



UNSW
SYDNEY



UNSW
Kingsford
Legal Centre

28 October 2022

Dear Honourable Members of Parliament and Senators,

Open Letter on the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

We, the undersigned, are writing in relation to the above Bill, which is designed to give legislative effect to the Australian Human Rights Commission's *Respect@Work* Report. We are all legal services that provide direct help to people affected by sexual harassment and discrimination.

We believe these reforms are long overdue and congratulate the Government on introducing the Bill. There are aspects of the Bill that we think are extremely positive and which will result in the prevention of sexual harassment and better legal responses. Specifically, we welcome:

- an enforceable positive duty on employers and persons conducting a business or undertaking (PCBU) in Australia to take measures to eliminate sex discrimination and sexual harassment. This has the potential to have profound legal and cultural implications for all workers across Australia, supporting their rights to safe and non-discriminatory workplaces.
- the new function of the Commission to inquire into systemic unlawful discrimination in workplaces and publish reports on this.
- provisions which make it unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex.
- a uniform approach to time limits under the *Australian Human Rights Commission Act 1986*, with a provision that provides that all discrimination complaints (and not just ones under the *Sex Discrimination Act 1984* (Cth)), need to be lodged within 24 months after the discriminatory acts, omissions, or practices.

However, to ensure that this Bill fully implements the recommendations of the *Respect@Work* Report as effectively as possible in substance and purpose, we make the below comments and recommendations on how the Bill can be improved. We believe that this legislative reform is a once in a generation opportunity and we must take the time to get it right.

Need for substantial increase in funding for AHRC to enforce positive duty

This Bill empowers the Commission to commence inquiries into compliance by employers and PCBU of their positive duty to prevent sex discrimination and sexual harassment in workplaces and issue compliance notices. Where employers and PCBU fail to comply with

these notices, the Bill empowers the President of the AHRC to apply to the Federal Court or Federal Circuit and Family Court of Australia for orders to compel compliance.

The compliance notices will be the main way positive duties are enforced in Australia. As a result, we strongly support these new enforcement powers of the Commission and their potential to effect significant legal and cultural change. However, their effectiveness will depend on the AHRC being properly funded to conduct this new role.

The AHRC has suffered many years of cuts to baseline funding¹ and both this and significant new funding needs to be committed to ensure this new compliance role can be properly discharged. We congratulate the Government for committing to providing the AHRC with \$31.8 million over four years to support the ongoing work of the Commission.² However, we seek more information about how these funds will be allocated, including how they will address the significant delays in processing complaints to the Commission. We are concerned that \$31.8 million will not be enough to rebuild the capacity and proper functioning of the Commission, let alone enable it to discharge its new roles under this Bill.

We also congratulate the Government for committing to providing \$10.5 million to implement the *Respect@Work* recommendations.³ However, we do not think this amount will be sufficient. For example, only \$5.8 million has been allocated to educate employers about the positive duty to prevent workplace sexual harassment and assess their compliance.⁴ Far more funds will be required to enable the Commission to undertake these key responsibilities to enable all employers in Australia to comply with the positive duty.

Recommendation 1: The Government must urgently restore adequate baseline funding to the AHRC and increase funding to support the new legislative powers of the AHRC under the Bill. This funding plan needs to be made publicly available as soon as possible so it can be considered with this Bill.

Cost provision – section 46PSA

We believe that the Bill could be improved in relation to how costs operate in discrimination law matters. The *Respect@Work* Report found that the risk of an adverse costs order in federal discrimination proceedings is a significant barrier to many applicants bringing proceedings.⁵ Our experiences with clients reflect this. We are concerned that this Bill does not go far enough to break down this barrier. This is especially the case when there is a significant power and resourcing imbalance between many workers and employers.

The Bill provides a default position that parties in discrimination proceedings will bear their own legal costs. This is an important first step, which we believe is an attempt to overcome the costs risks for individuals.⁶ However, we believe that the impact of this is significantly undone by other provisions which allow broad discretion as to costs (for example,

¹ Michelle Brennan and Dr Shannon Maree Torrens, 'Australian Human Rights Commission' (2022) https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview202223/AustralianHumanRightsCommission.

² The Hon Mark Dreyfus KC MP, 'Investing in Integrity, Human Rights and Safety' (25 October 2022) <https://ministers.ag.gov.au/media-centre/investing-integrity-human-rights-and-safety-25-10-2022>.

³ Ibid.

⁴ Ibid.

⁵ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 507.

⁶ See proposed section 46PSA(1) of the *Australian Human Rights Commission Act 1986* (Cth) in the Bill.

considering the financial circumstances of the parties and offers to settle).⁷ In our opinion, this will continue to deter many of our clients from bringing discrimination law proceedings and greatly impact on access to justice. This is not a cost neutral approach.

We advocate for an equal access (asymmetric) costs model. This model could better protect applicants from adverse cost orders with a provision like section 570 of the *Fair Work Act 2009* (Cth), where applicants are only liable in discrimination cases for costs where the claim is vexatious, lacks reasonable cause or their unreasonable conduct during proceedings has caused the respondent to incur costs. However, the model must also enable applicants to recover costs from respondents when respondents are found to have engaged in unlawful conduct.

In our view, this is vital to ensure access to justice for applicants and enable them to consider litigation as a viable option, and not be forced into settling matters on minimal terms. The model would also better support applicants in obtaining legal representation on a no-win-no-fee basis, as solicitors and barristers could recover costs when applicants win.

However, at a minimum we advocate for a provision in the Bill like section 570 of the *Fair Work Act 2009* (Cth). In our view this is vital to at least provide greater protection for applicants against the risk of an adverse costs order if they are unsuccessful in litigating their discrimination matter. The current Bill does not sufficiently protect applicants from this real and intimidating risk.

Recommendation 2: Revise the Bill to create an equal access costs model. This should provide that applicants will not be liable in discrimination cases for costs except where the claim is vexatious or the applicant's unreasonable conduct in the course of proceedings has caused the respondent to incur costs. However, the Bill must also provide that where an applicant is successful, the respondent is liable to pay their costs.

Positive duty should extend further

Australia's federal anti-discrimination laws are inconsistent and difficult to navigate, especially for people who experience multiple forms of discrimination. The *Respect@Work* Report found that sexual harassment is often accompanied by other forms of discrimination.⁸ The Bill misses an important opportunity to address this.

In particular, we are concerned that the positive duty on employers and PCBU does not apply to other forms of unlawful discrimination (e.g., disability, race, or age). Further, we are concerned that the Bill makes it unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex only, and does not apply to other protected attributes, such as disability, race, age.

Recommendation 3: Revise the Bill to ensure a consistent and intersectional approach to federal discrimination laws. This must include creating a positive duty on duty holders to take reasonable and proportionate measures to eliminate all forms of unlawful discrimination and making it unlawful for a person to subject another person to a hostile workplace environment on the ground of all protected attributes under federal discrimination laws.

⁷ Ibid s46PSA(2)-(3).

⁸ Ibid 10.

Need for ongoing statutory review of Bill

Lastly, while we support many of the provisions under the Bill, we are concerned about how a number of them will operate in practice. To ensure that the amendments increase access to justice and best serve to prevent and better respond to sexual harassment and discrimination, we recommend that the Bill is revised to include ongoing statutory review of its provisions. In particular, we recommend reviews of:

- how the positive duty provisions are operating in practice, including what kinds of matters are being investigated by the Commission and whether the Commission is adequately funded for the compliance role;
- whether the representative applications provisions increase litigation and support the rights and interests of persons and groups impacted by unlawful discrimination;
- how the provisions which make it unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex, or any other protected attribute, are operating in practice; and
- costs in the discrimination jurisdiction and specifically consideration of the equal access (asymmetric) costs model if not yet introduced.

Recommendation 4: The Bill include a legislative requirement for statutory reviews, including on the positive duty, representative applications, hostile workplace environments and costs. The first statutory review should commence 18 months after the Bill commences, with a report of the review to be tabled to Parliament and published within 6 months of the commencement of the review. There should then be a further review at the five-year anniversary of the Bill, with a report of the review to be tabled to Parliament and published within 6 months of the commencement of the review. There should then be regular reviews of the Bill every five years after on this basis.

If you have any questions about this letter, please contact Emma Golledge at legal@unsw.edu.au.

Yours faithfully,

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