maurice blackburn lawyers

12 October 2022

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Madam/Sir,

We welcome the opportunity to provide feedback in relation to the Committee's review of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*.

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

The issues addressed within the Bill – and in the wider Respect@Work Report – are of critical importance to my work and to the work of Maurice Blackburn. During my time on the Victorian Government's Ministerial Taskforce on Workplace Sexual Harassment[1], I had the opportunity to deeply consider the issues, causes and impacts of workplace sexual harassment.

Our report[2] recommended the adoption of all 55 Respect@ Work recommendations, and made a number of other recommendations supplementing this work. Chief amongst these was the recommendation that work-related gendered violence and workplace sexual harassment be treated as an occupational health and safety (OHS) issue.

While the topics covered by the Bill before the Committee are of vital importance, there is still much work to do.

[1] https://www.vic.gov.au/ministerial-taskforce-workplace-sexual-harassment
[2] https://www.vic.gov.au/sites/default/files/2022-06/Ministerial%20Taskforce%20into%20Workplace%20Sexual%20Harassment%20-%20Recommendations.pdf

Maurice Blackburn welcomes the words of the Attorney-General in his second reading speech:[3]

> *Sexual harassment is a serious and pervasive issue that affects all industries and all professions and demands a fundamental rethink in how our laws are shaped to prevent and respond more effectively. The Respect@Work report represents a paradigm shift in how public policy and the legislative framework support people who experience sexual harassment and discrimination in the workplace. This bill takes those steps as set out in the Respect@Work report, makes that paradigm shift and signals to all workers that they deserve to be safe at work.*

We wholeheartedly support these sentiments. The legislative response to the Respect@Work report should take us across a watershed in Australian working life.

The foundations of the Respect@Work report are in the lived experience of Australians in the workplace. For us it is this lived experience of our clients, and their stories of horrific workplace behaviours and cultures, that drive our desire for fundamental change. We are full of admiration for the courage of those who willingly shared their stories and experience with the report's authors. They will drive change for future generations.

We congratulate the Government on its uncompromised commitment to acting on the recommendations of the report – and on its decision to respond promptly and with such priority. This priority is itself a profound change in the drive for safer, more inclusive workplaces.

Given our general support for the objectives of the Bill in its entirety, Maurice Blackburn offers detailed input for the Committee's consideration on two specific elements of the Bill – the introduction of a positive duty on employers (schedule 2), and costs protection (schedule 5).

A Positive Duty on Employers

Maurice Blackburn notes, from the Explanatory Memorandum that:[4]

> *The Bill would insert a new provision in the SD Act to introduce a positive duty on all employers and PCBUs to take 'reasonable and proportionate measures' to eliminate unlawful sex discrimination, including sexual harassment, as far as possible.*

Maurice Blackburn has long advocated for the introduction of such a regime, under federal leadership. We agree that the suggested adjustment to the *Sex Discrimination Act 1984* is the appropriate response to recommendations 17 and 18 of the report.

In our advocacy, we have argued that for a positive duty on employers to succeed, employers need to be able to draw on a range of concomitant workplace measures such as:

- A clear gender equality strategy;
- A zero tolerance policy for sexual harassment within their workplace;
- Whistle-blower policies which encourage and support the bringing forward of allegations of sexual and other harassment;

[3] https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/26128/0012/hansard_frag.pdf;fileType=application%2Fpdf: p.7
[4] https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6916_ems_6a941119-e2b2-41c6-88ca-e4ce581e5244/upload_pdf/JC007519.pdf;fileType=application%2Fpdf: Paragraph 11, p.4

- A commitment to workplace consultation aimed at identifying systemic causes of sexual harassment;
- Identification and implementation of prevention measures to eliminate the risk of sexual harassment as far as reasonably practicable;
- Provision of education and training to employees and stakeholders to understand, identify and report sexual harassment;
- An effective complaints process that does not cause further harm or detriment to the person making the complaint; and
- Regular evaluation of review of workplace culture and complaints management, including seeking regularly scheduled feedback from staff as to areas for improvement or change.

Maurice Blackburn has also advocated strongly that the onus for preventing workplace sexual harassment must be taken off the victim-survivor, and that responsibility should shift to employers and PCBUs.

We also know that the implementation of a positive duty alone will not achieve the desired results. We encourage the Committee to regard this feature within the Bill as one essential element of a broad approach to achieving the elimination of workplace sexual harassment.

Costs Protection

Recommendation 25 of the Respect@Work report clearly articulates the need to ensure that fear of an adverse cost order does not provide a barrier to victim-survivors of workplace sexual harassment seeking access to justice.

Maurice Blackburn is very conscious of this need and our experience in this area gives us a particular insight both into how important this is to our clients and into the particular design features required to achieve this while ensuring access to justice.

The mechanism described within the report is flawed – in fact, we believe it would have the opposite effect[5] - and we welcome the acknowledgement of this in the fact that the Bill suggests an alternative mechanism for removing the disincentive to pursuing sexual harassment matters in federal courts.

However Maurice Blackburn believes that the measure proposed in the Bill still risks important unintended consequences; it would have a chilling effect on the victim-survivor's willingness to progress her/his claim and risks significantly limiting access to justice for people who have been discriminated against, bullied or harassed.

Paragraph 35 of the Explanatory Memorandum tells us:

> *The Bill adopts a 'cost neutrality' approach and would provide that, as a default position, each party would bear their own costs in an unlawful discrimination proceeding.*

[5] Maurice Blackburn would be delighted to discuss the unintended consequences of replicating s.570 of the *Fair Work Act 2009* in the *Australian Human Rights Commission Act* with the Committee, if that would be beneficial.

The harm suffered by victim-survivors is recognised through the courts primarily via compensation awards. Damages awards for sexual harassment matters have remained persistently low.[6]

The courts also, in our experience, tend to take a conservative approach to claims of economic loss. At the same time, the overall cost of proceedings, often exacerbated by the delaying tactics adopted by well-resourced respondents, often end up exceeding the assessed damages.

Victim-survivors and their representatives are forced to make a value judgement as to whether the stresses and anxieties associated with court proceedings make the claim worthwhile. Thus, the 'cost neutrality' approach may act as a barrier to accessing justice.

The mechanism proposed in the Bill provides, in effect, equal protection to perpetrators and victim-survivors, in circumstances where the power and economic asymmetry is vast. It also presents an opportunity for respondents to use the default cost position to minimise settlements.

In order to ensure the objectives of the Report and the Bill are fully realised, Maurice Blackburn suggests the Committee consider an alternative model in Schedule 5:

Section 46PSA

Repeal the section, and substitute:

46PSA Costs

(1) In proceedings under this Division against a respondent to a terminated complaint, the applicant must not be ordered to pay costs incurred by another party to the proceedings, except in accordance with subsection (2) of this section

(2) The applicant may be ordered to pay costs only if:

> (a) the court is satisfied that the applicant instituted the proceedings vexatiously or without reasonable cause;
>
> (b) the court is satisfied that the applicant's unreasonable act or omission caused the other party to incur costs

The language above borrows from the existing protections for whistleblowers under the *Corporations Act 2001,* s.1317AH.

The advantage of using the Whistleblower Cost Protection Provision within the *Corporations Act 2001* as a model is that it attempts to address both the resource and power differential between potential victim-survivors and respondents.

This power differential is one that is almost always present in claims brought pursuant to the *Sex Discrimination Act*.

[6] Since the decision in *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, which set a new benchmark for sexual harassment damages, there have been only 7 substantive decisions in sexual harassment cases in which general damages were awarded. The average awarded was $50,000 with a median of $70,000.

We believe those who expose sexually hostile and unsafe workplaces should be seen as whistleblowers, who deserve the same protections without constraints on achieving just outcomes.

In our experience, victims of sexual harassment are typically less resourced and more vulnerable than potential respondents in these kinds of claims – which may include large employers. The Whistleblower Cost Protection Provisions, we believe, would be far more effective in achieving the stated aim of Cost Protection, and align better with the intent of recommendation 25.

Our proposed provision has the following advantages:

i. It ensures that applicants are not discouraged from bringing claims (the rationale underpinning recommendation 25, and the existing proposed s.46PSA);

ii. It provides protection for respondents from vexatious claims, unreasonable acts or omissions;

iii. It allows for costs to be awarded against a respondent; and

iv. It thus avoids the unintended consequence of the proposed s.46PSA of discouraging claims where the quantum of an award will be significantly diminished by the costs incurred.

Concluding Remarks

The General Outline within the Explanatory Memorandum begins:[7]

> *The Government is taking decisive action to address sexual harassment in Australian workplaces by implementing all recommendations of the Sex Discrimination Commissioner's Respect@Work Report as a matter of priority. This Bill would implement seven of the recommendations of the Respect@Work Report and significantly strengthen the legal and regulatory frameworks relating to sexual harassment in Australia.*

Decisive action is just what is required. We congratulate the Government on prioritising the implementation of the Respect@Work recommendations, amongst a busy legislative agenda.

From our experience as a consumer and worker advocate, we too often see Governments fail to act in a timely and appropriate manner in response to important reports – reports that were assembled in good faith, drawing on evidence offered in the hope of change. Reports with the importance of Respect@Work should not be allowed to collect dust.

Each of the seven recommendations being implemented through this Bill is important and long overdue. When combined, they will fundamentally change how safety, acceptance and respect are perceived in the workplace, and in who is responsible for ensuring they exist.

We urge the Committee to consider our suggestions for adjustments to the Bill in the spirit in which they have been offered – as a way to make this very important Bill more victim-

[7] https://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r6916_ems_6a941119-e2b2-41c6-88ca-e4ce581e5244/upload_pdf/JC007519.pdf;fileType=application%2Fpdf: Paragraph 1, p.3

centred, and to ensure barriers to access to justice for victim-survivors are completely removed.

Please do not hesitate to contact me via my Executive Assistant Amy Briggs if we can further assist with the Committee's important work.

Yours faithfully,

Liberty Sanger
Principal Lawyer
MAURICE BLACKBURN