



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

Submission to the Senate Education and Employment
Legislation Committee

9 July 2021

1. On 24 June 2021 the Senate referred the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 to the Education and Employment Legislation Committee for inquiry and report by 6 August 2021.
2. The Queensland Human Rights Commission thanks the Committee for the opportunity to make this submission about the Bill.

Queensland Human Rights Commission

3. The Queensland Human Rights Commission (the Commission) is a statutory authority established under the Queensland *Anti-Discrimination Act 1991*.
4. The Commission has functions under the Queensland *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights.
5. The Commission also deals with complaints of discrimination, sexual harassment, vilification, and other objectionable conduct under the *Anti-Discrimination Act 1991* and human rights complaints under the *Human Rights Act 2019*.

Background to proposed amendments

6. The proposed amendments to the *Sex Discrimination Act* (SD Act) are made in response to the recommendations of the federal Sex Discrimination Commissioner in her 2020 *Respect@Work* report, following an extensive national inquiry into sexual harassment in the workplace.¹

Expanded coverage

7. The Queensland Human Rights Commission supports the proposed amendments to the SD Act that expand its coverage to:
 - include members of parliament, their staff, and judges at all levels of government;
 - ensure public servants at all levels of government are protected under the SD Act in the same way as all other workers;
 - adopt the concepts of ‘worker’ and ‘PCBU’ (persons conducting a business or undertaking) used in the model work health and safety law, so as to ensure that persons not previously covered under the SD Act –

¹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, 2020.)

such as interns, volunteers, and self-employed workers – are protected from harassment.

8. The Commission also supports the proposed amendment to the discretionary grounds on which a complaint may be terminated by the President of the Australian Human Rights Commission (AHRC). Instead of the current six months, a complaint under the SD Act could only be terminated if it is made more than 24 months after the alleged unlawful conduct took place. The Commission believes this change would reassure complainants that their complaints would not be dismissed prematurely.

Omissions from the Bill

9. A major omission from the Bill is the recommendation by the Sex Discrimination Commissioner for the introduction of a positive duty on employers to take steps to eliminate sexual harassment.
10. In the Respect@Work report, the Commissioner made the following recommendations:

Recommendation 17: 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. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered including, but not limited to:

- a. the size of the person's business or operations
- b. the nature and circumstances of the person's business or operations
- c. the person's resources
- d. the person's business and operational priorities
- e. the practicability and the cost of the measures
- f. all other relevant facts and circumstances.

Recommendation 18: The Commission be given the function of assessing compliance with the positive duty, and for enforcement. This may include providing the Commission with the power to:

- a. undertake assessments of the extent to which an organisation has complied with the duty, and issue compliance notices if it considers that an organisation has failed to comply
- b. enter into agreements/enforceable undertakings with the organisation
- c. apply to the Court for an order requiring compliance with the duty.

11. During the course of her inquiry, the Sex Discrimination Commissioner frequently heard that the lack of a positive duty in the *Sex Discrimination*

Act to prevent workplace sexual harassment meant that employers placed a higher priority on compliance with employment law and work health and safety laws, rather than discrimination law. This accords with the Queensland Human Rights Commission's experience of dealing with sexual harassment and other discrimination complaints pursuant to the Queensland *Anti-Discrimination Act 1991*.

12. The lack of a positive duty also places a heavy onus on individuals to complain about sexual harassment after it occurs, and to the high standard of proof required to demonstrate that sexual harassment occurred. Often, people subjected to sexual harassment resign from their jobs with adverse health, financial, and career impacts, and the workplace situation is left unaddressed.
13. It was for this reason that the Sex Discrimination Commissioner recommended the *Sex Discrimination Act* be amended to include a positive duty requiring employers, with the possible exception of micro-businesses, to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.
14. To support the implementation of the recommendation, the Sex Discrimination Commissioner recommended that the *Sex Discrimination Act* be amended to provide it with accompanying enforcement powers to assess compliance with the positive duty.
15. The reasons provided by the Government for not acting on this recommendation is that work health and safety laws already impose a duty on employers and PCBUs to ensure workers are not exposed to health and safety risks. This duty requires risks to health and safety to be eliminated or minimised so far as is reasonably practicable, including the risk of sexual harassment.
16. While existing workplace health and safety legislation does already have broad coverage of physical and psychological health risks, to date this has clearly failed to minimise the risks of workers being exposed to sexual harassment. The Sex Discrimination Commissioner in her report states:

WHS schemes have historically focused on physical harms this has been reflected in the approach of employers and WHS regulators, where psychological risks and hazards have been given less focus than physical risks and hazards. Even less attention is given to sexual harassment as a subset of psychological health.²

² *Respect@Work* (n 1) 480.

17. The Queensland Human Rights Commission is concerned that there is no *explicit*, proactive obligation on employers in either the *Sex Discrimination Act* or other legislation requiring them to take steps to try to prevent sexual harassment. To date workplace health and safety regulators have failed to act upon and proactively monitor workplace risks from sexual harassment. Without an explicit legislative directive on employers to take positive action, there is no reason to expect that there will be any sustained change in the future to the frequency of incidents of sexual harassment occurring in the workplace.
18. The imposition of a positive duty is not a duplication, but a strengthening of the law, and it has the potential to make real inroads in preventing sexual harassment. The Sex Discrimination Commissioner states:

The key benefit of a positive duty is that it shifts the burden from individuals making complaints to employers taking proactive and preventative action. As the positive duty is an ongoing duty, it shifts the emphasis from a complaints-based model to one where employers must continuously assess and evaluate whether they are meeting the requirements of the duty.

This would provide employers with a greater incentive to take proactive and preventative measures to comply with the duty and would significantly improve the effectiveness of the *Sex Discrimination Act* to contribute to broader systemic and cultural change. In this sense, it promotes accountability and can assist in encouraging a continuous improvement model for employers in how they address sexual harassment.³

19. While this may impose a relatively minor burden on business, such a burden is justified in order to prevent what has been to date the ongoing and unchanging occurrence of sexual harassment in workplaces.
20. Such an amendment would bring the Commonwealth anti-discrimination law into line with best practice under comparative international jurisdictions and current domestic law, and would ensure the focus is on preventing sexual harassment and discrimination in the first place, rather than punishing misconduct.

³ Ibid 479.

Recommendations

21. Accordingly, the Queensland Human Rights Commission recommends that the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 be amended to:
 1. 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. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered including, but not limited to:
 - a. the size of the person's business or operations
 - b. the nature and circumstances of the person's business or operations
 - c. the person's resources
 - d. the person's business and operational priorities
 - e. the practicability and the cost of the measures
 - f. all other relevant facts and circumstances.
 2. The Australian Human Rights Commission be given the function of assessing compliance with the positive duty, and for enforcement. This should include providing the Commission with the power to:
 - a. undertake assessments of the extent to which an organisation has complied with the duty, and issue compliance notices if it considers that an organisation has failed to comply
 - b. enter into agreements/enforceable undertakings with the organisation
 - c. apply to the Court for an order requiring compliance with the duty.