

National Women's Safety Alliance

The National Women's Safety Alliance

National Women's Safety Alliance (hereafter 'the Alliance') welcomes the opportunity to provide feedback on the 'Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022' which amends the Sex Discrimination Act 1984 as well as the Australian Human Rights Commission Act 1986 in line with the recommendations of the Australian Human Rights Commission Respect@Work report.

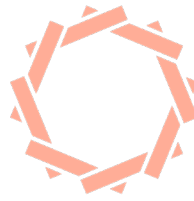
The Alliance, established in August 2021, connects the sector, experts, government, and victim-survivors with a shared vision to end violence against women. Our members are practitioners, policy experts, survivors and academics who contribute to our work to inform and guide national policy on women's safety. Our feedback on the exposure draft has been informed by our membership and the diverse expertise of our members within NWSA's Sexual Harassment Working Group, some of whom have advocated for legal reform on the issue of workplace harassment and sex discrimination for several years.

Executive Summary

The Alliance welcomes this opportunity to provide further advice on the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022. This written submission to the Senate Legal and Constitutional Affairs Committee reinforces our earlier submission on the Exposure Draft.

In our original submission on the Exposure Draft, it was noted that the Alliance was receptive to the sentiment of the Draft and the overdue nature of these progressive reforms. We did, however, note concerns in the Exposure Draft which, if not rectified, would limit the Bill's effectiveness, particularly regarding the usefulness of the hostile workplace's clause and test. In making this submission to the Inquiry, we restate this concern and refer to the suite of recommendations made from the Australian Discrimination Law Experts Group (ADLEG) whose submission has informed our own.

Without further amendment, particularly regarding those clauses relating to 'hostile workplace environments', the Alliance feels we cannot support the Bill in its current form.



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1) The dynamics of a hostile environment are not adequately captured

The inclusion of 'hostile workplaces' in the exposure draft reflects the recommendations from the Respect@Work report and our response to the Exposure Draft gave in-principal support to the inclusion of 'hostile environment.' However, in doing so, the Alliance's submission also raised several concerns with the scope and application and foreshadowed possible confusion that could arise in meeting the test.

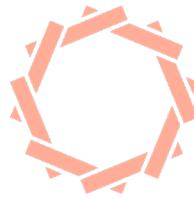
However, we shared our reservations about how the amendment was drafted which did not capture the permeability and dynamics of a hostile environment. Hostile workplaces, where the environment is such that others are left feeling unsafe or excluded remain a barrier to the economic participation of diverse women and one of the underlying factors in industry gender segregation that is longstanding in Australia.¹ Despite our advice, and the advice provided by ADLEG, the proposed legislation on hostile workplaces remains the same as it did in the Exposure Draft. Specifically, our submission recommended removing 28M (2)(a) and (b) from the proposed amendment to the Sex Discrimination Act.

We support the recommendations of the ADLEG calling for the proposed amendments at 28M(2)(a) and (b) to be removed from the SDA. The explicit reference to first person subjecting another, second, person does not adequately capture the fluidity of the workplace 'environment' and how one person's actions or behaviour (or multiple person's) can contribute to hostility that permeates and impacts on others who may not be the intended targets of the behaviour. We are concerned that the conditions of the proposed amendment (first person subjecting another, second, person) do not sufficiently recognise the concept of 'environment' and the dynamics of how hostile environments are 'created', often through cumulative and deliberately hostile actions.

We ask the Committee to consider the following situation:

An after-hours cleaning team might be exposed to and subsequently affected by explicit pornography and other sexual paraphernalia that adorns an office the team must clean. The cleaners and the perpetrator are never on site together, they are not colleagues and they do not know each other, but the perpetrator knows the cleaning schedule and deliberately amplifies the presence of sexual material in line with the cleaning roster knowing that the cleaning team sees it as they go about their work. As they don't know each other and are not on site at the same time, the prospect that the perpetrator is subjecting the cleaners, either as unknown individuals or a collective, to a hostile workplace environment may not be captured by the nuance.

As ADLEG noted in their submission to the Exposure Draft: "The benefit of adding a hostile environment action is to cover a situation where a person's unlawful behaviour lies in contributing to the creation of a hostile environment. Another person who is harmed by that environment can then bring an action against the persons who created the environment. This is a crucial distinction. It avoids the common situation where individuals' acts are difficult to connect directly to a specific individual, but they create a hostile environment, and another person is impacted by that environment." To address this, we refer you to the revised wording proposed by the ADLEG outlined in their submission to the Exposure Draft.



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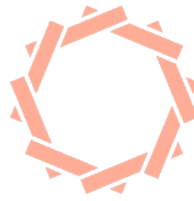
It remains a significant concern to the Alliance and our members that 28M(2)(a) requires the first person and the second person to be in the same physical workplace. This defies not only a contemporary appreciation of the scope and ubiquity of digital and online workplaces but also the emergence of working from home arrangements which proliferated during COVID-19. Further to this, workers with disabilities and parents who are connected to the workplace remotely and may only have limited workplace attendance requirements, would be particularly vulnerable to the exclusion of online hostility from the test.

As the ADLEG made clear in their submission, the requirement that the persons be in the same physical workplace presents an additional barrier and is particularly retrograde when understood in the context of how online tools and digital platforms can be used to facilitate harassment and threats.

2) Different tests of relevant circumstances for sexual harassment, sex discrimination and hostile workplace environments

Despite the recommendations of ADLEG and the Alliance in our original submissions to the Exposure Draft, the test for hostile environment remains different to the tests for sex discrimination and sexual harassment. While the tests for discrimination and harassment consider protective attributes such as age, gender, marital status, and religious belief, among others, the tests for hostile environment are not intersectional. Rather, the test is 'the seriousness of the conduct, whether it was continuous and repetitive and the influence of the person engaging in the conduct.' By excluding protective attributes and an intersectional lens the test for hostility fails to appreciate how intersectional identities can be weaponised in acts of workplace hostility.

The hostile environment test (28M(3)) also requires that a 'reasonable person would have anticipated the conduct to be humiliating, offensive or intimidating. In the Alliance's feedback to the Exposure Draft, we argued that the test was limiting because it did not reflect that the environment could also be hostile simply because it interferes with the capacity of another to work in quiet enjoyment or receive work that is commensurate with their skills and ability. We recommended that the hostile workplace environment test also include 'hostile effects' which could be used to capture someone who may not be demeaned or offended by simply not able to equally enjoy the workplace environment.



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3) Limitations with 'positive duty' amendments

We again draw attention to the limitations of the 'duty', listed in 47C(3) which have not been rectified in the tabled legislation. We note the list includes those whom the positive duty applies, includes the duty holder and their employees and agents. The omission of other persons, such as customers, clients or other relevant parties substantially limits the application of the positive duty and fails to recognize the unique vulnerabilities those employees with public facing roles have in terms of being stalked, threatened, or assaulted by customers.

The omission of patrons and others from 47C(3) would make it difficult for a complainant to argue that abuse and harassment by customers was not otherwise a failure on the part of the duty holder to prevent the conduct outlined in 47C(2). This arbitrary exclusion limits the applicability of the Bill for those whose occupation has any public facing role, an inextricable component to their harassment. In our response to the Exposure Draft, we recommended that rather than list those persons 'covered' by the duty, and thereby limiting its application, it would be prudent to remove subsection 47C(3) so that the duty holders outlined in (1) have a duty to prevent the conduct outlined in (2).

As noted in our response to the Exposure Draft, the capacity of the Australian Human Rights Commission to enforce or promote compliance has not been considered in the Bill, again limiting its scope. We again urge that any compliance measures be codified in an equivalent way to the enforcement powers of the Workplace Gender Equality Agency and that large duty holders be compelled to report on compliance and employee consultation to ensure that they have taken 'all reasonable steps' to prevent the conduct captured in 47C.