Australia’s obligation under the CEDAW to ensure “*women be given an equal start and that they be empowered by an enabling environment to achieve equality of results.*”⁷ International human rights law is concerned with substantive gender equality and this requires that equality is interpreted according to the broad context or realities of women’s disadvantages and the impact of these circumstances in terms of eliminating disadvantage in outcome or result.⁸

We consider the other parts of Recommendation 16 included in the Bill to be positive steps forward.

3) **Orders to stop sexual harassment**

The addition of a sexual harassment provision based on the current bullying provisions are likely to have little impact given the bullying provisions in the FW Act are problematic and ineffective. This is primarily due to jurisdictional limits to the existing stop bullying orders. Difficulties arise concerning not-for-profit groups and other organisations in the community sector and whether they fall within the definition of a ‘constitutionally covered entity’ under the FW Act. ALHR recommends clarity around whether an employer which

⁶ Ibid Page 452

⁷ United Nations Committee on the Elimination of Discrimination Against Women, General Recommendation No 25: On Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures, 30th Sess (2 July 2009) para 8

⁸ European Institute for gender Equality at <https://eige.europa.eu/thesaurus/terms/1401>

is a not-for-profit organisation in industries such as health, education, local government and community services is a constitutional corporation under the FW Act.

4) **“Conduct of a seriously demeaning nature”**

ALHR is concerned that the threshold for the new sex-based harassment provision—conduct that is “*seriously demeaning*”—sets a high bar for a finding of harassment to be made. The new Section 28AA arguably undermines the purpose of the Bill and would fail to drive change with respect to acceptable standards of behaviour. ALHR recommends amending the definition of harassment on the ground of sex in the Bill.

5) **Creating a positive duty on all employers**

The Bill does not go far enough as to introduce a positive obligation on employers to adopt measures to eliminate sex discrimination, sexual harassment and victimisation, as outlined in Recommendation 17 of the Respect@Work Report. Recommendation 17 provides that the SD Act be amended to introduce a duty on all employers to take reasonable and proportionate steps to prevent sexual harassment in their workplace. Civil penalties for breaches of this duty would apply as per Recommendation 18, thus removing from victims of sexual harassment the onus to prove an offence has occurred. ALHR strongly recommends that the Bill be amended to include this obligation on employers.

6) **Allowing unions and other representative groups to bring representative claims**

ALHR recommends that the Bill be updated to ensure that the *Australian Human Rights Commission Act 1986* be amended to allow unions and other representative groups to bring representative claims to court as per Recommendation 23 of the Respect@Work Report.

7) **Costs protection for claimants**

ALHR recommends that the Bill be updated to ensure that the *Australian Human Rights Commission Act 1986* be amended to include a costs protection for claimants as per Recommendation 25 of the Respect@Work.

Thank you for the opportunity to provide a submission. If you would like to discuss any aspect of this submission, please email me at: president@alhr.org.au

Yours faithfully

Kerry Weste

President

Australian Lawyers for Human Rights

Any information provided in this submission is not intended to constitute legal advice, to be a comprehensive review of all developments in the law and practice, or to cover all aspects of the matters referred to. Readers should take their own legal advice before applying any information provided in this document to specific issues or situations.