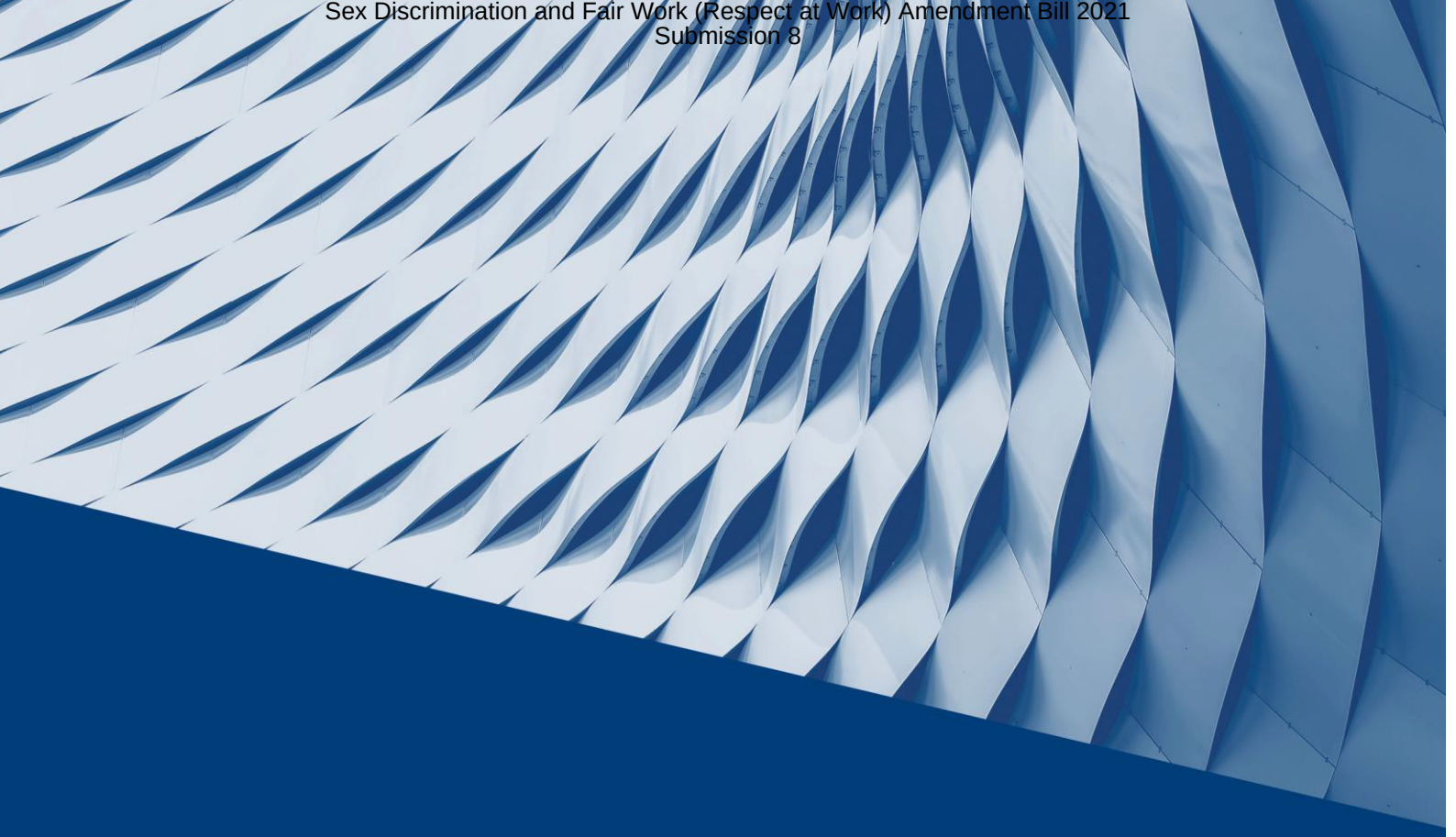

Respect@Work

ACTU submission to the Senate Education and Employment Legislation Committee inquiry into the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021*

ACTU Submission, 9 July, 2021
ACTU D. No 37/2021

ACTU
australian council of trade unions

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Introduction

The ACTU, formed in 1927, is the peak body for Australian unions and is the only national union confederation in Australia. For more than 90 years, the ACTU has played the leading role in advocating for the rights and conditions of working people and their families. The ACTU is made up of 39 affiliated unions and trades and labour councils, and we represent almost 2 million working people across all industries.

The prevention of sexual harassment and other forms of gendered violence at work is core union business and a priority for the Australian union movement. Unions have for many years been calling for stronger and more effective measures to prevent, address and redress all forms of violence, harassment, discrimination and bullying at work, including sexual harassment and sex-based harassment.[1] Workers who experience sexual or sex-based harassment must have access to fair, effective, efficient and confidential complaint mechanisms in workplace laws. Employers must be required to take reasonable steps to eliminate sexual harassment. It is crucial that our workplace, work health and safety, and anti-discrimination laws operate in a complementary and mutually reinforcing way to eliminate sexual harassment and sex-based harassment.

The National Inquiry into Sexual Harassment in Australian Workplaces (**the Inquiry**) was announced by the government in June 2018 in the context of the #MeToo movement and national and global recognition of the serious harm and loss – to workers, to employers and to the national economy - caused by the problem of sexual harassment in Australian workplaces. The Inquiry - conducted by the Sex Discrimination Commissioner, Kate Jenkins - was a world-first. The 930 page report is comprehensive, thorough, well-researched and informed by extensive consultations with a wide range of stakeholders. It makes 55 practical and carefully considered recommendations for reform to fix our broken system. The government made the right decision to commence the Inquiry and it must now accept the recommendations flowing from it.

The government's response to Respect@Work falls well short of what the Respect@Work Report says is necessary to prevent sexual harassment and other forms of gendered violence at work. The government's decision to refuse to take the actions recommended by Respect@Work - an Inquiry commenced by them - to end sexual harassment and other forms of gendered violence in Australian workplaces is unforgivable. Workers at Parliament House and countless other workplaces around the country who have had the courage to speak up about these injustices deserve much better. No worker should have to fear sexual harassment or any other form of

[1] See for example, ACTU Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into the effectiveness of the Sex Discrimination Act (2008)

gendered violence at work. The March4Justice Rallies demanded real change and the government must deliver. The time for action is now.

This submission details the shortcomings of the government's response and makes recommendations for a series of amendments to the Bill to close the identified gaps.

Summary of Recommendations

The government should:

- **Amend the Bill to implement the following recommendations of the Respect@Work Report:**
    - *Recommendation 28 – Amend the FW Act to expressly prohibit sexual harassment*
    - *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.*
    - *Recommendation 17 – Amend the Sex Discrimination Act to include a positive duty on employers to take reasonable measures to eliminate sex discrimination, sexual harassment and victimisation.*
    - *Recommendations 18 and 19 – Amend the Sex Discrimination Act to give the Sex Discrimination Commissioner the power to undertake systemic investigations (eg 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.*
    - *Recommendation 23 – Amend the Australian Human Rights Commission Act to allow public interest actions to be brought to court by representative bodies such as unions.*
    - *Recommendation 25 – Amend the Australian Human Rights Commission Act to ensure costs may only be ordered against a party if the proceedings are vexatious or unreasonable.*
- **Amend the Bill to provide for 10 days family and domestic violence leave in the National Employment Standards**
- **Commit to ratify and implement the International Labour Organization's *Violence and Harassment Convention, 2019 (No. 190)* without further delay (Recommendation 15)**

National Inquiry into Sexual Harassment in Australian Workplaces

On 19 June 2018, the Sex Discrimination Commissioner (**SDC**) announced that the Australian Human Rights Commission (**AHRC**) would be commencing a national inquiry into sexual harassment in the workplace (**the Inquiry**).

The 12-month Inquiry was established to consider the economic impact and drivers of sexual harassment, the adequacy of existing legal frameworks to prevent sexual harassment, examples of existing good practice, and make recommendations for change. The Inquiry process consisted of analysis of AHRC's 2018 sexual harassment survey results (which showed that sexual harassment in the workplace has increased since 2012); national consultations and public submissions; and research.

The ACTU played an active role in the Inquiry process. Michele O'Neil, ACTU president, was appointed as a member of the Reference Group for the Inquiry. Between 18 September and 30 November 2018, the ACTU conducted a national 'sexual harassment in the workplace' survey. Two in three women and one in three men told us they have been subjected to one or more forms of sexual harassment at work. Only a quarter of people who were harassed made a formal complaint; less than half reported the incident, and 40% told no one at all.[2]

In November 2018, Australian unions organised a Roundtable to provide the Sex Discrimination Commissioner with a briefing on the ACTU's survey results and detail the lived experiences of union organisers, campaigners and industrial officers who - on a daily basis – advocate for, represent and support workers who have been subjected to sexual harassment and other forms of gendered violence.

In February 2019, the ACTU joined with over 100 organisations through the 'Power2Prevent' coalition to submit a Joint Statement to the Inquiry setting out 5 priority areas for reform, including relevantly:[3]

1. ***Stronger and clearer legal duties*** *on employers to take proactive steps to prevent sexual harassment at work, and strong and effective regulators that have the full suite of regulatory tools and resources necessary to effectively tackle sexual harassment, including as a cultural, a systemic and a health and safety issue.*

[2] https://www.actu.org.au/media/1385284/a4_sexual-harassment-survey-results_print.pdf
[3] https://www.actu.org.au/actu-media/media-releases/2019/over-100-organisations-make-joint-call-for-urgent-action-to-end-sexual-harassment-at-work

2. ***Access to fair, effective and efficient complaints processes****, including a new right of action under the Fair Work Act, extended time limits, increased transparency of conciliation outcomes where appropriate, and other amendments and resources necessary to address the unique barriers that currently prevent workers who experience sexual harassment from taking effective legal action.*

On 28 February 2019, the ACTU, along with a number of affiliated unions, made a detailed submission to the Inquiry detailing these priority areas for reform.[4]

The Respect@Work Report

On 5 March 2019, the Sex Discrimination Commissioner published her Report – Respect@Work – making 55 recommendations for reform and a number of key findings, including that:

1. The current legal and regulatory system is 'simply no longer fit for purpose'. A new model is needed which will 'improve coordination, consistency and clarity' between the *Fair Work Act 2009* (**FW Act**), Work Health and Safety (**WHS**) laws and the *Sex Discrimination Act* (**SDA**).[5]
2. The legal and regulatory framework should 'encourage and support employers to take proactive and preventive measures to address sexual harassment, rather than relying on individual complaints'.[6]
3. The FW Act does not expressly prohibit sexual harassment and 'does not clearly or specifically provide an enforceable right for victims of sexual harassment in the workplace'.[7]

On 12 April,[8] the ACTU joined with a diverse group of organisations and individuals with extensive experience and expertise in women's rights and gender equity to call for the government to accept and implement all 55 of the Respect@Work Recommendations, with priority given to the following 'Safe Work 4 Women' reforms:

1. *Stronger work health and safety laws to make sure that employers are obliged to tackle the underlying causes of sexual harassment at work (Recommendation 35).*

[4] https://humanrights.gov.au/sites/default/files/2019-05/submission_306_-_australian_council_of_trade_unions_actu.pdf
[5] Respect@Work Report pp 10 and 442
[6] Ibid
[7] Respect@Work Report, p 517
[8] https://www.actu.org.au/media/1449462/safe-work-4-women-joint-statement.pdf

2. *Better access to justice for workers in our workplace laws by prohibiting sexual harassment in the Fair Work Act (Recommendation 28) and providing a quick, easy, new complaints process, and providing 10 days paid family and domestic leave as a national minimum employment standard.*
3. *Stronger powers for the Sex Discrimination Commissioner to make her own decisions to investigate industries and workplaces which are rife with sexual harassment, and positive duties on employers to take steps to eliminate sexual harassment (Recommendations 17, 18 and 19).*
4. *Ratification of the 2019 ILO Convention on the Elimination of Violence and Harassment at Work (Recommendation 15).*

While the group acknowledges that a range of measures are needed to address violence against women and gender inequality, including acceptance of all 55 of the Respect@Work Recommendations, the group was particularly concerned about the government's failure to commit to the four legislative reform areas above.

After this statement was issued, at a meeting of WHS Ministers on 20 May, the government committed to the first of the actions above; confirming that it will support amending the Model WHS Regulation to deal with psychological health, as recommended by the Boland Review[9] and Respect@Work (Recommendation 35). This commitment is welcomed by Australian unions and the 'Safe Work 4 Women' group. The development of a new WHS Regulation on psychosocial hazards at work will be a significant step forward in the prevention of sexual harassment and other forms of gendered violence at work. It is crucial that the new regulation applies the hierarchy of control and is sufficiently clear and detailed to enable employers to understand their obligations, and that a supporting Code of Practice on sexual harassment is also developed. The ACTU will continue to play an active role in this work through Safe Work Australia (SWA).

[9] https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf

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

On 8 April 2021, the Government (through the Prime Minister and Minister for Industrial Relations) finally responded to the Respect@Work Report in a document called 'A Roadmap for Respect'. While the government claims in that response that all 55 recommendations are 'agreed', closer analysis of the response shows that a number of key recommendations are in fact rejected, or likely to be rejected down the track.

The *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (**the Bill**) was introduced into the Senate on 24 June and referred to an Inquiry of this Committee, with a report due on 6 August 2021. The Bill will implement the government's commitments in 'A RoadMap to Respect' to make some amendments to the SDA and FW Act. The reforms in the Bill fall well short of what is recommended by the Respect@Work Report in key aspects. In particular, the government completely fails to accept crucial recommendations that would place a responsibility on employers to take reasonable steps to prevent sexual harassment; and to simplify complaints processes, namely:

- *Recommendation 28 – Amend the FW Act to expressly prohibit sexual harassment*
- *Recommendation 17 – Amend the Sex Discrimination Act to include a positive duty on employers to take reasonable measures to eliminate sex discrimination, sexual harassment and victimisation.*
- *Recommendations 18 and 19 – Amend the Sex Discrimination Act to give the Sex Discrimination Commissioner the power to undertake systemic investigations (eg 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.*
- *Recommendation 23 – Amend the Australian Human Rights Commission Act to allow public interest actions to be brought to court by representative bodies such as unions.*
- *Recommendation 25 – Amend the Australian Human Rights Commission Act to ensure costs may only be ordered against a party if the proceedings are vexatious or unreasonable.*
- *Recommendation 15 – Ratify the International Labour Organization's Convention on the Elimination of Violence and Harassment at Work 2019 (C.190)*

These failures amount to a missed opportunity that will continue to place the burden on the shoulders of individual workers to enter complex and lengthy complaints processes at their own cost and risk. The central focus of the Respect@Work Report Recommendations was to better integrate and align the anti-discrimination, workplace and WHS systems and emphasise a proactive, preventative approach to sexual harassment. The Bill in its current form fails to achieve this.

What is positive in the Bill?

The ACTU supports reforms in the Bill to:

- Amend the FW Act to include miscarriage as a permissible occasion for which compassionate leave can be taken.
- Amend the Sex Discrimination Act to:
    - Adopt definitions of 'worker' and 'person conducting a business or undertaking' from WHS laws to ensure all workers and workplaces are protected from sexual harassment. This broader scope of protections should be applied to all other forms of workplace sex discrimination and victimization under the Sex Discrimination Act, not just sexual harassment.
    - Clarify that the SDA extends to judges and members of parliament.
    - Remove the exemption of state public servants.
    - Ensure ancillary liability also extends to the prohibitions against sexual harassment and sex-based harassment.
    - Make it explicit that any conduct that is an offence under section 94 (which prohibits victimisation) can form the basis of a civil action for unlawful discrimination in additional to a criminal complaint.
- Amend the *Australian Human Rights Commission Act 1986* (AHRC Act) to:
    - Extend the President's discretion to terminate a complaint under the Sex Discrimination Act to 24 months since the alleged unlawful discrimination occurred; rather than 6 months.

What is missing from the Bill?

Fair Work Act 2009

A prohibition on sexual harassment

The Respect@Work report found that the FW Act 'does not expressly prohibit sexual harassment' and 'does not clearly or specifically provide an enforceable right for victims of sexual harassment in the workplace'[10] and made the following recommendations:

> ***Recommendation 28:*** *The Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the Sex Discrimination Act, is expressly prohibited.*
>
> ***Recommendation 29:*** *Introduce a 'stop sexual harassment order' equivalent to the 'stop bullying order' into the Fair Work Act. This should be designed to facilitate the order's restorative aim.*

While the Government has accepted Recommendation 29 to introduce a 'stop sexual harassment order' into the FW Act, it has failed to accept the key recommendation to consider an effective mechanism for explicitly prohibiting workplace sexual harassment in the FW Act.

The Respect@Work Report details the gaps in the FW Act. Section 340 currently prohibits a person taking adverse action against another person because they have a 'workplace right'. A worker may have a claim under s 340 if they are victimised for making a complaint about sexual harassment, but no clear right of action arises from the sexual harassment itself.[11] While courts can currently handle a claim about adverse action on the grounds of sex under s 351 (dealing with discrimination), it is unclear whether this extends to sexual harassment claims.[12] In addition, the term 'discrimination' in s 351 is not defined by the FW Act, and courts have interpreted it narrowly, finding that it should be given its ordinary meaning and should not be interpreted by reference to anti-discrimination statutes. Problematically, courts have required employees to prove that the employer intended to or consciously treated them less favourably.[13] This presents a significant obstacle to a successful claim of sexual harassment. It is clear that the current adverse action

[10] Respect@Work Report, p 517
[11] See for example *Shea v TRUenergy Services Pty Ltd* (no. 6) [2014] FCA 271 in which the applicant alleged that sexual harassment complaints about a colleague were the real reason she was made redundant – the application was dismissed.
[12] *Wroughton v Catholic Education Office Diocese of Parramatta* (2015) 255 IR 284l [2015] FCA 1236, [51]-[64]
[13] See Dominique Allen, 'Adverse Effects: Can the Fair Work Act Address Workplace Discrimination for Employees with a Disability?' (2018) Vol 41 No 3 University of New South Wales Law Journal 12-15

provisions of the FW Act are not fit for purpose for prohibiting sexual harassment or providing an enforceable right for workers experiencing sexual harassment.

The ACTU supports the Fair Work Commission's request for a short delay in the introduction of the new stop sexual harassment order process for 2 months after Royal Assent to enable sufficient time for the FWC to organise appropriate training and adapt procedures etc to ensure that the new provisions can operate as safely and effectively as possible for workers. However, the stop sexual harassment process will not provide a prohibition on sexual harassment as recommended by Respect@Work; and is subject to significant limitations. A worker will be required to prove that the risk of harm is *ongoing* before they can access these provisions and must be a current employee. The FWC cannot award monetary compensation. A major section of the workforce will be excluded from using this process– namely those organisations which are neither a Commonwealth entity nor a trading corporation.[14]

These limitations mean that there is a need for a clear prohibition on sexual harassment, as Recommended by Respect@Work, and a new complaints process in the FW Act which is available to all workers (including former and prospective workers) who seek a remedy (including compensation where appropriate) under workplace laws for current or past sexual harassment.

In 'A Roadmap to Respect', the government said that it will *'review the Fair Work system once the amendments proposed under Recommendation 16 have been implemented and their impact assessed.'* However, the implementation of Recommendation 16 is not in any way relevant to the implementation of Recommendation 28. Recommendation 16 relates to the Sex Discrimination Act and reads as follows:

> ***Recommendation 16:*** *Amend the Sex Discrimination Act to ensure:*
>
> *a. the objects include 'to achieve substantive equality between women and men'*
>
> *b. sex-based harassment is expressly prohibited*
>
> *c. creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited*
>
> *d. the definition of 'workplace participant' and 'workplace' covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed*

[14] [2014] FWC 6723 (Unreported, Commissioner Hampton, 30 September 2014)

e. the current exemption of state public servants is removed.

The government has agreed to implement only part of this Recommendation (points (b), (d) and (e)). Even if the government had agreed to implement all 5 aspects of Recommendation 16 (which it should), this would still not ensure that sexual harassment is expressly prohibited by the Fair Work system, which is what Recommendation 28 requires.

As noted in Respect@Work, the lack of an express prohibition on sexual harassment in the FW Act is 'a significant limitation that creates both ambiguities and gaps in how sexual harassment is handled under the Fair Work Act'.[15] Sexual harassment is undeniably a workplace issue which must be expressly prohibited by and addressed through our workplace laws. Australian Human Rights Commission statistics show that in 2018-19, the majority (69%) of complaints made under the SDA related to employment; almost a quarter of which (24%) related to sexual harassment specifically.[16] The Bill should be amended to introduce a new section containing a clear prohibition on sexual and sex-based harassment and an effective and accessible dispute settlement process into the FW Act. This new process should:

- Prohibit any person (including workers, clients and customers) from sexually harassing another person in any circumstances connected with work
- Grant a worker who claims they have been sexually harassed at work with the right to apply for a remedy
- Set out a secondary contravention which is directed to a business which fails to prevent sexual harassment of a worker in any circumstances connected with work
- Authorise the FWC to mediate, conciliate or arbitrate the dispute and make any orders, including the payment of compensation to a worker, if the FWC is satisfied that it is appropriate in all the circumstances of the case, taking into account the public interest in eliminating sexual and sex-based harassment
- Apply broad definitions of 'worker' and 'work', which capture all types of work and workers
- Provide all workers, including prospective, current and former workers, with the right to make a complaint
- Provide unions with the capacity to lodge complaints on behalf of an affected worker or workers whose industrial interests they are entitled to represent.

[15] Respect@Work Report at p 514
[16] https://humanrights.gov.au/sites/default/files/2019-10/AHRC_AR_2018-19_Stats_Tables_%28Final%29.pdf at pp 18-19

The new provision should contain two separate parts: 1) a new prohibition on sexual harassment and 2) an accessible new FWC process for dealing with sexual harassment and sex-based harassment matters.

A prohibition on sexual and sex-based harassment

The new provision should prohibit a person from sexually harassing a worker or subjecting a worker to sex-based harassment in any circumstances connected with work or prospective work in a business or undertaking. This should be a civil remedy provision enforceable by the courts. The provision should adopt the definitions of 'worker' and 'person conducting a business or undertaking' from the Model WHS Act, as the proposed 'stop sexual harassment' provisions will do.

Sexual harassment should be defined as per s 28A of the SDA. Sex-based harassment should be defined as per the new s28AA that will be introduced into the SDA by the Bill, with the clarification that sex-based harassment also includes 'creating an intimidating, hostile, degrading, humiliating or offensive work environment' (see discussion below on the importance of including this element).[17]

The provision should include a secondary contravention where an employer or PCBU 'fails to prevent' a worker being sexually harassed or subjected to sex-based harassment. This should be a civil remedy provision enforceable by the courts. An employer or PCBU will not be liable under this section if it is established that they took 'all reasonably practicable steps' to prevent a worker being subjected to sex-based harassment or sexual harassment in any circumstances connected with work or prospective work. Under a failure to prevent model of regulation, a corporation is liable not for the primary breach, or vicariously liable for the actions of individuals who engage in a primary breach, but rather for failing to take reasonable measures to prevent a primary breach from occurring. A failure to prevent model is aimed at encouraging corporations to take proactive steps to improve their corporate cultures. The potential contravention only arises once a primary breach has already occurred; namely once a worker has been (or is being) sexually harassed or subjected to sex-based harassment.

[17] Note also our submission that the requirement to prove that sex-based harassment is also 'seriously demeaning' is too onerous and should be removed.

A new accessible process in the Fair Work Commission for addressing sexual and sex-based harassment matters

A worker, including a former worker, who claims they have been or are being sexually harassed or subjected to sex-based harassment in any circumstances connected with work, or prospective work, in a business or undertaking, should have the right to lodge a **sexual harassment and/or sex-based harassment notification** with the Fair Work Commission, within 6 years after the sexual harassment or sex-based harassment occurred.[18] The FWC must then start to deal with the matter within 14 days after the notification is made, including by arbitration, conciliation or mediation.

If the FWC is satisfied that a worker has been sexually harassed and/or subjected to sex-based harassment, the FWC may make whatever order is appropriate in all the circumstances of the case, including an order to stop sexual harassment and/or sex-based harassment, to prevent further sexual harassment or sex-based harassment occurring, and for compensation to be paid to a worker. Contravention of an order made by the FWC under the new provisions should be a civil remedy offence.

In dealing with the notification, the FWC must take into account fairness between the employer or PCBU and the worker/s, as well as the public interest in the elimination of sexual harassment and sex-based harassment, and the extent to which the employer or PCBU has taken all reasonably practicable steps to prevent the sexual harassment and sex-based harassment from occurring. An application should be able to be made by:

- A worker or former worker who claims they are being or have been sexually harassed or subjected to sex-based harassment in any circumstances connected with work, or prospective work;
- An employee organisation that is entitled to represent the industrial interests of a worker or workers referred to in paragraph (a).
- A FWO inspector

The provisions should make it clear that two or more workers or former workers may apply jointly to have the FWC deal with the notification.

The availability of this accessible and efficient process in the FW Act will ensure that employers are incentivised to take reasonable steps to prevent workers from being sexually harassed; improve

[18] 6 years aligns with the time limit for other matters under the FW Act, including underpayments.

access to justice by providing workers with a quick and accessible process to resolve sexual harassment and sex-based harassment issues at work; and reduce the need for costly and complex court action.

10 Days Paid Family and Domestic Violence Leave in the National Employment Standards

The Bill presents a clear and important opportunity to amend the FW Act to provide all workers with access to 10 days paid family and domestic violence leave. While this was not a specific Respect@Work Recommendation, it is directly relevant to the elimination of sexual harassment and other forms of gendered violence. Sexual harassment, like family and domestic violence, is a symptom of gender inequity at work and in our communities. There is currently a lack of support in Australia's employment safety net for people experiencing family and domestic violence, which disproportionately impacts on women; reducing their safety and economic security. Maintaining both employment and a steady income is absolutely crucial for women leaving and recovering from family and domestic violence. Measures such as the provision of paid family and domestic violence leave help women to leave and recover from violence, thereby improving women's safety and economic security and playing a crucial part in reducing gender inequity at work and in our communities, which is the underlying cause of all forms of violence against women, including sexual harassment.

While the Fair Work Commission is currently reviewing the need for paid family and domestic violence leave in awards, this case will not be heard until November 2021 at the earliest.[19] In addition, any decision would only directly apply to award covered employees – less than a quarter of the working population. The most efficient way to provide access to this entitlement for the largest number of workers would be to insert the paid entitlement into the National Employment Standards (**NES**). A substantially higher number of workers are covered by the NES than by awards. The most recent ABS data (May 2018) tells us that 2.23 million or 21% of non-managerial employees are reliant on awards. By contrast, the NES apply to most Australian workplaces, except for some private sector workers in WA and some state sector and local government workers in other states.

In its decision issued on 3 July 2017, the majority of the Full-Bench of the Fair Work Commission found that:[20]

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[19] https://www.fwc.gov.au/documents/decisionssigned/html/2021fwcfb2047.htm
[20] *4 Yearly Review of Modern Awards – Family and Domestic Violence Leave Clause* [2017] FWCFB 3494 at [42] – [46], [49], [51], [55]-[56] and [116].

> *(a) Family and domestic violence is a significant problem which has a significant impact on affected individuals and the community, and which has a real and tangible impact on employees and employers in the workplace.*
>
> *(b) The evidence established that circumstances faced by employees who experience family and domestic violence, by contrast with other forms of interpersonal crime or hardship, requires a special response.*
>
> *(c) Existing entitlements, such as the right to request a flexible working arrangement, personal leave, and annual leave, do not meet the needs of employees subjected to family and domestic violence.*

The Commission said:

> *We accept the evidence that the provision of paid leave would assist employees who experience family and domestic violence. It would obviously reduce the financial impact of the consequences of the violence. We accept the evidence that employees who experience family and domestic violence face financial difficulties as a result of the family and domestic violence such as relocation costs or becoming a sole parent. Having to lose pay at the same time because of the need to attend to the consequences of family and domestic violence would add to the financial burden faced by these employees. We therefore, would have no difficulty in concluding that the provision of paid leave would be a desirable outcome.*

The Commission ultimately opted for 'a cautious regulatory response', noting that that the extent to which the new entitlement to unpaid leave would be utilised was unknown, as was the impact of the new entitlement on business.

Impact on Business

KPMG estimate the annual cost to employers of search, hiring and retraining employees who have left the workforce due to family and domestic violence at $96 million per year. This is exclusive of the cost of absenteeism of victims and perpetrators, which is estimated at a further $860 million per year.[21] Taking the relatively smaller figure of $96 million per annum, the cost of providing one day's paid leave per annum is a remarkably small proportion – just over three per cent – of the

[21] KPMG, The Cost of Violence Against Women and their Children, 2016, p 5

expenditure already incurred by Australian employers each year due to family and domestic violence.

During the hearing of the ACTU's application by the Commission, there was no evidence presented at all regarding any misuse of family and domestic violence leave entitlements. On the contrary, the (uncontested) evidence suggested a reluctance among affected workers to access to workplace support due to concerns about stigmatisation and privacy.[22]

Similarly, there has been no evidence presented of employers experiencing difficulties with costs or implementation of existing family and domestic violence leave entitlements. While family and domestic violence is a pervasive problem in our communities, the proportion of workers subjected to violence within a single workforce is likely to be small. Not all workers subjected to family and domestic violence will seek support from their employer, and not all workers who seek support will seek to access paid leave. This means that the costs associated with providing access to paid family and domestic violence leave are likely to be limited and manageable. Evidence from a number of public and private sector employers, as well as research evidence and economic modelling supports this conclusion.[23] In terms of administrative costs, employers already have administrative processes in place for managing various forms of paid leave, which they are already required to adjust to account for various changes, including minimum wage increases and the like. To the extent administrative costs exist at all, they are likely to be small.

Importantly, as highlighted during oral evidence by the ASU to the Parliamentary Inquiry into Family, Domestic and Sexual Violence, the cost of lost productivity due to employee absences to attend to matters relating to family and domestic violence is a cost that is already being incurred by employers. Both KPMG and PWC estimate the cost of lost productivity due to violence against women to be between $2.031 and $1.9 billion per year.[24]

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[22] See summary of uncontested evidence in ACTU Final Submissions dated 28 November 2016 at [191]
[23] See for example: Dr Martin O'Brien, Expert Report to the Fair Work Commission, 17 October 2016; Statement of Debra Eckersely, Price Waterhouse Coopers, Partner, Human Capital, dated 20 June 2016; Male Champions of Change, Playing Our Part, Workplace Responses to Domestic and Family Violence; Submission South Coast Shire Council to the Fair Work Commission dated 16 September 2016; Submission Greater Dandenong Shire Council to the Fair Work Commission dated 15 November 2016; UNSW, Implementation of Domestic Violence Clauses - An Employer's Perspective, November 2015; UNSW, Safe at Home, Safe at Work? National Domestic Violence and the Workplace Survey 2011; Victorian Government Submission to the Fair Work Commission dated 16 May 2016; Review of FDV leave uptake by Victorian Government, June 2017; Review of FDV leave uptake by the WA Government, August 2018; Stanford, J, Economic Aspects of Paid Domestic Violence Leave Provisions, Centre for Future Work at the Australia Institute, 2016
[24] Price Waterhouse Coopers, A High Price to Pay: The Economic Case for Preventing Violence Against Women, November 2015; and KMPG, The Cost of Violence Against Women and their Children in Australia, 2016

Workers have waited long enough for this essential protection. Now is the time, through an amendment to this Bill, to take action to provide this life-saving entitlement to all workers through the FW Act.

Sex Discrimination Act 1984

Objects of the Act include 'to achieve substantive equality between women and men'.

Recommendation 16 (a) is to amend the SDA to ensure the objects include 'to achieve substantive equality between women and men'. However, the Bill will amend the objects clause to reflect the objective of 'achieving, so far as practicable, equality of opportunity as between men and women.' Substantive equality and equality of opportunity are very different concepts.

Substantive equality is concerned with equality of outcomes, while equality of opportunity is concerned with 'formal' equality – e.g. equal treatment of women and men in laws and policies. It is not enough to simply require that men and women are treated equally. A commitment to *substantive* equality requires acknowledgment of systemic gender inequity and the need for proactive measures to ensure women can participate fully in work and society. The government should amend the Bill to adopt the wording from the Respect@Work Report.

Prohibition on sex-based harassment

The Respect@Work Report found that 'women often experience sexual harassment in conjunction with other sex-based harassment and discrimination because of broader inequality in the workplace.'[25] In certain circumstances, harassment can occur where a work environment or culture is sexually charged or hostile, even where the conduct is not directed at a particular person. While both sex-based harassment and creating a sexually hostile work environment could constitute unlawful sex discrimination under the Sex Discrimination Act, both are frequently associated with sexual harassment. To clarify this, the following recommendations were made:

> ***Recommendation 16(b)*** *– amend the Sex Discrimination Act to ensure 'sex-based harassment is expressly prohibited'.*
>
> ***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.*

[25] Respect@Work p 264

The Bill will expressly prohibit sex-based harassment, defined as unwelcome conduct of a 'seriously demeaning nature' in relation to the person harassed, in circumstances where a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated. The ACTU strongly supports the inclusion of an express prohibition on sex-based harassment in the SDA as recommended by Respect@Work, and also in the FW Act (as discussed above).

However, we are concerned that the test requiring the conduct to be 'seriously demeaning' as well as offensive, humiliating and intimidating is too high a bar. There is no requirement to prove that other kinds of sex discrimination are 'seriously demeaning' and it should not apply here. We are also concerned that the government's response does not pick up Recommendation 16(c), which also recommends an express prohibition on 'creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex.' This is a key part of this group of recommendations, particularly in the context of workplace sexual harassment. Sexual harassment is closely linked with gender inequity at work, and is often accompanied by non-sexual, sex-based discrimination and harassment, such as patronising treatment or hostile behaviour. These behaviours may not specifically directed towards a particular individual, but cumulatively they create an environment of hostility on the basis of sex. Hostile and sexist work environments of this kind are key drivers of sexual harassment. This is why it is important to prohibit both sex-based harassment and 'creating or facilitating a hostile working environment on the basis of sex.' While obligations under WHS laws do already require employers to take measures to create safe working environments, there is no individual complaints process under WHS laws, which is why complementary protections in the SDA and FW Act are required.

Positive Duties

Respect@Work found that *'rates of sexual harassment are actually increasing under the current framework, while rates of reporting have decreased. … many individuals do not have confidence in the existing systems and complaint-handling processes to deliver an effective response to the incident or complaint. The key benefit of a positive duty is that it shifts the burden from individuals making complaints to employers taking proactive and preventative action.'*[26]

[26] Respect@Work Report at p 479

Consequently, consistent with a previous review of the Sex Discrimination Act,[27] Respect@Work makes the following recommendation:

> ***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.*

We strongly support this key recommendation. The Bill should be amended as recommended by Respect@Work to include a new positive duty on employers. Unlawful discrimination provisions only arise once a complaint has been made, which places too much burden on individual complainants. A new positive duty would complement (not duplicate) existing duties under WHS laws. It would not significantly increase the burden of the existing responsibilities already faced by employers; rather it would strengthen them in regard to sexual harassment and provide duty holders with clarification on effective and proportionate measures to address sexual harassment. It is important that employers are required to take positive steps to prevent sexual harassment from both an anti-discrimination perspective as well as a work health and safety/risk management perspective. WHS duties are focused on providing and maintaining a work environment that is healthy and safe through applying the hierarchy of control to manage risks, so far as reasonably practicable.[28] The hierarchy of control is a step-by-step approach to eliminating or reducing risks and it ranks risk controls from the highest level of protection and reliability through to the lowest

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[27] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Effectiveness of the Sex Discrimination Act 1984 (Cth) in Eliminating Discrimination and Promoting Gender Equality (Final Report, December 2008).

[28] *Work Health and Safety Act 2011* (Cth), s 19(3)(a); *Work Health and Safety Regulation 2011, r 36*

and least reliable protection. Eliminating the hazard and risk is the highest level of control in the hierarchy, followed by reducing the risk through substitution, isolation and engineering controls, then reducing the risk through administrative controls. Reducing the risk through the use of protective personal equipment (PPE) is the lowest level of control. As with most work-related risks to health and safety, a combination of risk control measures is usually necessary, if elimination is not reasonably practical. A positive duty in the Sex Discrimination Act would require employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.[29] These are complementary approaches and both are needed to effectively tackle the underlying causes of sexual harassment and keep workers safe. The following case study illustrates how the two duties would operate together.

CASE STUDY

Sandy is a young supermarket worker. The policy at her work is that employees have to park at the far end of the carpark because the close parks are for customers. Evening shifts finish at midnight and she walks to her car alone. A group of young men hang out in the car park and yell sexualized comments to her on the way to her car. The last time she walked to the car one of them ran towards her and threw something at her. Sandy fears for her safety and has become very anxious about walking alone to her car at night. Sandy often starts to feel on edge and uptight as the end of her evening shift get closer, and she finds herself dwelling on the walk to her car. When this happens, Sandy is often so distracted that she makes mistakes or forgets things. Recently she cut herself with a box cutter while opening stock to put on the shelves. Sandy is reprimanded by her supervisor for not paying attention and making mistakes. Sandy tells her supervisor that the men in the car park are making her worried and distracted, but her supervisor tells her they're just mucking around and to 'get over it' and focus on her work.

Positive duties under WHS laws would require an employer in this situation to consider applying the most effective controls to manage the risks to this worker's health and safety, for example allowing staff to park their cars closer to the store front in well-lit areas ('elimination' controls); providing all staff with taxi vouchers when they leave work ('substitution' controls); providing security to escort individual staff members to cars ('engineering' controls); developing systems to report and investigate incidents of sexual harassment ('administrative' controls); and providing staff with personal duress alarms (providing 'Personal Protective Equipment').

[29] The submission of UnionsNSW to this Inquiry outlines the types of positive steps to address gender inequity that could be taken by employers.

Positive duties under the Sex Discrimination Act would require an employer in this situation to take reasonable and proportionate measures to (as far as possible) eliminate sex discrimination, sexual harassment and victimisation in the workplace, for example training all supervisors on gender inequity and the causes of sexual harassment; and how to respond to and support staff impacted by sexual harassment, in line with the Our Watch Change the Story Gender Equality framework; and using (for example) the Workplace Gender Equity Agency's diagnostic tools to audit the workplace to identify the underlying causes of gender inequality and develop a plan to address them.

The ILO Meeting of Experts on Violence against Women and Men in the World of Work (3–6 October 2016) found that an 'integrated approach' to addressing violence and harassment (including sexual harassment) is 'essential', and that the approach should cover 'prevention, protection, awareness raising, enforcement, compensation and rehabilitation'. They observed that a lack of integration can result in 'a lack of coherence and coordination' between different laws.[30] This is consistent with one of the key findings of Respect@Work, which is the need to improve 'coordination and consistency' between the WHS, anti-discrimination and workplace regimes.

The government's commitment to strengthen and clarify obligations in the WHS regime through a new regulation on psychosocial hazards is a crucial piece of the puzzle. However, it must be supported by complementary reforms in the Sex Discrimination Act and FW Act which ensure that the regulatory response to sexual harassment is comprehensive and multifaceted.

Adequate enforcement powers are essential if a positive duty is to be effective in delivering real change in workplaces. See discussion in the section below.

Enforcement and Inquiry Powers

Respect@Work finds that an *'enforceable positive duty would help to ensure employers engage with their legal obligations. It would also provide both a collaborative and enforceable mechanism for employers to work with the Commission and engage in the Commission's processes in a full and meaningful way and to effect change.'*[31] Respect@Work also finds that the Commission

[30] https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/meetingdocument/wcms_546303.pdf

[31] Respect@Work p 481

'should be provided with a broad inquiry function to inquire into issues of systemic unlawful discrimination, including systemic sexual harassment.'[32] The following recommendations are made:

> ***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*
>
> ***Recommendation 19****: the Australian Human Rights Commission should have the power to inquire into systemic unlawful discrimination, including systemic sexual harassment. The Commission should be given powers to require: a. the giving of information b. the production of documents c. the examination of witnesses d. with penalties applying for non-compliance, when conducting such an inquiry.*

The Bill does not provide the Australian Human Rights Commission with enforcement or inquiry powers for sexual harassment or sex-based harassment. The government has agreed 'to consider' additional inquiry powers; but only where inquiries are referred by them. The Bill should be amended to empower the Commission to conduct own motion inquiries in relation to unlawful sex discrimination, sex-based harassment, sexual harassment and victimisation, with enforcement mechanisms attached. The Commission's own-motion inquiries should not be limited to acts or practices of the Commonwealth, or under Commonwealth laws, or be confined to ILO workplace discrimination matters. These powers should include:

- The capacity to undertake systemic investigations – such as in circumstances where there a pattern of discrimination or suspected compliance issues becomes known to the Commission.
- Compliance monitoring – to ensure that industries, organisations, sectors or others are complying with the provisions of a positive duty.

The Commission should be empowered to take action where it suspects there are significant breaches of federal discrimination law that affect a class of people, without the need for an

[32] Respect@Work at p 484

individual complaint; and in relation to serious matters of public interest relating to sex discrimination, sex-based harassment, sexual harassment and victimisation. This function should be independently exercised by the Commission. The model provisions of the *Regulatory Powers (Standard Provisions) Act* should attach to the proposed investigation function as enforcement tools:

- enforceable undertakings and compliance notices under Part 6 of the Act
- civil penalties under Part 4 of the Act
- a broader suite of injunctive powers, than the existing AHRC Act provisions, as set out in Part 7 of the Act.

Costs protection

Recommendation 25 of Respect@Work is to amend the *Australian Human Rights Commission Act 1986* to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).

The Government notes that the determination of costs orders is already at the discretion of the court, but 'will review' cost procedures in sexual harassment matters to ensure they are fit for purpose, taking into account the issues raised by the Report.

Costs operate as a significant disincentive to pursuing sexual harassment matters under the SDA. The Bill should be amended to amend the AHRC Act to ensure costs may only be ordered against a party by the court if satisfied that the party instituted the proceedings vexatiously or without reasonable cause, or if the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs.

Australian Human Rights Commission Act

Representative claims

A representative complaint is a complaint lodged on behalf of at least one person who is not themselves a complainant. The Respect@Work Report finds that *'engaging with the complexities of the court system can be difficult and costly for complainants and representative actions can allow genuine cases that previously may not have proceeded past the conciliation stage, and particularly those that have a public interest element, to be heard in court.'*[33]

[33] Respect@Work Report at p 500

The AHRC Act currently allows complaints to be lodged with the Commission by a person (including representative bodies such as a trade union) on behalf of one or more other persons aggrieved by an alleged act of unlawful discrimination. However, if the matter does not resolve at conciliation, these bodies cannot then commence an action in the federal courts on behalf of the aggrieved person. This is because section 46PO(1) of the AHRC Act permits only an 'affected person' to commence action in the federal courts. 'Affected person' is defined to mean a person on whose behalf the complaint was lodged. This prevents representative organisations such as unions from bringing an action in the courts; even if they have pursued the complaint in the Commission first.

To address this, Respect@Work recommended that:

> ***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.*

The government has rejected this recommendation without detailed reasoning; simply noting that there is an 'existing mechanism' to enable representative proceedings in the Federal Court. However, this mechanism is onerous, legally complex and not fit for purpose for sexual harassment matters. It is well recognised that workers are extremely hesitant to even come forward and report sexual harassment to their employers (for reasons including fear of reprisals); let alone pursue risky, costly, complex and lengthy complaints processes in court at their own cost and expense. This reluctance to pursue complaints in court results in a denial of justice for workers and has been a significant contributing factor to the persistence of sexual harassment in Australian workplaces.

Many previous inquiry reports (including the *2008 Inquiry into Effectiveness of the Sex Discrimination Act 1984*) have recommended amendments to allow public interest actions to be brought to court by representative bodies such as unions. This reform is in the public interest, as it will improve access to justice and assist to resolve cases of systemic disadvantage. The federal courts already have the power to dismiss any action which is frivolous or has no reasonable prospects of success, which will act as a check on any unmeritorious actions.

ILO Convention on Violence and Harassment at Work (C.190)

The Respect@Work Report expresses support for *'the approach of ILO Convention 190 and considers the regulatory model recommended in this report is consistent with ILO Convention 190*

and its accompanying Recommendation'.[34] Respect@Work recommends that the Australian Government ratify the International Labour Organization's *Violence and Harassment Convention, 2019* (C.190) (Recommendation 15). The Australian Government has not accepted this Recommendation.

Recognising the lack of international standards directed at the prevention of violence and harassment at work, in 2018-19 the International Labour Organization, together with governments, employers and worker representatives, developed a new international standard to combat violence and harassment in the world of work. The Australian Government and Australian Employer representatives supported the adoption of C.190. C.190 (and supporting Recommendation No. 206) recognise every worker's fundamental right to be free from all forms of violence and harassment, including gender-based violence and harassment. Importantly, ILO C.190 encourages States to place a positive duty on employers to prevent violence and harassment in the workplace, by obligating States to adopt laws requiring employers to take steps, commensurate with their degree of control, to prevent violence and harassment in the world of work, including identifying hazards and assessing the risks of violence and harassment (with the participation of workers and their representatives) and taking measures to prevent and control them. The standards outline a practical, proactive, preventative framework to identify and eliminate the risk of violence and harassment in the world of work, including sexual harassment. The following countries have already ratified C.190:

- Argentina
- Ecuador
- Fiji
- Namibia
- Somalia
- Uruguay

While the government has advised that a law and practice review is underway, we have not been consulted on the review or provided with any details of progress. The government supported the adoption of C.190 and must now take the next step and commit to ratification.

[34] Respect@Work Report at p 450

In summary

The government has introduced a Bill to the Senate with a limited set of reforms which fall short of protecting workers from sexual harassment and other forms of gendered violence at work.

The Fair Work Commission cannot award compensation or penalties under the new stop sexual harassment provisions in the FW Act, and workers who have already been forced out of a workplace due to sexual harassment, and workers who are not employed in a constitutional corporation or a Commonwealth entity, cannot access this process. A clear prohibition on sexual harassment and an accessible dispute settlement process is urgently needed in the FW Act. The inclusion of a positive duty in the Sex Discrimination Act, supported by enforcement and investigation powers, is a core recommendation that the government must not ignore. There is no reason why representative bodies such as unions should continue to be prevented from bringing public interest discrimination and sexual harassment actions to court on behalf of affected members. The Bill presents an important opportunity to finally take the step of providing all workers with access to 10 days paid family and domestic violence leave, so that no worker has to make the choice between their safety and their pay cheque again.

The government's failure to make these changes mean that the Bill is a missed opportunity that will continue to place the burden on the shoulders of individual women to enter complex and lengthy complaints processes at their own cost and risk. The central theme of the Respect@Work Report Recommendations was to better integrate and align the anti-discrimination, workplace and WHS systems and put in place a proactive, preventative approach to sexual harassment. The current Bill fails to achieve this.

The government should commit to ratification of ILO C.190 without further delay; and amend the Bill to provide for 10 days paid family and domestic violence leave in the NES and implement the following recommendations of the Respect@Work Report:

- *Recommendation 28 – Amend the FW Act to expressly prohibit sexual harassment*
- *Recommendation 17 – Amend the Sex Discrimination Act to include a positive duty on employers to take reasonable measures to eliminate sex discrimination, sexual harassment and victimisation.*
- *Recommendations 18 and 19 – Amend the Sex Discrimination Act to give the Sex Discrimination Commissioner the power to undertake systemic investigations (eg 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.*

- *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.*
- *Recommendation 23 – Amend the Australian Human Rights Commission Act to allow public interest actions to be brought to court by representative bodies such as unions.*
- *Recommendation 25 – Amend the Australian Human Rights Commission Act to ensure costs may only be ordered against a party if the proceedings are vexatious or unreasonable.*

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