WOMEN'S LEGAL SERVICE NSW

12 October 2022

Committee Members
The Senate Education and Employment Legislation Committee
By email: legcon.sen@aph.gov.au

Dear Committee Members,

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

1. Women's Legal Service NSW (**WLS NSW**) thanks the Senate Education and Employment Legislation Committee for the opportunity to comment on the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (**the Bill**).

2. WLS NSW is a specialist accredited women-led community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, gender-based workplace discrimination, victims support, care and protection, human rights, and access to justice, and work within a trauma-informed framework.

3. WLS NSW provides a Working Women's Legal Service (**WWLS**). This service, operating for more than ten years, provides free specialist gendered advice and representation to women subjected to sexual harassment in the workplace, and workplace discrimination based on sex, pregnancy and breastfeeding and carer and family responsibilities.

Stated aims of the bill

4. The Bill proposes further changes to the *Sex Discrimination Act 1984* (***SDA***) and the Australian Human Rights Commission Act 1986 (***AHRC Act***) for the purposes of implementing seven recommendations from the Australian Human Rights Commission's 2020 Respect@Work Report (**AHRC Recommendations**). Its stated aim is "to strengthen the legal and regulatory frameworks relating to sexual harassment in Australia. The bill would also expand the role of the Australian Human Rights Commission in preventing sexual harassment and other forms of sex discrimination."[1]

[1]https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/RespectatWork2022

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Limited Consultation on the Bill

5. We appreciate the opportunity to make a submission to the Committee on this important piece of legislation and we welcome the Government's commitment to fully implementing all the AHRC Recommendations. We see this legislative reform as a once in a generation opportunity.

6. However, the timeframe allocated for comment is not sufficient to provide comprehensive feedback on all aspects of the Bill, and there should be more time for considered feedback from all affected persons, communities, and stakeholders to maximise the potential of such an important piece of legislation and to avoid any harmful unintended consequences from the Bill.

The Bill

7. The Bill purports to implement Recommendations 16(a), 16(b), 16(c), 17, 18, 19, 23, 25, and 43 of the Respect@Work Report.

Amendments to SDA s3 Objects Clause

AHRC Recommendation 16(a): Amend the Sex Discrimination Act to ensure that the objects include 'to achieve substantive equality between women and men'

8. Currently, section 3 (**the Objects clause**) of the *SDA* refers at (d) to "the principle of the equality of men and women; and at (e) to "equality of opportunity between men and women".

9. In accordance with Recommendation 16(a), the Bill proposes a change to sub-clause (e) to read "substantive equality between men and women" instead of "equality of opportunity between men and women". While we endorse adopting the terminology of "substantive equality", we recommend that the sub-clause be changed from "substantive equality between men and women" to "substantive gender equality". Reference to gender equality is more inclusive and captures all those protected by the *SDA*, including people who are gender diverse and non-binary. We would also recommend that sub-clause (d) be amended to refer to "the principle of gender equality" for the same reason.

Recommendation 1

WLS NSW recommends that references in the Objects clause of the *SDA* to "equality of men and women" and "equality between men and women" be replaced by "gender equality".

Sex-based harassment

AHRC Recommendation 16(b): Amend the Sex Discrimination Act to ensure that sex-based harassment is expressly prohibited

10. We support the Bill's removal of the word "seriously" from section 28AA(1)(a) of the *SDA*, but the amendment should go further. We believe that requiring sex-based harassment to be "demeaning in nature" is an unnecessarily high legal test for applicants given that the purpose of the provision is to address conduct that amounts to "harassment". It is sufficient to show that a person was exposed to conduct because of their sex, or characteristics pertaining to their sex, which an objective reasonable observer believes would have offended, humiliated or intimidated the person harassed.

Recommendation 2

WLS NSW recommends that the words "of a seriously demeaning nature" are removed from section 28AA(1)(a) *SDA*.

Subjecting a person to a hostile workplace environment on the ground of sex

AHRC Recommendation 16(c): Amend the Sex Discrimination Act to ensure that creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited.

11. Proposed section 28M makes it unlawful for a person to subject another person to a workplace environment that is hostile on the grounds of sex.

12. We are concerned that the proposed s28M defines hostile work environments as ones that are "offensive, intimidating and humiliating". We appreciate the words have been taken from s28A *SDA* (**the sexual harassment provision**) in an attempt to utilise familiar language. However, we believe that such language makes s28M too restrictive in its focus. We support a broadening of the provision to provide that a hostile workplace can be one that prevents women from doing their job, even if the workplace does not cause offence, humiliation, or intimidation. For example, an environment may be hostile to a woman on the ground of sex by ignoring her contributions, or otherwise preventing her from succeeding at work, even where these behaviours may not strictly offend, intimidate, or humiliate her.

Recommendation 3

WLS NSW recommends the Bill is revised to make it clear that a hostile work environment can be one where a person of a particular sex is made to feel "unwelcome" or "excluded" or otherwise prevents them from enjoying their rights at work.

13. We are also concerned that the current reach of the protection against hostile workplace environments is too narrow. Workers can equally experience a hostile work environment because of their race, age, or disability.

14. It is imperative that discrimination law recognises the complexity and intersectionality of sex harassment and discrimination. The Respect@Work Report clearly illustrates that sexual harassment is characteristically intersectional in nature and commonly experienced in other forms of discrimination. Intersectional discrimination has long been identified by those of us who work in this space as a significant legal gap in Australia and we see a missed opportunity here to better identify and protect against it.

15. We note that the Government has already recognised the need for a consistent approach to anti-discrimination laws in the Bill by proposing amendments to the provisions relating to victimisation in the *Age Discrimination Act* 2004, the *Disability Discrimination Act* 1992, and the *Racial Discrimination Act* 1975, and by extending the time limit for making all unlawful discrimination complaints to 24 months.

Recommendation 4

WLS NSW recommends that the protection against hostile workplaces should be extended to include any ground protected under federal anti-discrimination legislation.

Positive duty on employers to eliminate unlawful sex discrimination

AHRC 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.

16. The existing legislation requires employers to take "all reasonable steps" to prevent sex discrimination and sexual harassment. We welcome the proposed strengthening of the obligation from "preventing" to "eliminating" but have reservations around the change in language to "reasonable and proportionate measures".

17. We are concerned that the words "reasonable and proportionate" can be misleading. It is unclear what marker proportionate is being measured against; is it the size and capacity of the business or is it the seriousness of the conduct? The rationale for the change in the Explanatory Memorandum seems to be that using the word "proportionate" allows for assessing employers differently according to their circumstances. However, the existing terminology of "all reasonable steps" has been interpreted by the courts to incorporate a concept of proportionality and the steps expected will depend on the size and resources of the employer. The existing terminology acknowledges that the size, nature, and circumstances of the employer are relevant considerations and has the advantage of enabling the existing case law to be considered when interpreting and applying the new provision.

18. We are also concerned there is arguably a "watering down" of the obligation through the removal of the word "all".

Recommendation 5

WLS NSW recommends that the employers' obligation be to take "all reasonable steps" to eliminate sex discrimination, sexual harassment, harassment on the ground of sex, hostile workplace environments, and victimisation.

19. Again, we are concerned that the positive duty under the Bill only addresses the prevention of unlawful sex discrimination, and not other forms of unlawful discrimination, thereby failing to seize an opportunity to address the intersectionality of discriminatory practices.

Recommendation 6

WLS NSW recommends that the positive duty be extended to cover all forms of unlawful discrimination under Commonwealth laws. We also recommend broadening the positive duty to apply to all duty holders under anti-discrimination laws, including providers of accommodation, education or goods and services and clubs and sporting organisations.

Enforcement of the positive duty

AHRC Recommendation 18: The Commission be given the function of assessing compliance with the positive duty, and for enforcement.

20. We agree that the AHRC should be given the function of assessing and enforcing compliance with the positive duty. However, it is critical that the AHRC is properly equipped to exercise those functions.

Need to adequately fund the AHRC for compliance role

21. Lack of adequate funding is a real concern. Alarmingly, earlier this year the AHRC had its budget reduced by one third over the next four years.[2]

22. Compliance and enforcement are key to the effectiveness of the positive duty. However, there is no clarity as to what, if any, additional resourcing will be provided to the AHRC to carry out this pivotal role. This omission is a very significant concern to us in relation to the Bill, because without adequate funding, the AHRC will surely struggle to fulfil its compliance and enforcement functions, undermining the effectiveness of the positive duty.

23. At present, demand on the AHRC far outstrips its available resources. For this new compliance role of the AHRC to be meaningful, we need to see a significant budgetary increase to the AHRC before the Bill is introduced.

Recommendation 7

WLS NSW recommends that the Government urgently restore adequate funding to the AHRC and increase funding to support these new legislative powers.

Built-in statutory reforms

24. The amendments to the *AHRC Act* to empower the AHRC to monitor, assess compliance with, and seek enforcement of, the positive duty are set to take effect 12 months after Royal Assent, with its education and capacity building functions to commence immediately.

25. We support a staged approach for the introduction of the compliance regime to give enough time for employers and workers to develop an understanding of the duty and their liability and rights under it. However, we recommend that the compliance regime commence after a longer period of 18 months so as to provide sufficient time for the necessary cultural and systems reform on the positive duty, including the development of the capacity of the AHRC to undertake its new compliance role.

Recommendation 8

WLS NSW recommends that the AHRC's new functions to monitor and enforce compliance with the positive duty commence 18 months after Royal Assent rather than 12 months.

[2] 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

Need for clarity in the Bill for remedies for breaches of compliance notices

26. There is no mention in the Bill of financial penalties for employers for failure to comply with compliance notices by the AHRC. To ensure that employers take these new obligations seriously, the federal courts should be given power to order financial penalties for non-compliance. Further, any payment for breaching an order should be paid directly to the victim/survivors of the discrimination and/or harassment.

Recommendation 9

WLS NSW recommends that the Bill includes penalties that the Federal Courts can order against employers and a person conducting a business or undertaking for failing to comply with compliance notices. WLS NSW also recommends that the Bill makes it clear that the Court can order that any or all of these penalty amounts be awarded to affected workers or other persons.

Inquiries into systematic unlawful discrimination

AHRC Recommendation 19: Amend the Australian Human Rights Commission Act to provide the Commission with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment. Unlawful discrimination includes any conduct that is unlawful under the federal discrimination laws.

Need for enforceable inquiry powers of the AHRC for inquiries into systemic unlawful discrimination and the discharge of the positive duty

27. We are concerned that the Bill does not fully implement AHRC Recommendation 19, which lists powers of the AHRC to inquire into systemic unlawful discrimination. This recommendation proposed that the broad inquiry functions given to the AHRC empower it to require persons to: (a) give information, (b) produce documents, (c) examine witnesses and (d) issue penalties for non-compliance with these requests.

28. These powers are vital to ensure that employers take inquiries undertaken by the AHRC seriously, and that the AHRC is properly equipped to carry out its inquiry function.

29. We also submit that these powers should be given to the AHRC with respect to its inquiry processes into compliance with the positive duty.

Recommendation 10

WLS NSW recommends that the Bill implements AHRC Recommendation 19 fully and also ensures that the AHRC has the same powers for its inquiry processes into compliance with the positive duty.

Representative applications

AHRC Recommendation 23: Amend the Australian Human Rights Commission Act to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.

30. We welcome the proposed amendment to allow a representative body that has lodged a complaint in the AHRC on behalf of one or more affected persons to make an application to the federal courts in circumstances where the representative complaint is terminated. However, the proposed amendment appears more restrictive than AHRC Recommendation 23 as it refers to a "person" or "trade union", rather than picking up the terminology of "unions and other representative groups" from the Recommendation.

Recommendation 11

WLS NSW recommends that the words "or other representative group" be included after the words "a person or trade union" to avoid doubt that organisations that advocate for members of groups are clearly captured by the proposed amendment.

The interests of the individual and the group may not always be aligned

31. Section 46POA sets out the conditions for making a representative application, including the requirement that each person represented must give written consent. By providing written consent, a represented person is assumed to understand the effect of joining the representative action, particularly as the interests of the group and any specific individual may not fully align. It is important that applicants only consent with full knowledge of the implications of doing so.

32. It is important that each person is encouraged to obtain their own independent legal advice before consenting, to ensure they fully informed of their rights and the implications of joining a representative application.

Recommendation 12

WLS NSW recommends that s46POA *AHRC Act* is revised to provide that a person on whose behalf the application is made must be encouraged to get their own independent legal advice before consenting.

33. There must be funding made available for community legal services to provide such advice in recognition of the fact that many people participating in a representative application will not have the financial resources to pay a lawyer for independent legal advice.

Recommendation 13

WLS NSW recommends funding must be given to community legal centres to ensure free and independent legal advice is available to workers.

AHRC Recommendation 25: Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the Fair Work Act 2009 (Cth).

34. We support a change from the current costs' provisions where "costs follow the event". This is because the current costs provisions are a significant barrier to justice.

35. Further consideration must be given to a costs model which removes as many barriers as possible to applicants commencing proceedings and levels the field between applicants and respondents and their respective power and economic disparities.

36. At a minimum, we support a costs neutral model consistent with s570 *Fair Work Act 2009* (**FWA**), as proposed by AHRC Recommendation 25.

37. Ideally, we seek further consideration of alternative costs models, as discussed below.

Issues with proposed s46PSA

38. The proposal in the Bill fails to implement AHRC Recommendation 25. This is because proposed s46PSA is not a costs provision drafted in similar terms to s570 *FWA* and, in its current form, leaves applicants at significant risk of a costs order.

39. Section 570 *FWA* restricts costs orders to proceedings brought vexatiously or without reasonable cause, or if an unreasonable act or omission caused the other party to incur costs. Section 46PSA(3) does not mention vexatious or unreasonable conduct at all, and instead sets out a broad range of factors for the court to consider when deciding to award costs. For example, costs can be awarded when the party is "wholly unsuccessful" in court [s46PSA(3)(c)] or having taken into account the party's financial position (s46PSA(3)(a)).

40. In its current form, s46PSA could result in applicants being ordered to pay costs when their case is unsuccessful in court despite the case having merit when filed or being ordered to pay costs if found to have financial means.

41. We are concerned that these factors will continue to serve as a barrier for applicants to commence litigation.

Recommendation 14

WLS NSW recommends that the Bill is revised to include a cost provision consistent with section 570 of the *Fair Work Act* 2009 to protect applicants from adverse cost orders unless exceptional circumstances apply.

Greater consultation on a cost provision that enables applicants to claim costs

42. While we advocate for a provision like s570 *FWA* at a minimum, we strongly call for consultation on a costs model that enables applicants to claim costs against respondents in a wider range of circumstances in discrimination proceedings. A costs model of this kind is important for several reasons, including enabling applicants to fund litigation, to encourage respondents to settle matters, and to deter respondents from breaching their obligations under anti-discrimination laws.

43. An asymmetric costs model has been in place in the UK since 2013 in relation to personal injury claims, referred to as "qualified one-way costs shifting". In short, unsuccessful claimants in personal injury

matters will not be liable for the defendant's costs, except in limited circumstances.[3] We support consultation on whether an asymmetric system of costs allocation could be introduced federally in discrimination matters.

Recommendation 15

WLS NSW recommends further consultation regarding alternative costs models such as the asymmetric costs model and similar models.

44. Finally, given the short timeframe allowed for making a submission to the Committee, we reiterate that our comments are not comprehensive, and we have not been able to undertake a complete assessment of the Bill. Accordingly, our silence as to particular aspects of the Bill should not necessarily be read as an endorsement of them.

45. We join with other stakeholders in requesting broad public consultation of the Bill to ensure that it is as robust and considered as possible.

Yours faithfully,
Women's Legal Service NSW

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[3] *Civil Procedure Rules* (UK). r44.14-44.17