



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: HRC/ELC/D&I:JWas070721

7 July 2021

Mr Michael Tidball
Chief Executive Officer
Law Council of Australia
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By email: Tarryn.Gaffney@lawcouncil.asn.au

Dear Michael,

Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

Thank you for inviting the Law Society's input for a Law Council submission to the Senate Education and Employment Legislation Committee inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 ("the Bill"). This submission is informed by our Employment Law, Human Rights, and Diversity and Inclusion Committees.

In this submission, the Law Society sets out its support for the recommendations from the Australian Human Rights Commission's ("AHRC's") *Respect@Work* report that the Bill proposes to implement, and provides comment on whether specific provisions of the Bill are drafted appropriately to achieve the objectives of these recommendations. We also comment on the proposal to amend the *Fair Work Act 2009* (Cth) ("Fair Work Act") to make provision for up to two days of paid compassionate leave in the case of miscarriage.

We note at the outset that the Law Society's ability to consider the provisions of the Bill in detail has been constrained by the brief consultation period. Given the significance of many of the reforms proposed in the Bill, and the already-complex nature of Australia's anti-discrimination and sexual harassment framework, the consultation period of 11 working days set by the Senate Committee is inadequate. We request that the Law Council include an observation to this effect in its submission to the Committee.

The Law Society's position on specific recommendations from *Respect@Work* and related provisions in the Bill

Recommendation 16(a): Amend the Sex Discrimination Act 1984 (Cth) ("SDA") to ensure the objects include 'to achieve substantive equality between women and men'.

The Law Society supported this recommendation, and suggests that the words "as far as practicable" be removed from Item 31 in the Bill, as the AHRC did not include this caveat in *Respect@Work*.

Recommendation 16(b): Amend the SDA to ensure sex-based harassment is expressly prohibited.

The Law Society supported this recommendation, and supports the related provisions at Items

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60-76 in the Bill, on the basis that they will make it expressly clear that it is unlawful to harass a person on the ground of their sex.

Recommendation 16(c): Amend the SDA to ensure creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited.

The Law Society supported this recommendation, and we note that the Bill does not appear to implement the recommendation. We suggest the Bill could be amended to achieve the objective of this recommendation through following the approach outlined in *Respect@Work*, namely by “incorporate[ing] a prohibition on creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex into either the sex discrimination or sexual harassment provisions within the Sex Discrimination Act”.¹ We note that the AHRC also considered this issue could be addressed through better education and guidance materials for workplaces, including good practice sexual harassment and discrimination workplace policies, procedures and practices for employers.²

Recommendation 16(d): Amend the SDA to ensure the definition of ‘workplace participant’ and ‘workplace’ covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed.

Recommendation 16(e): Amend the SDA to ensure the current exemption of state public servants is removed.

The Law Society supported these recommendations, and we are of the view that the Bill appropriately implements them.

Recommendation 20: Amend section 105 of the SDA to ensure that it applies to sexual harassment.

The Law Society supported this recommendation, and supports the related amendment at item 86 of the Bill.

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

The Law Society supported this recommendation. We support the related amendments at Item 77 of the Bill. We note that the amendment at Item 77 deviates from the recommendation in *Respect@Work* by amending the SDA, however this is an acceptable means of achieving the outcome of making explicit that any conduct that is an offence under section 94 of the SDA can form the basis of a civil action for unlawful discrimination.

Recommendation 22: Amend the Australian Human Rights Commission Act so that the President’s discretion to terminate a complaint under the SDA on the grounds of time does not arise until it has been 24 months since the alleged unlawful discrimination took place.

The Law Society supported this recommendation. The benefits to complainants of an increased time frame to lodge a complaint will include greater access to the low-cost, confidential mediation process facilitated by the AHRC.

We note the proposed amendment at Item 3 of the Bill would provide a discretion to the President of the AHRC to terminate a complaint under the SDA following the lapsing of a 24-month period since the alleged unlawful discrimination took place, while the corresponding

¹ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020), 460.

² *Ibid.*

time limit for complaints lodged under other federal discrimination Acts would remain at 6 months.

To maintain consistency across the federal anti-discrimination framework, the Law Council may wish to consider requesting that the time limit be extended to 24 months for all kinds of unlawful discrimination. This would ensure that the victims of all forms of unlawful discrimination have access at the federal level to the benefits of an increased time frame for lodging complaints. It would also assist in minimising complexity for the AHRC and the courts in deciding which parts of a claim are justiciable, in instances where a person has experienced discrimination on the basis of multiple protected attributes, including sex.

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.

The Law Society supported this recommendation, and supports the related amendments at Items 23-28 of the Bill.

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 Law Society supported this recommendation, and supports the proposed amendment at Item 10 of the Bill that would implement the recommendation.

Provision of up to two days of paid compassionate leave in the case of miscarriage

The Law Society supports the proposed amendments at Items 8 and 9 in the Bill.

Power to intervene

The amendments at Item 83 of the Bill would provide the AHRC with the power to intervene in proceedings that involve issues of discrimination involving sexual harassment or harassment on the ground of sex, with the leave of the court. The Law Society supports this proposed amendment.

Additional comments

The Law Society reiterates the comments in our 31 May 2021 submission to the Law Council in relation to Recommendation 17 in *Respect@Work*, which proposed amending the SDA to 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. In our view, the failure to implement this recommendation in the Bill is a significant missed opportunity to promote a focus among employers on preventing sexual harassment in the workplace. In its submission to the Senate Education and Employment Legislation Committee, the Law Council may wish to encourage the Federal Government to implement this recommendation in any future amendment Bills arising from *Respect@Work*.

We hope this input is of assistance. Please contact Andrew Small, Policy Lawyer, on (02) 9926 0252 in the first instance if you have any queries.

Yours sincerely,



Juliana Warner
President