

# Submission to the Australian Senate Education and Employment Legislation Committee

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

Not in My Workplace thanks the Senate Committee for the opportunity to comment on the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021*. Our submission covers six areas:

1. About Not In My Workplace
2. The Case for Legislative Reform
3. Support for Elements of the Amendment
4. Where the Amendment Needs to Be Improved
5. Case Studies Supporting Stronger Amendments
6. Concluding Remarks

### **About Not in My Workplace**

We are called Not In My Workplace and we are a collective of CEOs, senior Executives, Chairs and Board Directors from across private, not-for-profit and public sectors making a stand to bring about change. Our organisation was incorporated in Victoria in September 2018, under the Incorporated Associations Act.

Not In My Workplace was formed following ongoing exposure of widespread sexual harassment events such as those behind the global and Australian #MeToo movement. Not In My Workplace has continued to facilitate debate and dialogue across industries, spurred by the ongoing exposure of high-profile sexual harassment, assault and bullying incidents in Australian corporate, non-government and public sector industries.

Most recently, Not In My Workplace hosted a virtual national summit on the findings of the Respect@Work report that was attended by speakers and participants from across the corporate, NGO and political arenas. We are bipartisan in our approach and our primary aim is to eliminate workplace sexual harassment in all industry sectors, particularly our own.

Not In My Workplace has held four summits since 2018 and reached more than a thousand senior executives across corporate Australia. We provided a submission to the original National Inquiry into Sexual Harassment and support the Australian Government adopting in full all 55 recommendations of the Respect@Work Report.

## The Case for Legislative Reform

There is a compelling case for legislative reform to address the issue of workplace sexual harassment and protect people and organisations from its occurrence and its impacts. Specifically, sexual harassment:

- is wide-spread and impacts a significant proportion of the population
- has significant health and wellbeing impacts
- leads to decreased productivity and negatively impacts the economy
- leads to the loss of trust in private and public institutions, particularly when it is not adequately or fairly addressed
- the Commonwealth and the Australian community have heavily invested in the development and delivery of the National Inquiry into Sexual Harassment and the resulting Respect@Work report.

### Sexual Harassment is Wide-Spread and Impacts a Significant Proportion of the Population

The Fourth National Survey on Sexual Harassment in Australian Workplaces found that 71 percent of Australians have been sexually harassed at some point in their lives, and more than a third of Australians have been sexually harassed at work. Workplace sexual harassment has enduring and serious impacts on individuals, including victims and witnesses, on organisations and at a broader societal level. These impacts were thoroughly investigated in the National Inquiry into Sexual Harassment in Australian Workplaces and formed the basis for the comprehensive recommendations in the ensuing Respect@Work report.

### Sexual Harassment has Significant Health and Wellbeing Impacts

Sexual harassment can cause a range of serious, complex and long-term health impacts. The Fourth National Survey found that nearly 20 percent of people who experienced workplace sexual harassment also experienced negative health and wellbeing impacts. Impacts can range from feelings of self-doubt and loss of confidence, to post-traumatic stress disorder (PTSD), suicide ideation, self-harm, chronic disease, hypertension and cancer (Respect@Work, 2020, p. 265 - 268).

### Sexual Harassment Leads to Decreased Productivity and Negative Economic Impacts

Economic modelling by Deloitte Access Economics estimates that workplace sexual harassment cost the economy \$3.8 billion in any given year. This includes \$2.6 billion in lost productivity and nearly \$1 billion in other financial costs **in one year alone** (Deloitte Access Economic, 2020). The financial costs of workplace sexual harassment are predominantly born by employers, who wear 70 percent of financial costs, with governments wearing 23 percent and individuals, 7 percent.

### Sexual Harassment Leads to Loss of Trust in Institutions

The presence of sexual harassment in any institution symbolises how gender shapes the political realities of that institution (Berthet & Kantola, p. 144, 2021). Whether it is a multinational corporation, a small business, a non-government organisation or the Australian Parliament, sexual harassment in any of these institutions erodes trust in that institution, and indeed trust in institutions within that sector. Further, the presence of sexual harassment shows that people within that institution are not considered nor treated equal. Legislation plays a critical role in creating institutional environments where such inequality is unlikely to happen in the first place.

## The Community and the Commonwealth Have Made Significant Investments in Addressing this Issue

Australia has invested a significant amount of time, effort and energy in uncovering and addressing sexual harassment in workplaces. Through the Australian Human Rights Commission, the National Inquiry into Sexual Harassment in the Workplace considered hundreds of submissions, listened to hours of testimony, conducted annual research and been a key part of many inquiries and investigations. Australian organisations have embraced the Respect@Work and Boards across the country are starting to give the issue of sexual harassment the priority it deserves. Given the significant investment, it is important that legislative reform is strong, sustainable and makes meaningful changes to protect people from sexual harassment and ensure the nation's workplaces are safe for people of all genders.

## **Support for Elements of the Amendment**

There are number of important elements of this amendment which we welcome and support. These are:

1. The expansion of the Sex Discrimination Act to cover sex-based harassment.
2. The inclusion of subcontractors, labour hire workers, outworkers, trainees, unpaid work experience students in the Sex Discrimination Act.
3. The extension of the time limit on termination of complaints from six to 24 months.
4. The inclusion of members of Parliament and their staff and federal and state judges into the Act.
5. Amendments to the Fair Work Act that include stop sexual harassment orders and to ensure that sexual harassment can be a valid reason for dismissal.

## **Where the Amendment Needs to Be Improved**

While there are a number of other positive proposals in the draft Bill, we believe that the above are critical to increasing protection for workers. However, given the gravity of the impact of sexual harassment, its prevalence and the significant investment and wide-spread support of the National Inquiry Into Sexual Harassment, this draft Bill needs to be improved if it is to make a meaningful positive impact on the elimination of workplace sexual harassment.

We have structured our response to this section to address the specific recommendations set out in the Respect@Work report that relate to legislative reform.

### **Recommendation 16 (c)**

In its response to the Respect@Work report, the Australian Government 'Agreed in Principle' to Recommendation 16 (c) that would amend the Sex Discrimination Act to expressly prohibit creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex.

While it is acknowledged in the Respect@Work report that a sexually hostile work environment could constitute unlawful sex discrimination under the Sex Discrimination Act, we believe it is important to clarify this in the legislation, particularly where conduct of a sexual nature in a workplace is not expressly directed towards a person. In this instance,

this type of conduct may not be found to be “in relation to” the complainant and therefore fall short of the existing statutory definition of sexual harassment. Accordingly, a worker subjected to that sexually hostile work environment would need to establish the existence of sex discrimination. This is a significant and disproportionate impost on the worker.

Further, while existing workplace health and safety laws require employers to take measures to create safe working environments, there is no individual complaints process under those laws.

**Recommendation for Improvement:** amend the Sex Discrimination Act to expressly prohibit creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex.

### **Recommendation 17**

This recommendation proposes amending the Sex Discrimination Act to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. The Government Response has “noted” this recommendation and committed to assessing whether such amendments would create further complexity, uncertainty or duplication in the overarching legal framework.

As noted in the Respect@Work Report and the Government Response to this report, the Workplace Health and Safety regime creates duties to take reasonably practicable steps to prevent risks to worker health and safety. This includes the risk of sexual harassment. A positive duty to this effect arises under s15 of the Equal Opportunity Act 2010 to take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible. The adoption of recommendation 17 would bring the Sex Discrimination Act into line with these other duties.

**Recommendation for Improvement:** amend the Sex Discrimination Act to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.

### **Recommendations 18 and 19**

Recommendations 18 and 19 propose that the Sex Discrimination Act give the Australian Human Rights Commission the power to undertake systemic investigations, for instance where there is a pattern of sexual harassment in a sector or workplace, and undertake compliance monitoring to ensure that industries, organisations or sectors are complying with a new positive duty.

While the Government has noted Recommendation 18 in its response, it has also committed to further consider this recommendation pending the outcome of its assessment of Recommendation 17 (relating to a positive duty to eliminate sex discrimination). The Government Response also recognises that there are advantages to the Commission having a broader suite of powers to be exercised upon the referral of a matter for investigation by Government. It is not clear why this consideration of recommendations 18 and 19 are contingent on consideration of recommendation 17 and we believe that these recommendations should be adopted as part of this amendment.

**Recommendation for Improvement:** amend the Sex Discrimination Act to give the Australian Human Rights Commission the power to undertake systemic investigations and

monitor compliance to ensure that industries, organisations or sectors are complying with a new positive duty.

### **Recommendation 23**

This recommendation proposes an amendment to the Australian Human Rights Commission Act to allow public interest actions to be brought to court by representative bodies such as unions. The Government response to this recommendation notes that there is an existing mechanism to enable representative proceedings in the Federal Court. However, while a complaint with the Commission can be lodged by person or trade union, this differs from the ability to bring proceedings in the Federal Court, which is limited to an “affected person” or the technical and complex representative proceedings process. Adoption of this recommendation would provide greater access to justice for employees or victims of sexual harassment or assault in the workplace.

**Recommendation for Improvement:** amend the Australian Human Rights Commission Act to allow unions and other representative groups to bring representative claims to court.

### **Recommendation 25**

This recommendation proposes an amendment to the Australian Human Rights Act to include a cost provision consistent with section 570 of the Fair Work Act. While the Government has Agreed in Principle to this recommendation it has noted that “the determination of cost orders is already at the discretion of the court” and said that it will review cost procedures in sexual harassment matters to ensure they are fit for purpose.

There are no current specific provisions relating to costs in unlawful discrimination proceedings under the Sex Discrimination Act before the Federal Court of Australia or the Federal Circuit Court of Australia. The courts have a general discretion to order costs, and generally exercise those powers according to the principle that the unsuccessful party usually pays the successful party’s legal costs. However, as acknowledged in the Respect@Work Report, the risk of cost orders may act as a disincentive to pursue sexual harassment matters in the federal jurisdiction. The Commission expressed concern about the negative impact on access to justice, particularly for vulnerable members of the community arising from this. Additionally, a disincentive on applicants pursuing sexual harassment matters is of significant concern in a system which relies almost entirely on the victims of sexual harassment to enforce the prohibition.

It is not clear why such an amendment should not be included in the Bill if the recommendation is Agreed in Principle, nor is it clear why any further review of cost procedures in sexual harassment matters should be required.

**Recommendation for Improvement:** amend the Australian Human Rights Act to include a cost provision consistent with section 570 of the Fair Work Act.

## Recommendation 28

This recommendation proposes amending the Fair Work Act to expressly prohibit sexual harassment. While the Government has Agreed in Principle to this, it has noted that it would review the Fair Work system once the amendments to the Sex Discrimination Act under recommendation 16 have been implemented and their impact assessed.

The current framework under Part 3-1 of the Fair Work Act does not provide the clarity and coverage needed for victims of sexual harassment in the workplace. They were not designed to address sexual harassment, and they do not adequately address the nuanced and complex factors underpinning sexual harassment, nor do they provide a victim with appropriate redress.

Whilst a prohibition of sexual harassment under the Fair Work Act would replicate the protection under the Sex Discrimination Act (and other State legislation), it would allow employees access to the processes under the Fair Work system and the cost protection offered by s570 of the Fair Work Act.

The Fair Work system arguable offers a more user-friendly complaints process and procedural benefits. This includes providing applicants access to the Fair Work Commission and the simplified application process in the Federal Court or Federal Circuit Court. Likewise, limiting cost orders to circumstances where proceedings are instituted does not remove the disincentive to pursue proceedings.

**Recommendation for Improvement:** review the Fair Work system to clarify that sexual harassment, using the definition in the Sex Discrimination Act, is expressly prohibited.

## Case Studies Supporting Stronger Amendments

The following three case studies are taken from two of our committee member organisations and demonstrates why a system that is reliant solely on people making complaints is disproportionate and unfair to victim – survivors and their support network. The names have been changed to protect privacy.

### Case Study: Sally

“Sally was new and young and wasn’t aware of the processes and policies. She was offered money...\$10,000 for a ‘date’, a colleague overheard the customer upping the money and that person raised the complaint. That customer is now barred from the venue. The reporting system still relies on employees to speak out and there is no proactive approach to find out what is happening by managers yet”

### Case Study: Far Reaching Consequences

“It doesn’t matter where it (sexual harassment) happens. I was a direct manager. I was on shift and at that time it happened in the main part of the venue and it was a male customer she was serving, and she was in tears. She had told me her mother was coming in eight hours a day and sitting close to where she was working because of what had been going on. She told me her father used to follow her in his car to make sure she got to work OK. I had big concerns because of the lengths that her family had been going to, to keep her safe”.

### Case Study: Regional City Pharmacy

Our organisation operates an independent nursing service, under a state government contract, inside a number of privately-owned pharmacies. In 2019 two of our nurses reported that a 16 year old pharmacy assistant had sought their support because of a

pharmacist harassing her. She said the pharmacist was touching her inappropriately at work, had accessed her personal phone number and was contacting her via text message and on social media and offering to pick her up from school and give her lifts to work. This contact was unwanted and unsolicited. Our staff advised the young staff member to speak to the owner of the pharmacy business to have this behaviour addressed. The young staff member then reported to our staff that the owner had declined to take action, as it was very difficult for him to recruit pharmacists. The young staff member resigned and left her position, she was very concerned about taking further action because the business is based in a regional city.

## **Concluding Remarks**

Not In My Workplace appreciates the opportunity to provide comment on this important set of legislative reforms. We believe that the draft amendments are a reasonable start. However, given the enormous impact that sexual harassment has on individuals, institutions, the economy and our community, bolder and more targeted amendments are required.

The National Inquiry into Sexual Harassment in Australian workplaces was a significant investment by the Australian Government and all who participated in it. We also believe, like many employers, that the Respect@Work report and recommendations will provide the generational change required to address workplace sexual harassment. We strongly believe this set of legislative reforms should honour and respect that body of work and heed the evidence-based reforms recommended within it.

Yours sincerely,

**Dr Jenny Gray**

President, Not In My Workplace

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