HOUSING INDUSTRY ASSOCIATION

Submission to the
Senate Standing Committees on Legal and Constitutional Affairs

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

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contents

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry.

As the voice of the residential building industry, HIA represents a membership of 60,000 across Australia. Our members are involved in delivering more than 170,000 new homes each year through the construction of new housing estates, detached homes, low & medium-density housing developments, apartment buildings and completing renovations on Australia's 9 million existing homes.

HIA members comprise a diverse mix of companies, including volume builders delivering thousands of new homes a year through to small and medium home builders delivering one or more custom built homes a year. From sole traders to multi-nationals, HIA members construct over 85 per cent of the nation's new building stock.

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into the manufacturing, supply and retail sectors.

Contributing over $100 billion per annum and accounting for 5.8 per cent of Gross Domestic Product, the residential building industry employs over one million people, representing tens of thousands of small businesses and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 22 centres around the nation providing a wide range of advocacy, business support services and products for members, including legal, technical, planning, workplace health and safety and business compliance advice, along with training services, contracts and stationary, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On 28 September the Senate referred the provisions of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (Bill) to the Standing Committee on Legal and Constitutional Affairs for inquiry and report.

HIA provides this submission in response to the Bill.

HIA does not oppose the primary objective of the Bill, that would see seven recommendations of the Respect@Work Report implemented to strengthen the legal and regulatory framework relating to sexual harassment for the purpose of *'ensure[ing] safer, respectful and more equitable workplaces in Australia'*.

HIA supports appropriate actions being taken by the business community to address the risks of sexual harassment and other forms of sex discrimination in the workplace. However, the complexity and societal nature of these issues, as well as the overlapping regulatory frameworks, means a regulatory response that places a heavy responsibility for the management of these matters on business is not always appropriate. In fact, these steps may undermine recognition of the need for, and importance of, cultural change; a necessary component of reform in this area as emphasised in the Respect@Work Report.

A systemic and community wide change in behaviour is best achieved through education and support tailored to the needs of, and risks prevalent in, particular industries or community cohorts. A 'one-size-fits-all' approach is inappropriate. There is a need for the development of industry specific guidance, in a similar way to which industry or task specific work health and safety codes of practice are developed.

The importance of a tailored approach is underscored by the unique nature of the residential building industry. As detailed below, the predominance of independent contracting arrangements, a high proportion of which are small businesses, coupled with the transient nature of the industry sets the residential building industry apart from other parts of the construction industry and other sectors of the economy.

While the Bill empowers the Australian Human Rights Commissions (AHRC) to ensure that employers and PCBUs are supported to meet their obligations and achieve compliance through, for example, the publication and preparation of guidance, HIA is concerned these materials will not be ready prior to the commencement of the Bill, nor will they be appropriately tailored.

When looking to respond to the risks of sexual harassment and other forms of sex discrimination in the workplace it is HIA's view that the regulatory approach should encapsulate the following 4 key principles:

- Compliance should take a pragmatic approach.
- Industry participants should have certainty of compliance and be directed towards practical solutions for achieving that compliance.
- Enforcement of the laws should be fair.

- Liability should be based on "actual" control.

While some elements of the above are evident in the Bill, HIA has several concerns including:

- The impact of the Bill on small businesses should not be underestimated. The Respect@Work Report outlined the unique circumstances that face small business regarding managing the risk of sexual harassment and responding to complaints.
- The impact of the Bill on current or proposed arrangements dealing with these matters in other jurisdictions.
- The overlap with existing work, health and safety obligations in terms of both duties and enforcement.
- How employers and PCBUs will practically comply with the obligation to prohibit conduct that subjects another person to a workplace that is hostile on the grounds of sex and the positive duty to take 'reasonable and proportionate measures' to eliminate unlawful sex discrimination.
- A lack of transition. While the enforcement and compliance powers of the AHRC will be delayed by 12 months, the new obligations regarding the positive duty and a hostile workplace should also be delayed to provide further time to educate and develop guidance material.

HIA elaborates on these and other matters regarding the Bill below.

2. THE RESIDENTIAL BUILDING INDUSTRY

The residential building industry includes detached home building, low, medium and high-density multi-unit housing developments, home repairs, renovations and additions, along with the manufacturers and suppliers of building products and related building professionals. The industry has important linkages with other sectors, such as manufacturing, finance, real estate and retailing, meaning its impacts on the economy go well beyond the direct contribution of construction activities.

For example, it is estimated that the residential building industry engages over 1 million people representing tens of thousands of small businesses and over 200,000 subcontractors reliant on the industry for their livelihood.

The residential building industry contributes over $100 billion per annum to the economy and accounts for 6.9 per cent of Gross Domestic Product.

The impact of the sector on the health of the Australian economy should not be underestimated.

The Respect@Work Report makes a number of observations regarding sexual harassment in the construction industry including:

- The construction industry has characteristics that make it more prone to sexual harassment, for example that it is a male-dominated industry.
- That the culture of the industry, including the acceptance of masculine norms and practices, tolerances for sexism and the exclusionary nature of the industry has adverse impacts on women in the sector and the appeal of the sector to women.

HIA supports moves that seek to respond to, and ultimately reduce the incidence of sexual harassment across the construction industry, including the residential building industry. To that end it is noteworthy that the construction industry is not homogenous. The industry is divided amongst those businesses operating in detached residential, multi-residential, renovation, commercial, public infrastructure and civil works sector. While some workers will move between sectors, as a general rule most tend to operate in just one discrete sector. The approach adopted on a single dwelling residential building site is, in every way, different from the approach adopted on, for example, a multi storey commercial development.

The unique nature of the residential building industry, in particular the detached housing and renovation markets, is further highlighted by its reliance on the use of subcontractors.

In commercial construction, whilst there are a large number of subcontracting firms, the overwhelming majority of those working are actually employed by these subcontracting firms. Further subcontracting occurs only in specialist areas. Most commercial construction employees are union members and casual labour is rarely used, for industrial reasons.

By contrast, the housing industry is predominately a subcontracting sector, meaning there are relatively few employees on a low or medium density housing site.

The flexibility of the subcontract system and the highly competitive nature of the residential building industry have interacted to secure a high degree of efficiency and productivity for many decades.

There are around 25 different trades involved on-site in the building of a house. These trades are on-site for short periods of time, interacting with other trades in an adhoc manner with respect to overlaps of time and direct interactions to undertake work tasks.

The familiar ones are of course concreters, bricklayers, framing carpenters, plumbers, electricians, roof tilers and painters. Others include the contractor who pegs out the site, backhoe operators, drainers, termite system installers, plasterboard fixers, plasterers, floor tilers, glaziers, kitchen installers, the fitting out carpenter, the floor sander, the brick cleaner and finally the garage door fixer.

Central to the notion of subcontracting arrangements and the use of independent contractors is that the contractor is running their own business, which is generally a small or micro business. This means that the way those contractors operate can be diverse.

Further as with any commercial relationship, there are risks in managing the subcontractor relationship and it is unclear how the proposed obligations will impact these contractual arrangements.

The allocation of risk through a contractual chain is acceptable business practice. How the industry will respond to the Bill through the allocation of the risks it highlights is unclear, principally because the expected approach and response to the new obligations are unclear.

3. THE BILL

3.1 HOSTILE WORK ENVIRONMENT

The Bill seeks to introduce a new provision to prohibit conduct that subjects another person to a workplace that is hostile on the grounds of sex.

The Explanatory Memorandum to the Bill (EM) notes that while conduct that results in a hostile work environment may be captured through existing provisions of the *Sex Discrimination Act 1984* (SD Act) it is not well understood or recognised and that the proposed amendment would *'provide clarity and certainty to the law and set clear boundaries on acceptable conduct in the workplace.'*[1]

HIA is concerned that proposed section 28M of the Bill does not achieve this outcome, in fact in many respects the provision in confusing and complex due to the broad and ongoing nature of the obligation.

The new obligation applies to the 'workplace'.

The meaning of 'workplace' has been drawn from the model *Work Health and Safety Act 2011* (WHS) and means

> *'a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.'*

The appropriateness of this definition for the purposes of work, health and safety laws can be justified. In contrast, there is less certainty regarding the appropriateness of this approach within the context of the Bill, particularly given the broad nature of this definition.

The proposed provision, as explained by the EM, appears to set an expectation that an employer or PCBU can and should anticipate all of those who may come into their workplace on an ongoing basis.

This presents real challenges for those working on residential building sites, particularly for those working on renovation, alterations and additions which would also be a 'workplace' for the purposes of the Bill. Owners generally remain on the premises while renovation, alterations and additions work is being carried out. This makes having some foreseeability regarding who will be attending the 'workplace' more difficult.

Inevitably a variety of individuals enter and exit residential building sites continuously. This does not only include trade contractors but local regulators, council officer or even bank valuer and in cases where owners remain on site this list expands.

[1] EM pg.4

It is hard to conceive how an employer or PCBU, working in these circumstances, can ensure they are taking the appropriate steps. While the example set out in the EM[2] provide some guidance the lack of examples that set out circumstances that would not breach the provision is problematic.

The notion that a hostile work environment is not *'directed towards a particular person, but results in a generally hostile environment'* [3] is an incredibly complex notion to respond to in a meaningful way. Further and based on the material in the EM, the possibility that a person could experience a hostile work environment based on, for example, overhearing others presents real challenges for employers and PCBUs.

While a 'reasonable person test' applies in conjunction with the ability to take into consideration a number of factors when assessing a workplace, that proactive nature of the obligations coupled with the intended broad remit of the provision, creates significant complexity for employers and PCBUs.

3.2 POSITIVE DUTY TO ELIMINATE SEXUAL HARASSMENT IN THE WORKPLACE

The Bill seeks to introduce a positive duty on all employers and PCBUs to take 'reasonable and proportionate measures' to eliminate unlawful sex discrimination, including sex discrimination, sexual and sex-based harassment, hostile work environments and victimisation, as far as possible. This imposes a proactive duty on employers and PCBUs to prevent discrimination and harassment being engaged in by the duty holder themselves, as well as their employees, workers, agents and third parties.

Existing regulatory arrangements

The EM concedes that WHS laws currently impose a positive duty on PCBUs to prevent sexual harassment. The EM also supports the observations of the Respect@Work Report regarding current overlapping duties under the SD Act and that rather than duplicating obligations, it is proposed that this new positive duty *'would ultimately work in a mutually reinforcing way.'*[4]

HIA is concerned that this overstates the compatibility between the current WHS regulatory arrangements including the current Codes of Practice that deals with sexual harassment[5], not to mention that a similar duty also exists under the Victorian *Equal Opportunity Act 2010* with proposals for similar arrangements under consideration across WA, the NT and the ACT.

What is 'reasonable and proportionate'?

The Bill imposes a significant duty on employers and PCBUs, a duty that, while described to be similar to that imposed under WHS laws, differs in a number of respects.

Firstly, the assessment of the steps to be taken to action the obligations in respect of the duty differ from the approach to managing risks and implementing controls under WHS laws.

The model WHS laws require that a PCBU *'ensure, so far as is reasonably practicable, the health and safety of their workers and any other persons who might be affected by a PCBUs business or undertaking'*. The 'reasonably practicable' test is a point in time test that requires the weighing up of

[2] See paragraph 37 and 45
[3] EM pg. 21
[4] EM pg. 32
[5] The Model Code of Practice: Managing psychosocial hazards at work addresses sexual harassment as a workplace hazard

a range of relevant factors. This approach is supported by a hierarchy of controls that guide PCBUs regarding the steps to take to meet their duty.

Section 47C proposes a different test, one that requires taking reasonable and proportionate measures to eliminate, as far as possible…unlawful sex discrimination etc. This imposes an ongoing obligation, the assessment of which does not appear to be linked to a particular point in time when determining if a breach has occurred, as stated in the EM:

> *'…employers must continuously assess and evaluate whether they are meeting the requirements of the duty.'*[6]

Secondly, and despite assertions in the EM that the approach under the Bill is, for all intents and purposes, the same as that under the model WHS laws, it is arguable that a 'proportionate response' sets a higher bar than what is *reasonably practicable*.

The notion of 'proportionality' holds significant weight, for example, in a criminal law context the concept may be used to convey the idea that the punishment of an offender should fit the crime; in a civil law sense, proportionately liability allows courts to apportion responsibility for damages amongst a number of wrongdoers to the extent of their determined wrongdoing. Finally in terms of its ordinary meaning, 'proportion' can mean *'comparative relation between things as to size, quantity, number…proper relation between things or parts: balance'*.

Critically if an employer or PCBU can prove that they have taken 'reasonable and proportionate' measures to eliminate unlaw sex discrimination they will not be held liable for the unlawful conduct of their employees etc. Therefore, understanding and complying with this test is crucial.

If the intention is that employers and PCBUs approach this duty in the same way as they do their duties under work health and safety laws then, a more common sense approach would be to adopt that approach in this Bill. This would provide greater clarity and certainty for employers and PCBUs.

Control and Influence

Subsection 47C(3) of the Bill provides that a duty holder is responsible for the conduct of specific people in the workplace. The EM states that this responsibility is confined to workplace relationships where an employer or PCBU could *'reasonably exercise control or influence over another person's conduct'*[7].

While supportive of this approach HIA would highlight that this intention is not abundantly clear from the drafting of the Bill. HIA strongly recommends that the duty apply where an employer or PCBU had actual control over those at the workplace. This approach provides both clarity and certainty regarding the nature and extent of the obligation.

[6] EM pg. 31
[7] Item 98

3.3 REPRESENTATION

The Bill seeks to amend the *Australian Human Rights Commission Act 1986* (AHRC Act) to enable representative bodies to make representative applications in the Federal Courts on behalf of people who have experienced unlawful discrimination. HIA opposes this approach.

HIA agrees with the current approach to handling complaints i.e., that representative bodies can lodge a complaint in the AHRC on behalf of a person but where a complaint is terminated, only the affected person has standing to initiate federal court proceedings. This *'constrained'*[8] approach appears appropriate.

Taking a matter to court is a serious step particularly where the complaint has been terminated by the AHRC. Affected persons should be able to go to their representative bodies for guidance and support but to allow those bodies to commence court proceedings, in HIA's view is a step to far.

If there is general acknowledgement of the complexities and costs in the court system the more appropriate response would appear to be to review those processes rather than unduly, and without much justification, expand the role of representative bodies in relation to these matters.

The proposed ability, under the Bill, of the AHRC to conduct inquiries into systemic unlawful discrimination offers a sounder approach, subject to sensible checks and balances to ensure that such investigations are not frivolous or vexatious, to respond to concerns of public interest based organisations as opposed to expanding standing in the Federal Court.

3.4 COMPLIANCE AND ENFORCEMENT

The EM sets out the current compliance and enforcement mechanisms with regards to sexual harassment, noting that the expanded role of the AHRC by way of the Bill requires that the operation of these current arrangements be clarified. On this basis HIA understands that:

- A work health and safety regulator can investigate sexual harassment in a workplace.
- An individual could make a complaint of sexual harassment to the AHRC under the AHRC Act in relation to the same conduct being investigated by the work health and safety regulator.
- A person cannot make a complaint about a relevant matter under both the SD Act and a state or territory law that deals with the same matter, however a person remains entitled to raise a WHS issue at their workplace.
- Applications to the Fair Work Commission (FWC) regarding orders to stop sexual harassment or bullying are intended to operate unaffected.

This represents a regulatory web that will require detailed explanation for employers and employees alike. Concerningly, if enacted, an employer or PCBU can be investigated for the same conduct through at least three different avenues at the same time. Equally, there does not appear to be anything preventing an applicant from commencing proceedings in different jurisdictions sequentially, particularly if the claim is unsuccessful.

[8] EM pg. 79

HIA suggest that this approach be reconsidered. The Committee could consider recommending an approach that would see applicants being required to 'choose' an option to the exclusion of others, for example, if a complaint is made to the AHRC, an application could not be made in the FWC's jurisdiction and vis versa.

3.5 IMPLEMENTATION

HIA supports the proposed approach to delay the commencement of the AHRC functions to monitor and assess compliance with the new positive duty to eliminate unlawful sex discrimination.

HIA is extremely concerned regarding the lack of any transitional arrangements in relation to the positive duty and the new prohibition on subjecting another person to a hostile workplace on the grounds of sex.

As noted by the Respect@Work Report, and echoed throughout the EM, obligations relating to sexual harassment currently exist, albeit in various forms, but employers and PCBUs appear to be broadly unaware of their obligations or how to take appropriate actions to respond to such circumstances. More rules do not of themselves, make people comply. Education and support for compliance are key to effective implementation.

In light of the complexity, uncertainty and inevitable cost burden that will be imposed, entities carrying out residential building work must be provided sufficient time to build capacity to address and respond to these complex issues. Time must also be allowed for contracting parties to understand their roles and responsibilities in responding to this issue and to negotiate and determine what the appropriate expectations are on all of those working on a residential building site.

On this basis HIA proposes a three staged transitional arrangement.

Stage 1 would see the commencement of the proposed new functions of the AHRC under clause 35A on Royal Assent.

12 months later the new obligations in Schedule 1 and Schedule 2, Part 1 of the Bill could commence, and finally, the third stage would see the commencement of the AHRC compliance and enforcement powers.

These proposed transitional arrangements seek to provide a balanced approach to ensure a focus on cultural change in the first instance, followed and supported by what would have become a familiar regulatory framework.