

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

Submission to the Senate
Legislation Committee on
Employment and Education

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Overview

This is the Business Council of Australia's (BCA) submission on the provisions of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (the Bill)*.

Why the Bill is needed

In recent years, there has been an increasing focus on the issues relating to workplace sexual harassment. Against this backdrop, the Australian Human Rights Commission conducted its world-first national inquiry into sexual harassment in Australian workplaces. The *Respect@Work* report (**Report**) arising from this inquiry was released in January 2020.

The Report made 55 recommendations intended to better prevent and respond to sexual harassment in the workplace. These include recommendations regarding legislative reform, specifically amendments to the *Sex Discrimination Act 1984 (SD Act)*, the *Fair Work Act 2009 (FW Act)* and the *Australian Human Rights Commission Act 1986 (AHRC Act)*. In the Sex Discrimination Commissioner's foreword to the Report she states that the

"current legal and regulatory system is simply no longer fit for purpose. In this report, I have recommended a new model that improves the coordination, consistency and clarity between the anti-discrimination, employment and work health and safety legislative schemes."

The BCA strongly endorses this finding that the laws governing sexual harassment require modernising to provide greater protections for victims of inappropriate workplace conduct and also provide greater clarity regarding the obligations on businesses to provide a safe workplace.

In response to the Report, the Commonwealth Government released its *Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (Roadmap)*. The Roadmap states that in response to the Report, the Government would develop and implement a suite of legislative and regulatory reforms intended to reduce the complexity in the current system and strengthen the national legal framework. The Bill reflects the Government's proposed legislative and regulatory reforms.

The Bill should be passed as soon as possible

The BCA supports stronger measures to deal with the issue of sexual harassment in the workplace and broadly endorses all the measures in the Bill.

The introduction of the Bill represents only one component of the recommendations made by the Sex Discrimination Commissioner in the Report and the steps set out in the Government's Roadmap, however it plays an important part in updating the legislation to make it fit for purpose.

The BCA therefore recommends that the Parliament pass the Bill as soon as possible. It will achieve necessary amendments to the SD Act and the FW Act to remove ambiguity, include appropriate clarifications and align the legislation more closely to community expectations.

Summary of amendments

The Bill introduces amendments to the FW Act, the SD Act and the AHRC Act. The key changes to each Act are summarised below.

Amendments to the Sex *Discrimination Act*

The objects of the SD Act have been amended to clarify that the SD Act aims to achieve not just the elimination of discrimination and harassment, but so far as practicable, the equality of opportunity between men and women.

The amendments introduce a new offence of sex-based harassment, making harassment on the grounds of sex unlawful. Sex-based harassment would be defined as “*unwelcome conduct of a seriously demeaning nature*” (which is to be read with its ordinary meaning) by reason of the person’s sex, in circumstances in which a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated. As harassment on the grounds of sex is likely to constitute unlawful sex-based discrimination, this amendment aims to give greater clarity to the current legislation.

The amendments are also intended to have closer alignment with the Work Health and Safety (WHS) model law, by adopting the use of the terms “*Person Conducting a Business or Undertaking*” (PCBU) and “*worker*”. The intention is to ensure that people not previously covered under the SD Act, such as interns, volunteers and self-employed workers, are protected from harassment, so that all workers are protected from harassment in a work context, in the same manner as they are protected under WHS laws. In particular, section 28(B) of the SD Act is amended to make it unlawful for:

- A PCBU to sexually harass a worker in the business or undertaking (or someone seeking to become such a worker); or
- A worker to sexually harass a fellow worker (or someone seeking to become a fellow worker).

If the above relationships are present, then there is no requirement that the conduct occur in connection with “work”.

In addition, section 28(B) is amended so that the Act applies to conduct in the following circumstances:

- A worker or PCBU (the first person) sexually harasses a person if the harassment occurs in connection with the first person being a worker or PCBU
- A person sexually harasses a worker or PCBU (the second person) if the harassment occurs in connection with the second person being a worker or PCBU
- In employer or employee (the first person) sexually harasses a person if the harassment occurs in connection with the first person being an employer or employee
- A person sexually harasses an employer or employee (the second person) if the harassment occurs in connection with the second person being an employer or employee

The amended section 28(B) also makes harassment on the grounds of sex unlawful in the same circumstances. The unlawful conduct in the above circumstances occurs when the conduct is “*in connection with*” the relevant person’s work, which is intended to be an extension from the current concept of the harassment being within a workplace. Whilst case law has been expanding the definition of a “workplace”, the change to the conduct having only to be “in connection with” work broadens this scope and will capture conduct in broader range of contexts.

The Bill introduces a new express civil offence of victimisation. Victimisation is a criminal offence under the current SD Act. The amendment is intended to remove any confusion as to whether the criminal and civil offences co-exist.

The Bill extends the accessorial liability provisions in section 105 of the SD Act to expressly include sexual harassment. Currently, they only apply to discrimination (noting that unlawful sexual harassment can constitute unlawful discrimination on the grounds of sex). This amendment will clarify that if a person were to cause, instruct, induce, aid or permit another person to sexually harass someone or harass them on the grounds of sex then that person will be liable as if they had committed the act themselves.

The Bill also clarifies that it is intended to cover Members of Parliament, their staff, as well as judges and removes existing exemptions in these regards. The Bill also amends the SD Act so that State and Territory public servants will be covered by the SD Act as they are, for example, under the Commonwealth *Disability Discrimination Act*.

Business Council of Australia's response

The proposed amendments expand the scope of the SD Act and also provide welcome clarity to the Act. The BCA supports these amendments. To the extent that they expand the obligations on businesses they are both reasonable and workable.

The BCA notes that the Bill does not incorporate all recommended legislative amendments from the Report. Specifically, it does not amend the SD Act to include a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.¹ This positive duty exists (although not stated in express terms) under the model WHS law. At an in-principle level, the BCA supports a positive duty on employers to take appropriate steps to protect employees from sexual harassment. At a practical level, the question is whether such a duty is best expressed in WHS laws or anti-discrimination laws.

The Government in the Roadmap expressed the concern that including a positive duty in the SD Act could create duplication and complexity, given that an equivalent duty currently applies under WHS laws. Including such a duty under the SD Act would also require the AHRC to be given new powers to enforce the duty that would differ substantially from its existing powers. The Roadmap notes that the Government is conducting further assessment on these matters. The BCA welcomes this further assessment. If this option is to be further considered by the Government, then the BCA does not believe it should be grounds to not pass the Bill in its current form.

Amendments to the *Australian Human Rights Commission Act*

The Bill amends the AHRC Act to vary the right that the President of the AHRC has to terminate complaints that are lodged more than 6 months after the alleged acts, to 24 months for complaints under the SD Act.

Business Council of Australia's response

The BCA supports the proposed amendments, which are intended to recognise the fact that it can take time for complaints of this kind to be made.

Amendments to the *Fair Work Act*

The Bill amends section 289 of the FW Act to state that sexual harassment in connection with a person's employment can constitute a valid reason for dismissal.

The Bill expands the anti-bullying jurisdiction contained in Part 6 -4B of the FW Act to include sexual harassment. As with bullying, this will only apply to a constitutionally-covered business. If the jurisdiction is enlivened and the Fair Work Commission is satisfied that the worker has been sexually harassed at work by an individual or a group of individuals and there is a risk that the sexual harassment will continue it may make such order as it considers appropriate (other than an order for a payment of a pecuniary amount).

¹ Recommendation 17

The Bill also amends section 104 of the Act to expand the grounds on which compassionate leave can be taken to also include circumstances in which an employee or their spouse experiences a miscarriage. Such leave can currently be taken in circumstances in which a family member of an employee either dies or experiences a serious illness.

Business Council of Australia's response

The BCA supports these amendments to the FW Act. The amendments to provide for compassionate leave in the event of a miscarriage are an appropriate update of the Act and should be uncontroversial.

The amendment to section 387 of the FW Act is intended to try and address the reported difficulties² for employers who in the case of sustained findings that an employee has engaged in sexual harassment feel that they may be constrained from terminating the employee's employment. Whilst the amendment provides greater clarity for employers, the Fair Work Commission has in many cases found that sexual harassment is a valid reason for dismissal.³ However, even with this amendment, which puts the validity of sexual harassment as a reason for dismissal beyond doubt, if the dismissal is harsh or procedurally unfair, the employer may not be able to defend an unfair dismissal application. The risk remains, therefore, that an employee whose employment has been terminated for unacceptable sexually harassment could, even if the harassment constitutes a valid reason for termination, succeed in their unfair dismissal claim. Ideally, the FW Act should be further amended to state that sexual harassment is not only a valid ground for dismissal but also constitutes serious misconduct, which would provide employers with greater confidence to deal with situations that justify dismissal.

² See, for example pp 525-533 of the Report.

³ See, for example, *Colin Ramon Reguero-Puente v City of Rockingham*

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