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Senate Legal and Constitutional Affairs Committee
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Dear Committee Secretary,

I, Associate Professor Kantha Dayaram, welcome the opportunity to make a brief submission regarding the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022.

I am an Associate Professor of Employment Relations at Curtin University and hold a doctorate in Public Policy, and qualifications in Health and Labour Economics. I teach and research in the areas of Employment Relations and Work Health and Safety. As part of my research with Curtin University's Gender Research Network and work through Curtin University, I have undertaken research, provided executive training, given public seminars[1], on the prevention of Workplace Sexual Harassment and Discrimination. I provide this submission based on some of the research findings that have emanated from my work on the 'Prevalence and reporting of workplace sexual harassment in Australia'[2] and on 'Bystander intervention and training' [3]

This submission is supported by Professor John Burgess of Torrens University, Adelaide who has undertaken research on precarious employment in Australia and workplace diversity and inclusion. The submission is also supported by Curtin University's Gender Research Network (Academic co-lead Dr Samantha Owen).

Centrality of Safe Workplaces and Workplace Changes

Ensuring safety at work is central to supporting the United Nation's Sustainable Development Program (Goal 8 proclaims Decent work for All) and the International Labour Organisation's decent work agenda (ensuring core rights at work) is one of the four pillars at work [4]. Safety not only includes an absence of physical harm, but also includes mental well-being and preserving human rights and dignity, including the right to be not bullied, intimidated and sexually harassed at work. Ensuring that work and workplaces are free from bullying and harassment is the responsibility of workplace owners and managers and supported by processes and remedies through state institutions. In particular, the claimants/survivors of sexual harassment require remedies and processes that are easy to access, comprehensive in their coverage and offer effective remedies for the claimants/survivors. It is important to consider the reach and effectiveness of existing legislation and remedies in Australia in light of ongoing changes in work and the workplace over recent decades.

In general there are four developments that have complicated the application of legislation. First, there is the ambiguity of employment status. As more workers move onto to contracts and into arrangements of self-employment, their status for protection is ambiguous. Second, the short duration of engagements and the vulnerability for short-term engagement workers makes it difficult to report incidents of harassment. Here, there has been reports and publicity around the vulnerability of backpackers in the agricultural harvesting sector. Third, there are changes around the workplace [5]. Work in isolated locations (such as FIFO) or at multiple sites (gig working deliveries) leaves workers vulnerable as they are without direct support mechanisms[6]. In addition, the rise of online working through the COVID_19 pandemic, has opened up online mediated harassment and intimidation. The fourth complication is the identification of the employer and the organisation that is responsible for ensuring basic rights at work. Sub-contracting and agency arrangements can cloak responsibility and online mediated working associated with the gig economy makes it difficult to identify the 'employer' where work is mediated through a platform [7].

The Regulatory Framework

Within the Australian employment regulatory framework, sexual harassment is dealt with Federally and by all States and Territories. Section 106 of the *Sex Discrimination Act* (Cth) (**the SDA**)[8] accords vicarious liability to the employer if the employer fails to take all reasonable steps to prevent an employee from committing sexual harassment. The SDA confers powers to the Australian Human Rights Commission to refer matters to the Federal Court. There are two key challenges that stand out in the pursuit of a claim against an employer under the SDA. The first challenge is pursuing action through the courts. Taking a matter to the Federal Court is complicated and seeking remedy is costly, see *Ford v Inghams Enterprises Pty Ltd* and *Von Schoeler v Boral Timber,* [note 34] [9]. The second challenge is the drastically changed work and employment conditions since the legislation was passed in 1984, as outlined above. The workforce has experienced an increase in precarious, insecure and non-standard work; remote work and use of online/electronic communication have increased, giving rise to gig and online work.

In addition to the SDA and powers afforded to the Australian Human Rights Commission to put forward cases to the Federal Court, sexual harassment is also dealt with in the *Crimes Act 1958* (Cth)[10] (**the Crimes Act**) and the *Fair Work Act 2009* (Cth)[11] (**Fair Work Act**). Sexual harassment may constitute a criminal offence under the Crimes Act or may be 'pursued as an action in tort, such as trespass to the person or negligence'. The criminal route can be costly and riskier than claims in discrimination law.

In response to the increasing prevalence of workplace sexual harassment and the Australian Human Rights' Respect@Work recommendations [12], in 2021 section 789FD(2A) of the Fair Work Act [13] was amended to include sexual harassment and respect at work. This amendment is important because it provides workers with new protections, whereby a worker who believes that they have been sexually harassed at work can apply to the Fair Work Commission for an order to stop the sexual harassment. For the Fair Work Commission to make an order, it must be satisfied that harassment has occurred and that there is a risk of future occurrence. The latter could render what is interpreted as once-off harassment ineligible for remedy. This was evident in *THDL [2021] FWC 6692* [14] when the Fair Work Commission rejected its first application for an order to stop sexual harassment, confirming

that it would only make orders to stop sexual harassment where it could be established that the harassment could reoccur. In this case, the Commission ruled that there was no such risk since the relevant persons had intervention orders that they were not to be within 200 meters of each other [15, 16].

State jurisdiction, for example in Western Australia (**WA**), sexual harassment in the employment context is dealt with under the *Equal Opportunity Act 1984* (WA) [17] (which differs to the SDA in its explicit inclusions) and the *Work Health and Safety Act 2020* (WA) (**WHS Act**)[18]. A psychosocial code of practice was made under the WHS Act and implemented in 2022. The WHS Act introduced key changes including that recognising sexual harassment as a psychosocial hazard and health risk; extending the State regulator's enforcement powers; broadening the definition of employer to include individuals conducting a business; and extending the definition of workers to include contractors, volunteers, interns and casual workers. However, more changes are required to address the issue of overly complex and costly complaints processes which the Australian Human Rights Commission inquiry into sexual harassment in the workplace found and could be a potential limit to the efficacy of the SDA[19]. The inquiry also highlighted that the current system for addressing sexual violence in the workplace is difficult for workers to understand and navigate[20]. Moreover, while sexual harassment is responsible for approximately 11% of workplace stress claims, the duration of such claims (and absence from work) is twice that of other stress claims [21].

Vicarious Liability versus Positive Duty of Care

Under section 106(1) (b) of the SDA, employers are 'vicariously liable' for any incidents of sexual harassment by their workers or agents in the course of their employment. Accordingly, employers are responsible for both discouraging workplace sexual harassment and facilitating just resolutions [22, 23]. Section 106(2) of the SDA also makes clear that the employer is *not* vicariously liable if they 'took all reasonable steps to prevent the employee or agent from doing acts of the [prohibited] kind' [24]. A recent analysis of 26 legal cases involving vicarious liability heard by the Federal Court or the Federal Magistrate's Court suggests that 'reasonable' steps taken by an employer included employee awareness of the organisation's sexual harassment policy and awareness of the complaints handling process [25] . The analysis further suggests that by the courts' interpretation of both vicarious liability and reasonable steps, these measures are more reactionary than proactively being able to prevent sexual harassment.

Similarly, the WHS Act includes vicarious liability under the employer's duty of care. Like the SDA, section 18 of the WHS Act requires employers to take 'reasonably practicable' steps. Section 18 of the WHS Act specifies two elements to what is 'reasonably practicable' [26]. The first element is that the duty holder must first consider what can be done, that is, what is possible in the circumstances for ensuring health and safety; the second element is that the duty holder must then consider whether it is reasonable in the circumstances to do all that is possible.' Importantly, the *WHS Act* limits the scope for risk reduction by employers by introducing prohibition of insurance and indemnities of WHS penalties. By prohibiting insurance indemnification, it shifts the duty of care to a preventative duty [27].

This proposed change to the Anti-Discrimination and Human Rights Legislation Amendment Bill (Respect at Work) 2022 is important as it shifts the responsibility of prevention of harm

from workers who experience it, to employers who have the power to prevent such conduct. Consequently, the amendment will complement the WHS Act or similar harmonised WHS State/Territory legislation that enforces the employer's duty of care and obligation to take 'reasonably practicable' steps towards the physical and psychological health and safety of workers. It also includes proposed changes to the SDA to include 'express prohibition' to 'protect people from hostile workplace environments on the ground of sex' [28].

In addition, The Bill also implements recommendation 18 of the Inquiry by increasing the Australian Human Rights Commission's powers to enforce the positive duty through conducting inquiries into compliance, making recommendations to achieve compliance, giving compliance notices specifying actions to address non-compliance, applying to the courts for an auditor to direct compliance with notices and provides a power to enter into enforceable undertakings [29].

To Change Workplace Cultures Positive Duty Needs to be Explicit

The proposed Bill however, leaves the Courts to interpret 'reasonably practicable' steps that an employer should have/or has taken. This could be interpreted along similar lines to section 18 of the WHS Act that provides that a 'duty holder must first consider what can be done, that is, what is possible in the circumstances for ensuring health and safety'[30]. The AHRC Respect @Work report highlighted that while women are more likely to be sexually harassed at work than men (39% and 26% respectively), Aboriginal and Torres Strait Islander people were more likely to experience workplace sexual harassment than non-Indigenous workers (53% and 32% respectively) [31]. Other high-risk categories include: workers under the age of 30; lesbian, gay, bisexual, queer, intersex (LGBTQAI+) workers; culturally and linguistically diverse workers; and workers with a disability, thereby linking sexual harassment with discrimination. In other words there is intersectionality of the characteristics of the claimants/survivors and the array of actions of intimidation and harassment that are exercised against them.

The Bill needs to make a 'positive duty of care' explicit if it intends to protect these categories of workers. Not all workers are aware of their rights at work; or have equivalent English language abilities and are economically job independent [see Australian Meat Industry Employees Union v Dick Stone] [32]. At a minimum the Bill needs to make explicit that employers' positive duty of care includes: 1) a code of conduct in language that is appropriate to the respective workforce; 2) an information statement of workers' right to a safe workplace is provided in clear appropriate language [33]; and 3) appropriate **regular** training is provided to all workers [See Von Schoeler v Boral Timber] [34]. A **multi-pronged** positive duty approach is needed to prevent workplace sexual harassment.

In addition, just as the Bill proposes that sexual harassment in the workplace should be viewed as a 'serious misconduct', the Bill should also provide for a 'positive duty to investigate'[35]. This will help reduce a defendant's trauma and increase procedural fairness in the case of vexatious claims.

Yours sincerely

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