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Senate Education and Employment Legislation Committee

Submission to the Inquiry into the provisions of the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

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Authorisation

This submission has been authorised by the NFAW Board

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Submission to the Senate Education and Employment Legislation Committee's Inquiry into the provisions of the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

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.

Overview and recommendations

The Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (the Bill) is minimalist in its ambitions and achievements: indeed, many of its provisions are described by the government in its Explanatory Memorandum as merely clarifying existing provisions of the relevant legislation (paras 14, 18, 19, 21, 24 and 184).

The Explanatory Memorandum states that the government's *Roadmap for Respect*, including the proposed legislative measures, will provide 'a clear and comprehensive path forward to prevent and address workplace sexual harassment' (para. 3). In fact, the legislative package is far from comprehensive and rejects any preventative measure. The government has declined to act on Respect@Work recommendations 15, 17, 18, 19, 23, 25, 26, 28, 35 and 39, in some cases by ignoring them and in others by calling for further consideration at some unspecified future time.

While it is claimed in the Explanatory Memorandum that this package gives effect to recommendations 16, 20, 21, 22, 29, and 30 (para. 3), in fact the critical *preventative* measures in recommendations 16 (a and c) are simply omitted.

While NFAW welcomes all but one of the proposed amendments that have survived the neutering process of the government's *Roadmap for Respect*, it notes that:

- the remaining measures amend the existing reactive, complaints-based model and omit, indefinitely defer or reject any legislative support for pro-active and preventative measures
- as a consequence the government's response continues to throw legislative responsibility for addressing sexual harassment back onto its victims
- clarifying some aspects of the sexual harassment regime is a minimalist response to the needs of victims, who are vulnerable to victimisation dismissal, reputational damage, loss of future employment and considerable legal costs if they are left by government to carry legal responsibility for responding to harassment across Australian workplaces (790)

- educational packages alone cannot leverage legislative and system change. Given past experience with such packages in the discrimination jurisdiction associated with many of the nine reviews of the operation of the SD Act, it is disingenuous to argue or imply that they can.

Recommendations

Recommendation 1

NFAW supports the amendments proposed in this very minimalist package with the exception identified in recommendation 3.

Recommendation 2

NFAW recommends that the Committee deplore the omission from the Bill of the principle of substantive equality and measures to prevent sexual and sex-based harassment in the workplace, and recommends amendments to the Bill to

- expressly prohibit of creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex
- 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
- give the Commission the function of assessing compliance with the positive duty, and enforcing it
- give the Commission a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment, and
- 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.

Recommendation 3

NFAW recommends that the Committee establish to its own satisfaction whether two different standards of harm are being established in 28A and new clause 28AA of the SD Act, as well as whether the definition in the latter implies that broad sex-based harassment must be targeted at an individual before it is recognised under law.

Recommendation 4

NFAW recommends that the Committee record its support for an amendment to the Fair Work Regulations to include sexual harassment in the definition of 'serious misconduct'.

Recommendation 5

NFAW recommends that the Bill 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.

Recommendation 6

Recognising the time that was allowed to elapse before the government made its initial response to Respect@Work, NFAW strongly recommends that the Bill be amended to insert a reporting deadline for the government's legislative response to recommendations 15, 26, 28, 35 and 39.

Discussion

Individual measures proposed by the Bill are set out below, together with those legislative recommendations from *Respect@Work* that they are meant to address and those recommendations that are not addressed.

1. Amendments to the Sex Discrimination Act (SD Act)

- ***Item 3: 'Paragraph 46PH(1)(b)': Amending the discretionary grounds on which a complaint may be terminated by the President of the Australian Human Rights Commission***

Respect@Work recommendation 22: Amend the Australian Human Rights Commission Act so that the President's discretion to terminate a complaint under the Sex Discrimination Act on the grounds of time does not arise until it has been 24 months since the alleged unlawful discrimination took place.

This provision would mean that a complaint under the SD Act could only be terminated if it is made more than 24 months after the alleged unlawful conduct took place instead of the current six months. The President already has and would still maintain their discretion to consider a complaint beyond the statutory timeframe. However, this change would reassure complainants their complaints would not be dismissed within 24 months of the conduct.

This amendment is supported.

- ***Item 31: Clarifying the object of the SD Act***

Respect@Work recommendation 16 (a): Amend the Sex Discrimination Act to ensure:

(a) the objects include 'to achieve substantive equality between women and men'

This Bill would create a new object clause to make it clear that in addition to the elimination of discrimination and harassment, the SD Act aims 'to achieve, so far as practicable, equality of opportunity between men and women' (item 31). According to the Explanatory Memorandum (para 57): 'this amendment would ensure that the concept of equality of opportunity between men and women, in addition to the elimination of discrimination, underpins the operation of the SD Act'.

A concept of equality of opportunity already underpins the SD Act. That concept is demonstrably dated and deficient. It does not address systemic causes of sexual harassment. Instead, it treats acts of discrimination as one-off aberrations from some sort of benign national norm, and makes the victim responsible for dealing with them. It is a form of whack-a-mole using victims as mallets. It is also adversarial and procedural and brings discrimination law and often victims and witnesses into disrepute (3.8(b)(i) and p. 558):

> As the [Commission's] 2018 National Survey shows, rates of sexual harassment are actually increasing under the current framework, while rates of reporting have decreased. This may suggest that the present Sex Discrimination Act is not providing an effective framework for employers to prevent sexual harassment. The survey findings are supported by submissions and consultations, which demonstrate that 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 amendment to the object of the SD Act proposed by the government silently guts recommendation 16 of *Respect@Work*, which explicitly and carefully called for the objects of the Act to include 'substantive equality'.

Substantive equality is not a new concept which the government somehow missed. It 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. It is extraordinary that organisations such as NFAW are still having to say this.

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 (sections 5.2 and 5.3) 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 have been excised from the government's *Roadmap* and from this Bill, leaving only the empty claim to provide 'a clear and comprehensive path forward to prevent . . . workplace sexual harassment' (para. 3).

Specifically, the Bill omits the broad in principle support for substantive equality in recommendation 16 (a) and the preventative measures set out in recommendations 16(c), 17, 18, 19 and 23 of *Respect@Work*:

- Recommendation 16 c: express prohibition of creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex
- Recommendation 17: introduction of a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible
- Recommendation 18: giving the Commission the function of assessing compliance with the positive duty, and enforcing it
- Recommendation 19: giving the Commission a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment
- Recommendation 23: amending 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.

All of these actions are lost to this Bill. In the *Roadma*p, most of these were 'noted', which appears to have been formalised spin for 'rejected'; 18 was indefinitely deferred; and 19 was 'agreed in part', apparently spin for substituting the government's recommendation for the Commission's recommendation.

NFAW recommends that the Committee deplore these omissions and recommends amendments to the Bill to

- expressly prohibit of creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex
- 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
- give the Commission the function of assessing compliance with the positive duty, and enforcing it
- give the Commission a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment, and
- 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.

Recommendation 2

NFAW recommends that the Committee deplore the omission from the Bill of the principle of substantive equality and measures to prevent sexual and sex-based harassment in the workplace, and recommends amendments to the Bill to

- expressly prohibit of creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex
- 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
- give the Commission the function of assessing compliance with the positive duty, and enforcing it
- give the Commission a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment, and
- 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.

We note that the government has in the past acted to undermine elements of substantive equality in women's employment. Many of these elements are present in section 2A of the principal objects of the Workplace Gender Equality Act -- passed under a previous government-- but the minimum standards designed to be the drivers of action are squibbed in the government's current Workplace Gender Equality (Minimum Standards) Instrument 2014, which in its current form merely requires employers to do something, or at least to think about doing something, to address barriers to equal employment opportunity in their workplaces.

- ***Items 32ff and 63: Expanding coverage of the SD Act***

Respect@Work recommendation 16 (d): the definition of 'workplace participant' . . . covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed and (e) the current exemption of state public servants is removed.

The provisions appear to address the recommendations and are supported.

- ***Item 60: Prohibiting sex-based harassment***

Respect@Work recommendation 16 (b) sex-based harassment is expressly prohibited.

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):

> 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)

The Commission noted in its report 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'.

What the government has chosen to do is to insert a separate clause 28AA (Meaning of harassment on the ground of sex) which appears 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** [our emphasis] in relation to the person harassed; 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 would appear to 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 proposed definition may undermine the consideration of harassment as an effect of broad systemic misconduct and require the victim to establish some degree of personal targeting.

Because of this concern, NFAW recommends that the Committee establish to its own satisfaction whether two different standards of harm are being established in 28A and new clause 28AA of the SD Act, as well as whether the definition in the latter implies that broad sex-based harassment must be targeted at an individual before it is recognised under law.

Recommendation 3

NFAW recommends that the Committee establish to its own satisfaction whether two different standards of harm are being established in 28A and new clause 28AA of the SD Act, as well as whether the definition in the latter implies that broad sex-based harassment must be targeted at an individual before it is recognised under law.

- ***Item 63: Simplifying the operation of section 28B and expanding its coverage to protect all workers in a modern work context***

Respect@Work recommendation 16 (d): the definition of . . . 'workplace' covers all persons in the world of work.

The provisions appear to address the recommendations and are supported.

- ***Item 77 (together with items 1 and 2): simplified processes for complaints of victimisation to the AHRC***

Respect@Work recommendation 21: Amend the Australian Human Rights Commission Act to make explicit that any conduct that is an offence under section 94 of the Sex Discrimination Act can form the basis of a civil action for unlawful discrimination.

This provision would clarify the existing position under the legislation that victimising conduct can form the basis of a civil action for unlawful discrimination in addition to a criminal complaint under the SD Act.

The provision appears to address the recommendation and is supported.

- ***Item 86: Ensuring that people who cause, instruct, induce, aid or permit another person to engage in sexual harassment are also liable under the SD Act.***

Respect@Work recommendation 20: Amend section 105 of the Sex Discrimination Act to ensure that it applies to sexual harassment.

Section 105 of the Sex Discrimination Act deems the conduct of a person who 'causes, instructs, induces, aids or permits' another person to do an unlawful act of discrimination to have engaged in that same conduct. Section 105 currently only applies to Division 1 or 2 of Part II, and therefore does not apply to sexual harassment, which is set out in Division 3 (unless the conduct also amounts to discrimination) or victimisation.

The amendment would address the limitations of the current provision as recommended and is supported.

2. Amendments to the Fair Work Act (FW Act)

As is the case with recommendations relating to the SD Act, selected recommendations of *Respect@Work* relating to the FW Act are indefinitely deferred.

One recommendation which was actually agreed to in the *Roadmap* but whose status is unclear is recommendation 31: 'Amend the definition of "serious misconduct" in the Fair Work Regulations to include sexual harassment'. We hope that the government intends meet its commitment to this amendment and recommend that the Committee put on record its support for such an amendment.

Recommendation 4

NFAW recommends that the Committee record its support for an amendment to the Fair Work Regulations to include sexual harassment in the definition of 'serious misconduct'.

Amendments which do appear in the proposed implementation package are as follows.

- ***Items 4-5 and 11-28: Clarify and expressly provide for the availability of 'stop orders' in relation to sexual harassment within the FW Act***

Respect@Work 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 sexual harassment may constitute bullying in some circumstances, the two types of behaviour can differ substantially in nature and experience. This Bill would amend the existing anti-bullying jurisdiction in the FW Act to make it clear that within that jurisdiction, the FWC can make an order to stop sexual harassment in the workplace.

These amendments are supported.

- ***Item 10 Sexual harassment as a valid reason for dismissal***

Respect@Work recommendation 30: Amend Section 387 of the Fair Work Act to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable.

The Bill would insert a legislative note into the FW Act to confirm that sexual harassment in connection with the employee's employment can be a valid reason for dismissal.

This amendment is supported.

- ***Items 7 – 9: Miscarriage leave***

The Bill would vary the existing entitlement to compassionate leave in the FW Act to enable an employee to take up to two days of paid compassionate leave (unpaid for casuals) if the employee, or employee's current spouse or de facto partner, has a miscarriage.

The changes build on the *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020*, which introduced improved access to unpaid parental leave and compassionate leave for families dealing with the trauma of stillbirths, infant deaths and premature births.

This proposed amendment follows an announcement from the NSW Government in its budget on 22 June, relating to NSW public sector employees, that it will provide five days of paid bereavement leave where an employee or their spouse has a miscarriage.

This amendment is supported.

3. Deferred amendments

The *Roadmap* identifies and defers a number of legislative responses recommended in *Respect@Work.* One of these is Recommendation 25: Amend the Australian Human Rights Commission Act [(AHRC Act]) to insert a cost protection provision consistent with section 570 of the Fair Work Act 2009 (Cth).

This recommendation has been agreed to in principle by government and then indefinitely deferred pending a vaguely worded review. There is no clear reason why this provision cannot proceed as part of the current package, and (from the victim's perspective) every reason why it should, as costs operate as a significant disincentive to pursuing sexual harassment matters under the SDA.

We recommend that the Bill 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.

Recommendation 5

NFAW recommends that the Bill 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.

Other deferred amendments go to the big systemic 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 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 35: WHS ministers agree to amend the model WHS Regulation to deal with psychological health, as recommended by the Boland Review, and develop guidelines on sexual harassment with a view to informing the development of a Code of

Practice on sexual harassment. Sexual harassment should be defined in accordance with the Sex Discrimination Act.

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.

All of these matters go to the issue of systemic failure to drive cultural change and prevent the sexual and sex-based harassment of women. All have been left hanging. 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.

Recognising the time that was allowed to elapse before the government made its initial response to *Respect@Work*, and the profound inertia evident in the government's approach to substantive equality, NFAW strongly recommends that the current Bill be amended to insert a reporting deadline for the government's legislative response to these recommendations.

Recommendation 6

Recognising the time that was allowed to elapse before the government made its initial response to *Respect@Work*, NFAW strongly recommends that the Bill be amended to insert a reporting deadline for the government's legislative response to recommendations 15, 26, 28, 35 and 39.