

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

**Question No. 1**

**Senator Scarr asked the following question at the public hearing on 17 October 2022:**

**Senator SCARR:** Lastly, Safe Work Australia, which is obviously a key coordinator, regulator, in this space, in its concluding remarks in paragraph 37, states:

To ensure optimal outcomes for prevention of workplace sexual harassment, the introduction of a positive duty in the SD Act should be complementary to the existing duties in the model WHS laws. To achieve this, in our view, both frameworks should use the same language, impose duties of the same standard and not further confuse, or cause uncertainty, to duty holders and the broader community.

[...]

**Senator SCARR:** Okay. Have you had an opportunity to review Safe Work Australia's submission?

**Ms Jenkins:** I have not.

**Senator SCARR:** Can I ask you to give us a formal response to that on notice so that we've got that evidence? I read their concluding comments to you, and there seems to be a bit of a different nuance from what you said, so I think it would be useful to get a formal response to that.

**The answer to the Senator's question is as follows:**

The Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) (Bill) seeks to introduce a positive duty into the *Sex Discrimination Act 1984* (Cth) (Sex Discrimination Act). This duty would attach to all employers and 'persons conducting a business or undertaking' (PCBUs) and would require these duty holders to 'take reasonable and proportionate measures to eliminate, as far as possible' certain discriminatory conduct, including sex discrimination, sexual harassment, sex-based harassment, and acts of victimisation in the workplace context. This legislative amendment, and

its proposed formulation, is a direct implementation of Recommendation 17 of the Respect@Work report<sup>1</sup>.

In its submission to this Inquiry, Safe Work Australia raised concerns that the proposed positive duty in the Sex Discrimination Act is drafted in different terms to a positive duty that currently exists in the model Work Health and Safety (WHS) laws—which also imposes a positive duty on PCBUs to prevent risks to health and safety, which includes risks to psychosocial health. It is now accepted that workplace sexual harassment may create a risk to psychosocial health.

As Safe Work Australia notes, the duty under the Sex Discrimination Act would require ‘reasonable and proportionate measures’ be taken in relation to the elimination of workplace sexual harassment ‘so far as possible’, while the model WHS Act requires workplace sexual harassment to be eliminated or minimised ‘so far as is reasonably practicable’.

Safe Work Australia’s submission states:

To ensure optimal outcomes for prevention of workplace sexual harassment, the introduction of a positive duty in the SD Act should be complementary to the existing duties in the model WHS laws. To achieve this, in our view, both frameworks should use the same language, impose duties of the same standard and not further confuse, or cause uncertainty, to duty holders and the broader community.

While acknowledging the concerns of Safe Work Australia, the Australian Human Rights Commission (Commission) supports the formulation of the positive duty proposed in the Bill. As set out in the Respect@Work report, the proposed positive duty in the Sex Discrimination Act was never conceptualised as being identical to the one in WHS laws. Instead, it was intended that ‘with these differing but complementary approaches, the two positive duties would work in a mutually reinforcing way’.<sup>2</sup>

As identified in the Respect@Work report, WHS laws and discrimination/equal opportunity laws have different foundations and focuses.<sup>3</sup> The WHS positive

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<sup>1</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) (Respect@Work report) at <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

<sup>2</sup> Respect@Work report, 480.

<sup>3</sup> Respect@Work report, 480.

duty, as it relates to sexual harassment, is focused on psychological health broadly and frames sexual harassment as a safety risk and hazard. The proposed positive duty in the Sex Discrimination Act would operate more broadly within a human rights framework to address conduct that is made unlawful by an anti-discrimination law. Conduct may be unlawful under the Sex Discrimination Act even if it does not pose a specific risk to health and safety. The positive duty in the Sex Discrimination Act would also extend beyond sexual harassment and include sex discrimination, sex-based harassment, conduct that amounts to subjecting a person to a hostile work environment on the ground of sex and acts of victimisation.

The positive duty that would be introduced into the Sex Discrimination Act by the Bill is based on a positive duty that already exists in the Victorian *Equal Opportunity Act 2010*. Duty holders, such as employers and PCBUs, are already obliged to comply with both federal and state and territory anti-discrimination laws.

Recommendation 26 of the Respect@Work report proposes that: '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.'

This recommendation was made because the Commission considers that consistency in sex discrimination and sexual harassment provisions across federal, state and territory anti-discrimination laws is important, as it allows for the development of a clear and coherent body of guidance and precedent.

If the Bill passes, duty holders will have the obligation to prevent sexual harassment under WHS laws and the Sex Discrimination Act. The Commission considers that these duties, working in combination, will encourage employers to take proactive measures to prevent sexual harassment in the workplace.

## Question No. 2

**Senator SCARR:** Okay. I've got a heap of questions, to be frank, but we've run out of time. I just want to pursue this point, because I think it's an important point, Commissioner, given our experience. I've done sexual harassment

training, conducted training with employees and sought to do all the things you outlined in terms of employers et cetera. It concerns me that, in terms of the optics, we're imposing the duty on employers and there's no—on the face of it—clear duty imposed upon employees, contractors and everyone who's engaged in the workplace. It's as if the employer solely has the power to change this when it's a whole-of-society problem. In a workplace, everyone in the workplace has responsibilities and duties. Don't you think there's some benefit in making that abundantly clear in the act, given that we're trying to send a message to everyone that, if you're an employee in the workplace, it's not just the guy, or the woman—the manager—sitting in the head office; all of us have a responsibility to change the culture? Do you see what I'm getting at?

**Ms Jenkins:** I do understand what you're getting at, and my response would be: the single most important change, I think, would be employers feeling responsible and taking action and, as a result of them being the employer, that they should be able to make a significant change. There are also the accessory liability provisions in the Sex Discrimination Act that would apply to managers who don't take action, and therefore it cascades. But we're happy to provide a written response that gives you better clarity and, in terms of practical application, I do think the positive duty and the employers being focused on this will be the single most revolutionary change that will impact sexual harassment.

**Senator SCARR:** Thank you.

**The answer to the Senator's question is as follows:**

It is correct that, if the Bill passes, the positive duty in relation to sex discrimination and sexual harassment would only attach to employers and PCBUs.

In Respect@Work, the Commission recommended the introduction of a positive duty in the Sex Discrimination Act, attaching to all employers, because it heard that the lack of a clear positive duty meant that employers were placing a higher priority on compliance with employment law and work health and safety laws than discrimination laws.<sup>4</sup> The Commission also heard that workers were often reluctant to bring complaints against their employers, given the usual power imbalance between a worker and their employer. Therefore, the individual complaints model that currently exists under the Sex Discrimination Act was seldom used to hold employers accountable for workplace sexual harassment and did not create the appropriate incentive for action to prevent sexual

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<sup>4</sup> Respect@Work report, 28.

harassment. The Commission's proposed function under this Bill of assessing and enforcing compliance with the positive duty in relation to sex discrimination and sexual harassment would allow the Commission to inquire into an employer or PCBUs' compliance with the positive duty if it 'reasonably suspects' that it is not complying. This would operate alongside the existing individual complaint model and focus on achieving more systemic change.

Employers and PCBUs can exercise significant authority and influence over workplace environments and culture. The Commission considers that it is appropriate that the positive duty attach to them in the first instance. It also considers that this model works consistently with the Bill's proposed compliance functions for the Commission discussed above. The question of extending the positive duty to individual workers and third parties in workplaces is an interesting one that was not explored in Respect@Work. If this Bill passes, there will be opportunity to evaluate the effectiveness of the positive duty in the Sex Discrimination Act and consider the question of whether it should be extended beyond employers and PCBUs.

As further background, the Commission notes that the conduct of co-workers and others are covered by the sexual harassment provisions in the Sex Discrimination Act under section 28B and section 105:

- Section 28B of the Sex Discrimination Act makes it unlawful for a 'person' to sexually harass another person in the workplace context, which extends to the conduct of fellow workers and third parties — such as suppliers, contractors, customers, patients — if the harassment occurs in connection with either the person harassed or the alleged harasser being a worker. This means that, if a person sexually harasses another person, they can be named as an individual respondent in a complaint under the Sex Discrimination Act. These complaints can proceed to the federal courts and, if the conduct is found to be unlawful, judicial remedies are available — for example, an order that a respondent pay damages.
- Under section 105 of the Sex Discrimination Act, a person who 'causes, instructs, induces, aids or permits another person' to engage in sexual harassment can also be held liable for that conduct. This means that other individuals can be held liable under the Sex Discrimination Act for unlawful conduct in the workplace if they could have prevented the unlawful conduct from occurring or permitted its performance.

This means that it is unlawful for a person to sexually harass another person at work — or to permit such conduct — subject to the consequence of a complaint

being made under the Sex Discrimination Act. While not articulated as a positive duty in the Sex Discrimination Act, these provisions do operate to proscribe such conduct.

**The Committee also asked the following questions by email dated 18 October 2022:**

1. Has the Commission made an assessment of the additional work that may arise for the Commission out of implementation of this Bill and its provisions?
2. If so, has it made an estimate of the new resources that would be required to undertake that additional work in reasonable timelines, alongside its existing body of work?
3. What is that estimate in the year ahead, and into the longer term, say over the next few years?

**The response to the Committee's questions are as follows:**

**Question No. 1**

The Bill introduces new functions for the Commission including:

- a. to prepare and publish guidelines for complying with the positive duty in relation to sex discrimination;
- b. to promote an understanding and acceptance, and the public discussion, of the positive duty;
- c. to undertake research and educational programs in relation to the positive duty;
- d. to inquire into a person's compliance with the positive duty;
- e. to ensure compliance with the positive duty; and
- f. to inquire into any matter that may relate to systemic unlawful discrimination or suspected systemic unlawful discrimination.

These new functions of the Commission require resourcing as set out in response to questions 2 and 3 below.

The Commission also anticipates that the amendments proposed by the Bill will lead to an increase in the number of unlawful discrimination complaints it receives. This is because the Bill introduces an additional ground for making a complaint under the Sex Discrimination Act – if a person considers they have been subject to a hostile work environment on the basis of sex. Additionally, the reforms to the representative applications provisions in the *Australian Human Rights Commission Act 1986* (Cth) create a clear pathway to Court for representative applications and are likely to result in an increase in these types of complaints. The Commission will monitor any increase in complaint numbers.

### **Question No. 2**

The Commission has estimated that it requires a new Business Engagement and Compliance team to undertake the new functions proposed in the Bill in reasonable timeframes. The team will comprise one Director (EL2) leading a team of two Senior Lawyers, two Senior Policy Officers /Educators, two Senior Conciliators and three Research Officers. These resources will have a different focus over time, as follows:

- a. In the initial phase of implementation - develop education and training materials and guidelines for employers, to assist them with understanding and preparing for the commencement of the positive duty.
- b. In the subsequent phase of implementation:
  - conduct compliance assessments, issue compliance notices, reconsider compliance notices, negotiate enforceable undertakings with businesses and undertake court applications for compliance orders and enforceable undertakings; and
  - conduct inquiries into systemic unlawful discrimination.

These resources will be required on an ongoing basis.

### **Question No. 3**

The cost estimate for the implementation of the new Commission functions proposed in the Bill is approximately \$500,000 in the 2022-23 year, and \$1.8m in subsequent years.