

Ai GROUP SUBMISSION

Senate Standing Committee
Education and Employment
Legislation Committee

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

9 July 2021

Ai
GROUP

Executive Summary

Ai Group welcomes the opportunity to provide a submission to the Senate Education and Employment Legislation Committee regarding the Government's *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2020 (the Bill)*.

Ai Group supports the Bill.

Sexual harassment has no place in Australian workplaces and more needs to be done to address this important issue, including giving employers more support when addressing inappropriate conduct in their workplaces. The Bill:

- Amends the unfair dismissal laws in the *Fair Work Act 2009* (Cth) (**FW Act**) to make specific reference to sexual harassment;
- Expands the anti-bullying provisions in the FW Act to give the Fair Work Commission (**FWC**) expanded powers to deal with sexual harassment in Australian workplaces;
- Expands the compassionate leave provisions in the FW Act to include miscarriages; and
- Makes various measured amendments to the *Sex Discrimination Act 1984* (Cth) (**SD Act**) including creating a new definition of 'harassment on the ground of sex'.

Ai Group's support for the *Respect@Work* reforms

Ai Group was a leading contributor for employers in the [National Inquiry into Sexual Harassment in Australian Workplaces](#), conducted by the Sex Discrimination Commissioner, Kate Jenkins, and commissioned by the then Minister for Women, The Hon. Kelly O'Dwyer in 2018.

Ai Group's Chief Executive, Innes Willox, was appointed to the Member Reference Group for the National Inquiry and Ai Group facilitated a range of employer consultations with the Commissioner to share employer experiences in both preventing and responding to cases of sexual harassment.

Ai Group made a [detailed submission](#) to the National Inquiry calling for a range of reforms to eliminate sexual harassment from our community and to better support employers who are currently constrained by a complex legal framework in preventing and addressing complaints. A number of our recommendations relating to the complexity of the current legal framework, the constraints on employer actions under unfair dismissal laws, and the need for greater Government funding in community education and preventative initiatives were adopted in the *Respect@Work Report* and supported by the Australian Government in its [Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces released](#) 8 April 2021.

Sexual Harassment a valid reason for unfair dismissal

The Bill introduces a note to the FW Act's unfair dismissal provisions (s.387) to clarify that sexual harassment by an employee in connection with their employment can amount to a valid reason for dismissal by their employer. The definition of sexual harassment used in the FW Act is the same as the definition in section 28A of the SD Act.

This unfair dismissal amendment is important. It clearly articulates to workplaces, employers and employees that sexual harassment is a serious issue and can amount to a valid reason for termination of employment.

The amendment also provides an appropriate focus for the FWC when exercising its discretion in unfair dismissal cases where sexual harassment has occurred.

[Ai Group's submission](#) to the National Inquiry detailed several unfair dismissal decisions of the FWC where employers dismissed employees for substantiated claims of sexual harassment or sexual misconduct but where the conduct was viewed as not sufficiently serious to constitute a valid reason for dismissal (see for example *Boyle v BHP Coal Pty Ltd* [2020] FWC 1080 and *Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal v Jodie Goodall* [2016] FWCFB 5492).

Some of these decisions resulted in an order that the employer reinstate the employee; undermining the employer's policies and communicated position prohibiting such conduct, as well as potentially creating further harm in the workplace, including to the victim.

The Bill's s.387 amendment does not extend to addressing the broader unfair dismissal framework that can result in decisions favouring alleged procedural deficiencies or mitigating factors over the seriousness of sexual harassment. However, the amendment should be a clear signal that conduct amounting to sexual harassment has serious impacts on victims and the workplace and should be afforded substantial weight.

Sexual harassment and serious misconduct

The Australian Government has also separately committed to ensuring that sexual harassment is explicitly referred to in the definition of 'serious misconduct' in the *Fair Work Regulations 2009* (Cth) (**FW Regulations**). This amendment to FW Regulation 1.07 would complement the Bill's amendment to the unfair dismissal provisions. It would be inconsistent with modern workplaces to continue to limit explicit references of serious misconduct to theft, intoxication and common assault without referring to sexual harassment.

These amendments would enable employers to more confidently act on forms of conduct that would be recognised as either unlawful under the SD Act or would conflict with other legal obligations such as work, health and safety laws. The amendments would:

- Provide clearer grounds for termination of employment in appropriate cases;

- Inform contracts of employment, including for managers and executives;
- Inform workplace policies and codes of conduct about what is and what isn't appropriate workplace behaviour on which employers may act, including to terminate employment;
- Inform the community more broadly about what is not appropriate behaviour at work; and
- Assist in achieving more clarity in unfair dismissal cases.

New FWC powers to stop sexual harassment

The Bill expands the anti-bullying provisions in the FW Act to give the FWC expanded powers to deal with sexual harassment in Australian workplaces. Unlike the anti-bullying provisions however, the Bill importantly makes sure that sexual harassment need not be repeated conduct; a key distinction between bullying and sexual harassment.

On application by a worker, the FWC may make orders to prevent a worker from being sexually harassed at work, if the Commission is satisfied that the worker has been sexually harassed at work by one or more individuals, and that there is a risk that the worker will continue to be sexually harassed at work by the individual(s).

The FWC may make any order it considers appropriate, but it cannot make an order requiring payment of a financial penalty or monetary compensation. This aspect of the FWC's jurisdiction emphasises the injunctive nature of the relief in stopping the sexual harassment while preserving the applicant's employment. The expansion of the anti-bullying provisions in this way make this avenue for relief a genuine alternative for complainants who do not wish to pursue lengthier legal proceedings tied to applications for monetary compensation, where such litigation generally either results in a breakdown of the employment relationship or occurs after employment has ended.

Ai Group considers these provisions of the Bill to be sensible amendments. They complement the FWC's jurisdiction in its longstanding dealings with matters of workplace sexual harassment in unfair dismissal applications.

Ai Group has not identified any problem with the drafting of these provisions, and we support their inclusion in the Bill unamended.

New definition of 'harassment on the ground of sex'

The Bill creates a new definition of 'harassment on the ground of sex' in the SD Act to supplement the SD Act's existing definitions of sexual harassment and sex-based discrimination.

'Harassment on the ground of sex' is defined as where a person harasses another person based on that person's sex (including a characteristic that appertains or is imputed to that person's sex), by engaging in unwelcome conduct of a seriously demeaning nature and where a reasonable person

would have anticipated the possibility that the person harassed would have been offended, humiliated or intimidated.

Much of what could be classed as ‘harassment on the ground of sex’ under the proposed definition could also, in many circumstances, amount to sexual harassment and/or sex-based discrimination as defined in the SD Act and through case law. Ai Group understands that the purpose of the proposed definition is to clarify, without doubt, that such conduct is captured by the SD Act’s protections. To the extent that the definition covers sex-based harassment not covered by existing SD Act definitions, it is important that the definition covers conduct of a nature that ought to be unlawful, as opposed to mildly inappropriate or trivial. We note that the Government has referred to this intent in its Explanatory Memorandum.

Expansion of the Sex Discrimination Act’s coverage

The Bill adopts key terminology from work health and safety laws (**WHS laws**), specifically the term ‘worker’ and ‘person conducting a business or undertaking’ (**PCBU**) and aims to achieve greater alignment between the SD Act’s protections and those in WHS laws. These terms appear in the Bill’s amended definitions and in the amended s.28B which deals with unlawful sexual harassment in employment. The amended s.28B(3)-(8), in referencing the terms ‘worker’ and ‘PCBU’, replace the previous s.28B(3)-(6) in respect of unlawful sexual harassment based on existing definitions of ‘workplace participant and workplace’.

Ai Group acknowledges the *Respect@Work Report* findings that the legal framework applying to employers regarding sexual harassment at work was complex, with competing and inconsistent obligations across anti-discrimination laws, workplace laws and WHS laws. Indeed, this was consistent feedback provided by many Ai Group members throughout the National Inquiry. These SD Act amendments improve consistency with WHS laws and the FW Act’s anti-bullying provisions including the proposed extension to include sexual harassment.

Sexual harassment laws to apply to the Judiciary, Members of Parliament and State Governments

There is no good reason why the Judiciary, Members of Parliament and their staff and State Governments are presently excluded from the SD Act’s coverage while the private sector is included. Sexual harassment is a community-wide problem.

Ai Group welcomes these amendments and considers them timely and important.

Complaints of sexual harassment to the AHRC may be within 2 years of the alleged conduct

The Bill amends the discretionary grounds on which a complaint to the AHRC may be terminated by the President. Instead of the current timeframe of 6 months, the Bill enables the President to terminate complaints 2 years after the alleged unlawful conduct occurred.

The rationale for this provision is explained in the *Respect@Work Report*.

Extension of compassionate leave to miscarriages

The Bill extends the FW Act's compassionate leave provisions to employees who experience a miscarriage or whose spouse or de facto partner has a miscarriage. Employees will be entitled to up to two days of paid compassionate leave (unpaid for casuals).

This is an appropriate extension to the existing compassionate leave provisions which provide up to two days of paid leave (unpaid for casuals) where a member of the employee's immediate family or household dies or has a life-threatening illness or injury.

These amendments follow the *Fair Work Amendment (Improving Unpaid Leave for Parents of Stillborn Babies and other Measures) Act 2020* which extended compassionate leave and unpaid parental leave to eligible employees who experience the birth of a still-born child.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We are a truly national organisation which has been supporting businesses across Australia for nearly 150 years.

Ai Group is genuinely representative of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, ICT, transport & logistics, engineering, food, labour hire, mining services, the defence industry and civil airlines.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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