WOMEN'S LEGAL CENTRE ACT

07/07/2021

Committee Members
The Senate Education and Employment Legislation Committee

Via email: eec.sen@aph.gov.au

Dear Committee Members

RE: SUBMISSION – SEX DISCRIMINATION AND FAIR WORK (RESPECT AT WORK) AMENDMENT BILL 2021 ('the Bill')

Thank you for the opportunity to comment on this important area of law reform.

About the Women's Legal Centre ACT

The Women's Legal Centre is a specialist community legal centre. Our main legal practice areas are employment, discrimination, sexual harassment, family law, family violence, early intervention Care and Protection work and victims of crime.

The Centre provides legal assistance across the spectrum of need, including legal information and referral, legal advice and representation and litigation. The Centre provides legal services within a multi-disciplinary and trauma-informed practice model that incorporates social work, cultural supports and collaborative service models to provide wrap-around support to the most vulnerable and at-risk clients.

The Centre also provides community legal education and input on law and policy development to build government and community capacity to work towards deeper legal and cultural change to redress power imbalances and address violence and gender inequality.

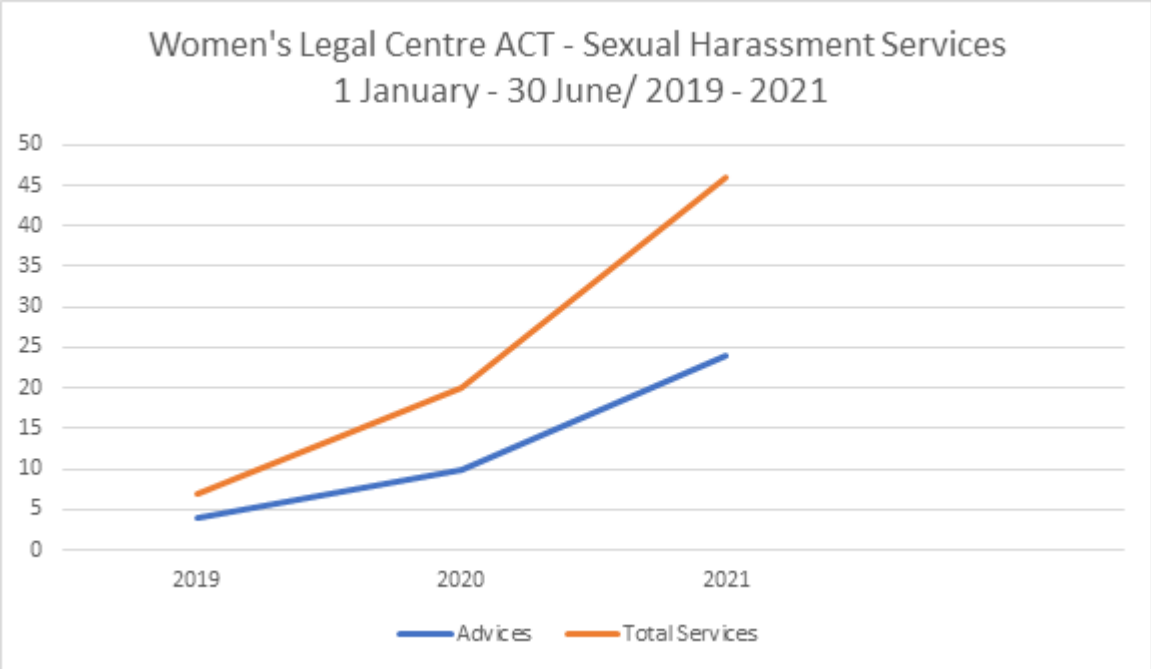
Employment & Discrimination Practice

Our Employment & Discrimination Practice aims to support women to stay connected to the paid workforce. We believe keeping women in safe and secure employment is crucial to their safety, financial independence, and well-being.

We provide free legal assistance to women in low-paid and/or precarious employment who are experiencing problems at work. We help clients enforce their rights and entitlements at work, including access to parental leave and flexible work arrangements, and the right to be free from discrimination and sexual harassment at work.

We are one of the few community legal centres in Australia that has maintained an employment practice, and we are the only community legal centre in the ACT that provides ongoing representation in employment matters. There is no Working Women's Centre in the ACT.

In the last six (6) months alone, the Centre has seen a rapid increase in women approaching the centre for advice, information, and representation in sexual harassment matters. Over the last three years, in the same period, services relating to sexual harassment have increased by more than **650%.**



This majority of women approaching the Centre for assistance with sexual harassment matters were:

- in casual and insecure employment
- in male-dominated workplaces
- in small businesses
- harassed and assaulted by their boss or supervisor figure.
- reported their boss used work as a vehicle to perpetuate abuse and harassment, such as organising work trips, taking unnecessary work photos for 'marketing', contacting victim-survivors after hours to talk about work, asking victim-survivors to stay back late after work and offering to be their 'mentor'.

Our work is often focused on supporting women at the earliest stage, and we help them to navigate complaints processes provided by the Fair Work Commission, ACT Human Rights Commission, and Australian Human Rights Commission to reach practical and sustainable solutions to their problems. Through these processes, we have assisted women who have been sexually harassed at work to: keep their jobs, by ensuring they no longer have to work with their harassers; force their employers to implement better policies and complaint procedures; receive apologies; and obtain appropriate financial compensation for the lost income and distress they have experienced.

Welcomed changes but missed opportunity for others

The Centre welcomes many of the proposed changes in the Bill, in particular: the extension of timeframes for people to lodge complaints of sexual harassment to the Australian Human Rights Commission ('**AHRC**'); the expanded coverage of workers who will be provided protection under the *Sex Discrimination Act 1984* (Cth) ('**SDA**'); and the express statement that sexual harassment will be a valid reason for dismissal under the *Fair Work Act 2009* (Cth) ('**FW Act'**). We also welcome provisions making miscarriage a valid reason for a worker to use compassionate leave.

However, the Centre sees this Bill as a missed opportunity to fully implement the changes recommended by the AHRC's 2020 Respect@Work Report. We are disappointed the Bill fails to provide a costs protection provision for claimants (Recommendation 25 of the Respect@Work Report). We are equally disappointed the Bill does not introduce positive duties on employers (Recommendation 17 of the Respect@Work Report), meaning the onus of preventing and addressing sexual harassment remains largely with individuals who have been sexually harassed. As it stands, this Bill will do little to reduce the widespread and pervasive nature of sexual harassment in Australian workplaces.

POSITIVES OF THE BILL

The Centre welcomes the following amendments:

- **Sexual harassment as a valid reason for dismissal:** One of the most exciting aspects of this Bill is the amendment to the FW Act to expressly state, in a legislative note, that sexual harassment can be conduct amounting to a valid reason for dismissal. While this may be seen as merely clarifying the current position at law, this express statement provides clarity to employers, which is particularly important for small businesses with limited access to legal advice. Many of our clients are employed by such businesses. The employers we interact with are often very reluctant to take appropriate, punitive action against sexual harassers, out of fear of being subject to an unfair dismissal claim from the harasser. In the Centre's experience, it is almost always the person who has been harassed that ends up quitting, or moving within the organisation, to get away from their harasser. We foresee this change will give greater confidence to employers to take appropriate action against sexual harassers, and as a result, more people who have been harassed will be able to maintain their jobs and paid

employment. Keeping women connected to the paid workforce is a foundation of financial independence and security.

The Government's response to the Respect@Work Report stated the Government would also amend the definition of 'serious misconduct' in the *Fair Work Regulations 2009* (Cth) to include sexual harassment. This would clarify that sexual harassment can justify summary dismissal (dismissal without notice). We want to see more employers take sexual harassment seriously, and summarily dismiss harassers. This will not only act as a major deterrent, but will also ensure the person who has been harassed can instantly feel safer at their current workplace, and not be forced to leave their employment in order to avoid contact with their harasser. We note there is no reference to this change in the explanatory memorandum to the Bill, and look forward to the Government keeping its commitment and implementing this change, as soon as possible.

- **Increase in timeframe from 6 months to 2 years.** Currently, the President of the Australian Human Rights Commission has the discretion to terminate a complaint under the SDA if the conduct occurred more than 6 months ago. The Centre welcomes the proposed increase to this timeframe from 6 months to 2 years as recommended by the Respect@Work Report. Most of our clients are not aware they have the option to make a complaint to the AHRC until they have sought legal advice from us, and they often do not seek legal advice until after they have attended to their immediate needs, such as quitting their job to escape the harasser and finding a new job and attending to their safety and psychological well-being. This is often more than 6 months after the sexual harassment occurred. It can also take time for people to understand what they experienced was unlawful, and time for people to feel safe and confident enough to lodge a formal complaint. All these factors are even more pertinent to culturally and linguistically diverse claimants, who often have little understanding of their rights or where to seek assistance.

- **Protection against harassment based on sex:** Another significant proposal is the introduction of express protection against harassment based on sex, as currently there is only express protection for harassment based on sexual harassment. While harassment based on sex would be covered by current protections against sex discrimination, this change will provide greater clarity to employees and employers that a complaint can be made to the AHRC if a person is harassed at work based on their sex.

  Australia still has a long way to come to achieve gender equality in the workplace, which is important in and of itself, but also necessary to address the scourge of domestic and family violence in Australia. There is a strong correlation between gender inequality and incidence of domestic and family violence and beliefs and behaviours which disrespect women are a root cause of violence towards women. This protection against sex-based harassment is a step in the right direction. However, note our concern below with the limitation of this protection to conduct that is 'seriously demeaning'.

- **Expanded coverage of workers protected by sexual harassment provisions:** We support the use of the terms: 'worker' and 'person conducting a business or undertaking', to ensure more workers are provided protections against sexual harassment (and the new sex-based harassment) under the SDA, including interns, volunteers and self-employed workers. These changes also bring some alignment between the SDA and work health and safety legislation. **However, we note this expanded coverage only applies to protections against harassment, not the protections against sex discrimination.** The rationale for this is unclear, and we urge the Government to consider extending all protections in the SDA to all workers.

  We support the focus in the Bill on the relationship between the harasser and the person harassed rather than requiring that the conduct occurs 'in connection with work', a term which has been subject to much judicial debate and uncertainty. This change will provide greater clarity to employers and workers.

- **Coverage of members of parliament, staff, and judges at both state and federal levels:** The Centre very much supports the provisions that extend protections afforded by the SDA to members of parliament, their staff and judges at all levels of government. This is another important change to ensure as many workers as possible are provided protection under the SDA. The current loopholes are unacceptable and leave many workers without any avenue of complaint. As the public has seen over the past few years, our parliaments and courts are not immune to the high prevalence of sexual harassment in Australian workplaces.

- **Removal of exclusion of state public servants:** The Centre welcomes the removal of the existing exclusion of state public servants. The historical reasons for this exemption are no longer relevant. It is important that all state and territory employees are given the protections and complaint avenues afforded by the SDA. This brings the SDA in line with other Commonwealth anti-discrimination Acts.

- **Inclusion of sexual harassment in definition of bullying for the purposes of stop bullying orders:** The Centre welcomes the introduction of sexual harassment as bullying for purposes of stop bullying orders. We are pleased to see that, in contrast to stop-bullying orders, the sexual harassment need not be repeated, and the claimant does not need to prove there is a risk to health and safety (it is assumed that sexual harassment creates a risk to health and safety).

  However, we note the limitations of this avenue for providing redress. The primary aim of such orders is to prevent further bullying or harassment and they are not made with the intention of punishing bad behaviour. Orders cannot include a requirement to pay a pecuniary amount. In addition, these orders are only available where there is a risk of harassment occurring again, for example when the harasser and the person who was harassed are still working together.

  Most of our clients choose not to apply for a stop-bullying order because they are reluctant to continue working with a bully while going through a formal process, potentially jeopardising their safety and employment for the sake of potentially

receiving an order, which will not ensure their protection, nor would it provide any kind of compensation if they find themselves out of a job. We expect our clients who have been sexually harassed will have a similar view of the 'stop harassment orders'. Furthermore, most of our clients who have been sexually harassed at work have already quit or been forced out of their employment before they seek legal advice. Therefore, these orders will be useless for most of our clients. Nevertheless, we will be watching with great interest to see if this jurisdiction can be used successfully to address some forms of sexual harassment.

- **Express clarification that victimisation can be brought as civil action:** We welcome clarification that claims of victimisation can be brought as civil actions (as well as criminal) as this was thrown into question because of judicial comment over the past decade. This change will provide greater clarity to workers and employers. We have heard countless recollections of women being fired or "performance managed" after expressing their concern about sexual advances from their supervisors. It is important claimants have an accessible avenue to make complaints of victimisation.

- **Miscarriage a valid reason to take compassionate leave:** The Centre welcomes the provision making miscarriage a valid reason to take up to two days of paid compassionate leave (unpaid for casuals) as provided for in the FW Act. While changes to the FW ACT in 2020 have given improved access to unpaid parental leave and compassionate leave for families dealing with stillbirths, this change will provide improved access to leave for families experiencing miscarriage (defined as the spontaneous loss of an embryo of fetus before 20 weeks gestation). We have assisted employment clients through miscarriages and the uncertainty of whether they are able to use personal leave is an additional unnecessary stress during this traumatic time. We note this is not a significant change as the leave available comes from an existing entitlement of two days paid compassionate leave (unpaid for casuals).

NEGATIVES OF THE BILL

- **No costs protections for claimants:** One of the biggest disappointments in this Bill is that it does not provide any costs protections for claimants under the SDA.

  Section 570 of the FW Act provides that a party can only be ordered to pay costs (the other side's legal fees) in very limited circumstances. These are: when the party instituted the proceedings vexatiously or without reasonable cause; when the party's unreasonable act or omission caused the other party to incur the costs; or when they unreasonably refused to participate in a matter before the Fair Work Commission about the same facts.

  There is no similar provision in the SDA, and disappointingly, this Bill does not change that. Costs risks will continue to be a significant deterrent to claimants.

  We have had clients with strong discrimination cases who have decided not to proceed due to the risk of having to pay the other side's costs. Often the other

side is a large business or government department with expensive external lawyers, meaning the amount they may have to pay in costs is enormous and terrifying, and greatly shadows what they could potentially expect to receive in damages. Sexual harassment cases often involve an assessment of both side's credibility, as there is rarely direct evidence, such as video footage. Therefore, even if the conduct clearly meets the criteria for unlawful sexual harassment, claimants worry they will not be believed, and take a big risk in taking a matter further. The inconsistency in awards for damages also means that claimants face the risk of having to pay costs if they reject an offer less than what the court orders. Again, this means claimants are faced with the choice of giving up, accepting offers that potentially undervalue their loss, or continuing and gambling their financial security.

- **No positive duties on employers:** The Government's response to the Respect@Work Report states it '*recognises the importance of a preventative approach to stop sexual harassment before it occurs*'. However, the Bill fails to introduce positive duties on employers, meaning the work of addressing sexual harassment remains largely with individuals who have been sexually harassed, after the fact. This is despite calls from experts and advocates, including the Centre, for over a decade. In its report of 12 December 2008, the Senate Standing Committee on Legal and Constitutional Affairs recommended further consideration should be given to amending the SDA to provide for positive duties for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment and promote gender equality. The Respect@Work Report recommended employers should be required to take reasonable and proportionate measures to eliminate sexual harassment and sex discrimination at work. It is extremely disappointing that this recommendation has been ignored.

  The Government has indicated that it believes the current work health and safety protections are sufficient. Given the AHRC found sexual harassment is endemic in Australian workplaces, the WHS regime is clearly not doing enough to prevent sexual harassment. **If we ever want to see a reduction in sexual harassment in Australian workplaces, we must shift the onus away from individuals who have been sexually harassed and demand more of employers**.

- **Sex-based harassment must be 'seriously demeaning'**. Currently, sex-based harassment is covered by the protections against sex discrimination. While the Centre welcomes the introduction of express provisions against sex-based harassment to provide greater clarity, we are concerned these new provisions are limited to '*seriously demeaning'* conduct. As there is currently no requirement that sex-discrimination must be 'seriously demeaning' to be unlawful, the new provisions may have the effect of limiting existing protections, rather than enhancing them.

Under the new provisions, to establish unlawful harassment on the ground of sex, the unwelcome conduct must be:

1. of a seriously demeaning nature in relation to the person harassed; AND

2. 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.

The first limb is unnecessary and is not a requirement to establish *sexual* harassment. It is also unclear what the Courts would find to be 'seriously demeaning', providing uncertainty to employers and workers.

We urge the Government to remove the words 'seriously demeaning' as the second test is clearer, and more than adequate to ensure the conduct in question is serious enough to do harm, and warrant protection.

- **Sex-based harassment not considered bullying and not considered valid reason for dismissal.** We also note with concern the different treatment of *sexual* harassment and the new *sex-based* harassment. While sexual harassment will be expressly included in the definition of bullying for the purposes of stop bullying orders and considered a valid reason for dismissal, sex-based harassment will not. The rationale for these omissions is unclear. If the Government wishes to send a strong message that demeaning and degrading comments about women are unacceptable, this should be rectified.

Yours sincerely

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