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Senate Legal and Constitutional Affairs Legislation Committee

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

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Authorisation

This submission has been authorised by the NFAW Board

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

This submission is being made by The National Foundation for Australian Women (NFAW).

NFAW is dedicated to promoting and protecting the interests of Australian women, including intellectual, cultural, political, social, economic, legal, industrial and domestic spheres, and ensuring that the aims and ideals of the women's movement and its collective wisdom are handed on to new generations of women. NFAW is a feminist organisation, independent of party politics and working in partnership with other women's organisations.

We welcome the Committee's invitation to comment on the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022. The Bill straightforwardly embraces the suite of recommendations made by NFAW and other commentators from the sector on remedying the deficiencies of the previous Government's response to *Respect@Work*. In particular we welcome the recognition of the nature and impact of systemic discrimination, the need for substantive equality, and the measures required to progressively bring it about.

Our key remaining concern in this context is that the Bill reproduces the silences in *Respect@Work* about the role of WGEA minimum standards in driving substantive equality. Dovetailing the Bill's proposed amendments to the *Sex Discrimination Act* 1984 (SD Act) with the Workplace Gender Equality Act (WGE Act) would greatly increase their individual effectiveness in preventing and responding to systemic discrimination, and would provide more clarity for employers about the operation of the regime overall.

Our remaining concerns address operational matters associated with the proposed sex-based harassment provisions.

Finally, recognising the Government's commitment in *Australian Women.Labor's Plan for A Better Future* to implement all the recommendations of *Respect@Work*, we also raise the issue of those recommendations that are still outstanding.

Recommendations

1: Operationally, recommendations 16, 17 and 18 of *Respect@Work* are wholly consistent with the 2012 WGE Act minimum standards model. We recommend that the WGE Agency be enabled to refer employers who do not meet minimum standards provisions under the WGE Act to the AHRC for enforcement under the provisions set down in Schedule 2 Parts 1 and 2.

2. NFAW recommends that the Bill be clarified to ensure that sex-based harassment includes the systemic inequalities as well as individual acts of sexual aggression.

3. NFAW recommends that the Bill includes sexual harassment in the powers conferred under s.35A.

4: Section 789FF of the Fair Work Act (FW Act) should be amended to apply the anti-bullying jurisdiction of the FWC to **sex-based harassment**.

5. Section 789FF(1)(b)(ii) of the FW Act, the proposed s.28M of the SD Act and any other corresponding new provision relating to sex-based harassment should be amended to rely on an 'in connection to work' threshold instead of an 'at work' threshold to ensure that the amendments applying the anti-bullying jurisdiction of the FW Commission to sexual harassment would operate as broadly as the *SDA* currently does.

Discussion

Substantive Equality Measures: Schedule 2 Parts 1 and 2

Substantive equality is embedded in the key articles (in particular Article 2 (b)) of the Convention on the Elimination of All Forms of Discrimination against Women, which Australia has signed. It has recurred time and again in the nine reviews of the operation of the SD Act. Its inclusion in this Bill is as welcome as it is late.

Substantive equality is not passive and does not assume that acts of discrimination come out of nowhere. It assumes that discrimination arises in a context and that to address discrimination it is necessary to address that context, including the laws, policies and actions that detrimentally affect women's de facto enjoyment of a specific right or entitlement. Because it is active in concept, its implementation is generally agreed (see sections 5.2 and 5.3 of *Respect@Work*) to involve a positive duty on responsible parties – in this case employers – as well as stakeholder engagement and an 'enforcement agency … which should provide the back-up role of assistance, building capabilities and ultimately sanction where voluntary methods fail'.

These features of a model of substantive equality – a positive duty, stakeholder engagement and an enforcement mechanism-- are in fact the elements of the recommendations of

Respect@Work that were excised from the 2021 Bill and addressed in this one. They include:

- expressly prohibiting creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex
- introducing a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible
- giving the Commission the function of assessing compliance with the positive duty, and enforcing it, and
- giving the Commission a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual discrimination, and

These are long overdue, critically important and extremely welcome measures. Our only significant concern is that while embracing the recommendations of *Respect@Work*, the Bill also embraces its silences concerning the role of the Workplace Gender Equality Agency (WGEA) in bringing about substantive equality. Aligning the amendments to the SD and WGE Acts would greatly increase their individual effectiveness in preventing and responding to discrimination, and would clarify the role and responsibilities of employers.

- *Role of WGEA*

The SD Act and the *Affirmative Action Act* 1986 (AA Act) were initially part of the same legislative package. They were explicitly intended to complement each other, the one responding to and the other preventing acts of sex discrimination. The legislation was split to make passage of both parts easier.

Splitting the legislation resulted in two separate sets of legislative machinery, each of which has suffered from the limitations appropriate to its underpinning. Hitherto the discrimination response function of the SD Act has remained complaint-reliant and legalistic; the discrimination prevention function of the AA Act (now the Workplace Gender Equality Act (WGE Act)) continues to rely on a weak human resource model in which exhortation and awards for good behaviour replace functioning standards.

Both Acts were recently reviewed in Respect@Work (2020) and the *WGEA Review Report* (2021). Data from these reviews confirmed that the poor fit between the discrimination prevention and the discrimination response functions had enabled discrimination and harassment to persist largely unchecked.

The present Bill implements the Government's election commitment to amend the SD Act 'to make it clear that employers have a positive duty to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation'. The *WGEA Review Report* recommended that the token minimum standards currently set under the WGE Instrument be strengthened to achieve the same end – to drive the prevention of sex discrimination.

Dovetailing the amendments to the SD and WGE Acts would greatly increase their individual effectiveness in preventing and responding to discrimination, and would provide more clarity for employers about the operation of the regime overall.

The WGE Act requires the setting of functional minimum performance standards to be met by employers in order to demonstrate progress towards substantive equality. This provision was put into the WGE Act in 2012 by the Gilliard government and requires employers to meet minimum performance standards set by Instrument.

The Gillard government intended that these standards would be based on workplace data received from employers annually and benchmarked to take into account industry and size factors. According to the Explanatory Memorandum, they were thus to consist of 'quantitative outcomes or evidence of actions taken aimed at improving quantitative outcomes over time'. They were to set a floor which could be raised progressively by the Minister as benchmarked data improved. Details on the setting and application of the proposed standards are at Attachment 1.

However, the minimum standards that were actually set under the Instrument by Minister Abetz following the change of government called for one workplace policy and no workplace actions. They thus rendered the minimum standards provisions wholly ineffective.

If the Government were to amend the WGE Instrument to set meaningful outcome-based minimum performance standards, WGEA could use these to drive the prevention of discrimination across **all workplaces employing 100+ people**, while the Sex Discrimination Commissioner and courts would have the same clear, objective performance standards as a framework for establishing whether **individual employers** had met their positive duty to "take reasonable and proportionate measures to eliminate, as far as possible, certain discriminatory conduct" under Schedule 2 Part 1 on the Bill.

Under proposed s 47C(6) the SDC is required, when establishing what 'reasonable and proportionate measures' means in a given workplace, to consider,

> (a) the size, nature and circumstances of the duty holder's 4 business or undertaking; 5
> (b) the duty holder's resources, whether financial or otherwise; 6
> (c) the practicability and the cost of steps to eliminate conduct 7 covered by subsection (2) or (4); 8
> (d) any other relevant matter.

The WGEA minimum outcome standards would already incorporate the considerations set out in proposed s 47C(6)(a), namely the size of the organisation's business and the industry and industry circumstances in which they operate. This data would be available to the AHRC in individual cases. Employers whose outcomes data falls well below WGEA's benchmarked industry standard are unlikely on the face of it to have implemented all the reasonable and proportionate measures available to them to eliminate sex discrimination. In those cases it would fall to employers to demonstrate that (c) the practicability and cost of the measures

were inconsistent with (b) their resources. The same requirement applies to the WGE minimum standards in s. 19B(d) of the WGE Act.

The 'reasonable and proportionate measures' proposed for the SD Act -- called 'minimum standards' in the WGE Act -- are modelled on workplace health and safety (WHS) standards, and like WHS standards are most effective when supported by workplace audits, enforceable undertakings and court orders. Schedule 2, Part 2 of the Bill provides these compliance measures for the SD Act as part of its response to *Respect@Work*. Giving the WGE Agency the power to refer employers who do not meet minimum standards provisions under the WGE Act the to the AHRC for enforcement under the provisions set down in **Schedule 2 Parts 1 and 2** would enable the Agency, over time, to progressively raise the floor set by minimum standards. The Agency has asked for these powers in previous reviews.

The demands on employers that could be enforced through such measures are far from onerous: under the WGE Act provisions, enforcement measures would only apply to employers who have failed to show some progress towards a minimum standard within a two-year timeframe (s. 19(c)), and have also failed to establish the impracticability of doing so (s. 19B(d)).

RECOMMENDATION 1

Operationally, recommendations 16, 17 and 18 of *Respect@Work* are wholly consistent with the 2012 WGE Act minimum standards model. We recommend that the WGE Agency be enabled to refer employers who do not meet minimum standards provisions under the WGE Act to the AHRC for enforcement under the provisions set down in Schedule 2 Parts 1 and 2.

Other provisions

- *Costs*

The issue of costs in bringing an action for discrimination is not clearcut. There is an argument that the anticipation of costs acts as a deterrent to bringing a case. This is especially relevant to the current costs framework, in which applicants may be liable for the costs of both parties if they are unsuccessful. The contrary argument is that if each party pays its own legal costs, lawyers will be reluctant to take on speculative actions on behalf of clients who are unable to pay.

Respect@Work proposed an amendment to the current framework based on section 570 of the Fair Work Act (FW Act). That model provides that each party pays its own legal costs, and that costs may only be ordered against a party if the court is satisfied that the party instituted the proceedings vexatiously or without cause, or if the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs.

The Bill adopts this model with some variations that are broadly consistent with the AHRC's more recent recommendations on harmonising costs issues across the anti-discrimination jurisdiction. The variations expand the grounds on which the court may order costs against a party to include:

> (a) the financial circumstances of each of the parties to the proceedings;
> (b) the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission);
> (c) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
> (d) whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle:
> (i) the proceedings; or
> (ii) the matter the subject of the terminated complaint; and, if so, the terms of the offer;
> (e) whether the subject matter of the proceedings involves an issue of public importance;
> (f) any other matters that the court considers relevant.

Sun-paragraph (e) has been added to the AHRC's recommendations, and 'whether any party to the proceedings is receiving assistance provided by the Attorney-General's Department, or is receiving assistance by way of legal aid (and, if a party is receiving any such assistance, the nature and terms of that assistance' has been removed.

We note in this context that an effort has been made in the Bill to forward the AHRC's longstanding agenda of harmonising anti-discrimination legislation. Amendments to the timeframe for making a complaint, victimisation and inquiries into systemic discrimination are copied into the Age Discrimination, Disability Discrimination and Racial Discrimination Acts. This development is welcome.

- *Sex-based discrimination*

Respect@Work pointed out that there is no rational underpinning for limiting harassment to *sexual* behaviour. Conduct which falls short of sexual harassment may nevertheless constitute sex discrimination if it amounts to less favourable treatment on the basis of sex. According to the Australian Discrimination Law Experts Group (ADLEG) in 2019:

> Limiting harassment to "sexual" behaviour suggests that women are disadvantaged by individual acts of sexual aggression, rather than more systemic inequalities. The remedy for sexual harassment then becomes dealing with individual perpetrators. This approach diminishes the many non-sexual acts that might form the basis of harassing behaviour and make workplaces hostile to women. For example, recent Australian research demonstrated that women had to modify their behaviour to avoid harassment over their appearance, their potential for pregnancy or negative assumptions about their intelligence. Women reported that they felt they had to dress differently, or take off a wedding ring to avoid assumptions about child-bearing

> and complained of being "treated like a moron", and not taken seriously compared to men. (pp 17-18)

Respect@Work noted that 'as a matter of practice, a significant number of complaints that the Commission accepts under the Sex Discrimination Act in the area of employment are assessed as amounting to sexual harassment and/or sex discrimination' (p. 535). It proposed that, to provide clarity and certainty to the law, sex-based harassment be expressly prohibited under the SD Act, and noted that 'one way this could be achieved is to incorporate a prohibition on sex-based harassment into either the sex discrimination or sexual harassment provisions within the Sex Discrimination Act'.

The previous government chose to implement this recommendation by inserting a separate clause 28AA (Meaning of harassment on the ground of sex), which appeared to set a separate and higher standard for sex-based harassment than for sexual harassment more generally.

Sexual harassment is defined in Section 28A as occurring when

(a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

(b) engages in other unwelcome conduct of a sexual nature in relation to the person harassed.

Sex-based harassment is defined in the proposed new Section 28AA as occurring when

(a) . . . the person engages in unwelcome conduct **of a seriously demeaning nature in relation to the person harassed** [our emphasis]; and

(b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Rather than clarifying the intersection of sexual harassment and sex-based harassment, the new provision set two separate standards in the case of sexualised mistreatment ('unwelcome') and of systemic mistreatment ('seriously demeaning') on the ground of sex. In addition, by inserting 'in relation to the person harassed', the definition undermined the consideration of harassment as an effect of broad systemic misconduct by appearing to require the victim to establish some degree of personal targeting.

We further note that proposed s.35A of the AHRC Act confers on the AHRC a range of functions in respect of sexual discrimination, but it does not include sexual harassment in these new functions.

The present Bill addresses the former concern but not the latter. Because of this concern, NFAW recommends that the Bill be clarified to ensure that sex-based harassment includes the systemic inequalities as well as individual acts of sexual aggression.

RECOMMENDATION 2

NFAW recommends that the Bill be clarified to ensure that sex-based harassment includes the systemic inequalities as well as individual acts of sexual aggression.

RECOMMENDATION 3

NFAW recommends that the Bill includes sexual harassment in the powers conferred under s.35A.

- *Amendments to the Fair Work Act: section 789FF*

Whilst the Fair Work Act (FW Act) has been amended to apply the existing anti-bullying jurisdiction of the FWC to ***sexual harassment***, the amendments have not applied the existing anti-bullying jurisdiction to ***sex-based harassment***. For the reasons noted above, NFAW regards this as an important omission, and asks that it be rectified as part of this Bill.

RECOMMENDATION 4

Section 789FF of the Fair Work Act (FW Act) should be amended to apply the anti-bullying jurisdiction of the FWC to **sex-based harassment**.

It should also be noted that section 789FF(1)(b)(ii) of the FW Act only applies where the worker has been sexually harassed 'at work'. We support the view of the Australian Discrimination Law Experts Group that:

> the limitation contained in proposed s 789FD(2A) that the worker must be sexually harassed 'at work' will limit the capacity of these orders to address sexual harassment for workers. This is so because social media used outside working hours is a major avenue for bullying and harassment. Sexual harassment is also likely to occur at informal functions attended with work colleagues… If a worker engages in unwelcome conduct of a sexual nature by posting or sending materials to a co-worker but outside of work hours, and they are received by the co-worker when they are not at work or performing work, this would not satisfy the 'at work' requirement.

We note that this limitation regarding the requirement that behaviour occurs in the workplace has also been incorporated in the Bill in proposed s.28M(2)(a) and (b) of the Sex Discrimination Act. The changing nature of work makes it problematic to limit harassment to circumstances where the two parties are located in the same workplace.

The LCA recommended amendments to reflect the 'in connection to work' threshold instead of an 'at work' threshold to ensure that the proposed amendments that would specifically apply the existing anti-bullying jurisdiction of the FWC to sexual harassment would apply as broadly as the *SDA* currently does. We support his proposal.

RECOMMENDATION 5

Section 789FF(1)(b)(ii) of the FW Act, the proposed s.28M of the SD Act and any other corresponding new provision relating to sex-based harassment should be amended to rely on an 'in connection to work' threshold instead of an 'at work' threshold to ensure that the amendments applying the anti-bullying jurisdiction of the FW Commission to sexual harassment would operate as broadly as the *SDA* currently does.

Outstanding issues

The Bill has picked up key recommendations of *Respect@Work* deferred in 2021, specifically union representative rights and costs. Other amendments deferred by the 2021 legislative package go to the big issues: to the intersection and effective operation of the relevant federal legislation, the SD Act and the FW Act, with each other and with state WHS and defamation legislation and the model laws on which they draw. These amendments include:

- Recommendation 15: The Australian Government ratify ILO Convention 190.

- Recommendation 26: The Australian Government work with state and territory governments, through the Council of Australian Governments or another appropriate forum, to amend state and territory human rights and anti-discrimination legislation with the objective of achieving consistency, where possible, with the Sex Discrimination Act, without limiting or reducing protections.

- Recommendation 39: The Council of Attorneys-General consider how best to protect alleged victims of sexual harassment who are witnesses in civil proceedings, including but not limited to defamation proceedings. Measures could include amending state and territory legislation governing defamation proceedings to introduce a standard direction or presumption in favour of confidentiality and suppression or non-publication of witness details in any defamation court proceeding, where the defamatory material includes allegations of sexual harassment. Consideration should also be given to additional witness safeguards and protections.

We note that until these matters have been addressed the recommendations of *Respect@Work* cannot be said to have been fully implemented.

Attachment 1: The setting and application of the proposed minimum output standards on sex discrimination under the Workplace Gender Equality Act

According to the WGEA Data Explorer, the current gender pay gap for total full-time remuneration in relevant employers in the Financial and Insurance Services in 2021 was 29.5% for salary data that has been annualised and converted to full-time equivalence. That means that roughly half of the employers in Financial and Insurance Services had a gender pay gap which was even wider than 29.5%. The Agency could set a minimum outcome standard that would require the lowest decile/s of employers in the industry to show progress in narrowing their gender pay gap to the industry average or to some specified point nearer the industry average.

The same process could be used to establish numerical minimum outcome standards on an industry by industry, size band by size band basis in relation to lagging indicators for each of the six workplace matters covered by the WGE Act and data collection (namely, gender composition of the workforce; the gender composition of governing bodies of relevant employers; equal remuneration between women and men; the availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities; consultation with employees on issues concerning gender equality in the workplace; any other matters specified in an instrument under subsection – now covering sexual harassment (s. 3)).

In industries with low rates of women in management, the poorest performing decile/s of employers could be required to improve the percentage of women in management up to that of the 50 per cent of top performing employers or to some specified point nearer the industry average. In the female-dominated sectors such as Aged Care Residential Services, where women are well represented in the workforce and in managerial positions generally, a lagging indicator is the percentage of part time women who resigned in 2021 (at 50.3%). In that industry the poorest performing decile/s of employers could be required to improve the percentage of part-time employees they retain to reach the floor achieved by the 50% of top performing employers or to some specified point nearer that group.

This is how minimum outcome standards might work for WGEA, with a focus on output data that points to poorer than average workplace practice in diagnosing and remedying discriminatory practices. The demands set by such standards are far from onerous: under the WGE Act minimum standards provisions, employers are only required to show progress towards the minimum standard within the two-year timeframe set under the Act, not to actually achieve it (s. 19(c)). Failure to show some progress can also be offset by presenting a reasonable excuse (s. 19B(d)).

Once the bottom 50% of employers make some progress towards the floor set by the top 50%, a new minimum standard could be set to raise the floor further. Standards for the different employment indicators set under the Act could be supported with guidance material which might or might not be formalised as Codes of Practice, on the WHS model.