

## The National Women's Safety Alliance

National Women's Safety Alliance (hereafter 'the Alliance') welcomes the opportunity to provide feedback on the exposure draft 'Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (the Exposure Draft)' that amend the Sex Discrimination Act 1984 as well as the Australian Human Rights Commission Act 1986.

The Alliance, established in August 2021, connects the sector, experts, government, and victim-survivors with a shared vision to end violence against women. Our members are practitioners, policy experts, survivors and academics who contribute to our work to inform and guide national policy on women's safety. Our feedback on the exposure draft has been informed by our membership and members of our Sexual Harassment Working Group, some of whom have advocated for legal reform on the issue of workplace harassment and sex discrimination for a number of years.

We recognise that the scope of the exposure draft is limited to the options for Federal law reform and that other reforms relating to the application of the Fair Work Act and the system itself are being progressed separately. We intend to participate in those consultations when they commence.

## Executive Summary

We congratulate the Australian Government in pursuing the recommendations arising from the *Respect@Work* report and beginning the process of law reform and social change. Alongside the proposal for universal paid domestic and family violence leave, we are buoyed by the Government's intent to ensure workplaces are a standard bearer and contribute to eliminating violence against women in all its forms. The exposure draft is a strong step forward from previous efforts at law reform which fell short of the recommendations of the landmark *Respect@Work* report.<sup>1</sup>

The exposure draft incorporates those amendments which were left outstanding by the previous government, including around positive duties to prevent unlawful sex discrimination, Commonwealth public sector reporting to the Workplace Gender Equality Agency to align with the private sector, prohibitions on sex-based harassment and hostile workplaces. We are receptive to the sentiment of the exposure draft and the overdue nature of these progressive reforms, but we have concerns which if not addressed in drafting, could limit the Bill's effectiveness. In outlining these concerns, we note that this is not an exhaustive submission. We therefore endorse the suite of recommendations made

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<sup>1</sup> Committee report into previous Amendment Bill [Sex Discrimination and Fair Work \(Respect at Work\) Amendment Bill 2021 – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au/legislation/proposed/amendments/sex-discrimination-and-fair-work-respect-at-work-amendment-bill-2021)

from the Australian Discrimination Law Experts Group (ADLEG) who have shared their expertise with us.

Our submission provides feedback on three elements of the exposure draft: hostile environment, tests of relevant circumstances and, the positive duty amendments.

## 1) The dynamics of a hostile environment are not adequately captured

We support the inclusion of 'hostile workplaces' in the exposure draft reflecting the recommendations from the *Respect@Work* report. Hostile workplaces, where the environment is such that others are left feeling unsafe or excluded remain a barrier to the economic participation of diverse women and one of the underlying factors in industry gender segregation that is longstanding in Australia.<sup>2</sup> However, we have reservations about how this amendment is drafted which do not capture the permeability and dynamics of a hostile environment.

We support the recommendations of the ADLEG calling for the proposed amendments at 28M(2)(a) and (b) to be removed from the SDA. The explicit reference to *first person subjecting another, second, person* does not adequately capture the fluidity of the workplace 'environment' and how one person's actions or behaviour (or multiple person's) can contribute to hostility that permeates and impacts on others who may not be the intended targets of the behaviour. We are concerned that the conditions of the proposed amendment (*first person subjecting another, second, person*) do not sufficiently recognise the concept of 'environment' and the dynamics of how hostile environments are 'created', often through cumulative actions.

To address this, we refer you to the revised wording proposed by the ADLEG outlined in their submission.

## 2) Different tests of relevant circumstances for sexual harassment, sex discrimination and hostile workplace environments

We also draw your attention however to the variations in the tests for 'relevant circumstances' between 28A (sexual harassment), 28AA (harassment on the grounds of sex) and 28M (hostile workplace environments) which should be addressed to avoid confusion and complexity. The circumstances are outlined below.

For **sexual harassment** the following circumstances are considered relevant in applying the test;

- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;

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<sup>2</sup> [Sex Discrimination and Fair Work \(Respect at Work\) Amendment Bill 2021 \(aph.gov.au\)](https://aph.gov.au)

- (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- (c) any disability of the person harassed;
- (d) any other relevant circumstances

Likewise for ***harassment on the ground of sex*** the following are relevant circumstances

- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status religious belief, race, colour, or national or ethnic origin, of the person harassed;
- (b) the relationship between the person harassed and the person who engaged in the conduct;
- (c) any disability of the person harassed;
- (d) any power imbalance in the relationship between the person harassed and the person who engaged in the conduct;
- (e) the seriousness of the conduct;
- (f) whether the conduct has been repeated;
- (g) any other relevant circumstance

And for ***hostile workplace environments*** the following are relevant circumstances:

- (a) the seriousness of the conduct;
- (b) whether the conduct was continuous or repetitive
- (c) the role, influence of authority of the person engaging in the conduct
- (d) any other relevant circumstances.

The variation between the relevant circumstances makes establishing a standard difficult. Notably where a given circumstances is listed in one such test but arbitrarily excluded from another, there is an implication that its exclusion means it will not meet the test. For example, it is not understood why a 'power imbalance' is explicated for harassment on the grounds of sex but omitted for sexual harassment and hostile workplace environment. Interpretation of what could be captured and what is not could therefore vary considerably. Our concern is that this could invite the court to break down offending conduct into smaller individual acts rather than assess them as cumulative patterns of reinforcing behaviour.

It is also concerning that the relevant circumstances for 28M(3) (hostile environment) does not include 'the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed'. By excluding this test, the exposure draft fails to appreciate how intersectional identities can be weaponised in acts of workplace hostility.

Furthermore, the test for a hostile environment incorporates the language of 'offensive, humiliating, intimidating' which does not reflect that the environment could also be hostile simply because it interferes with others' capacity to work in quiet enjoyment or receive work that is commensurate with their skills and ability. The burden of this test is similarly reflected by the qualifier 'demeaning' in 28AA(1) when proving sex-based harassment. Both

these qualifiers, place the burden on the complainant to feel demeaned, humiliated, offended or intimidated rather than to be frustrated or inhibited in performing their work.

We recommend that the exposure draft be amended so that the relevant circumstances test outlined in 28AA and 28M(3) be standardised.

We recommend that 28M(1),(2) be amended to include *hostile effects*, such as preventing the affected person from equally enjoying the workplace environment.

### 3) Limitations with ‘positive duty’ amendments

The Alliance is broadly supportive of the amendments to introduce ‘positive duties’ into the SDA, in line with the findings of the *Respect@Work* report.

Despite this, we draw attention to the current limitations of the ‘duty’, listed in 47C(3). The list includes those whom the positive duty applies to including the duty holder and their employees and agents. The omission of other persons, such as customers, clients or other relevant parties substantially limits the application of the positive duty, however.

In a survey of 6000 shopfront workers conducted by the Shopfront Distributors Association (the SDA), nearly half reported that they had weekly or monthly abusive encounters with customers in the past year. Women workers, (and for those working in retail and fast-food many would not meet the legal definition of adult), were more likely to report being abused, including in overtly sexual ways.<sup>3</sup>

The omission of patrons and others from 47C(3) would make it difficult for a complainant to argue that abuse and harassment by customers was not otherwise a failure on the part of the duty holder to prevent the conduct outlined in 47C(2). This arbitrary exclusion limits the applicability of the Bill for those whose occupation has any public facing role, an inextricable component to their harassment. As ADLEG outlines in their submission the implications for this go beyond the traditional customer and service personnel interaction and could include journalists or sports people being exposed to threats and harassment from members of the public while performing their work.

Rather than list those ‘covered’ by the duty, and thereby limiting its application, we recommend removing subsection 47C(3) so that the duty holders outlined in (1) have a duty to prevent the conduct outlined in (2).

Further to this, there is concern that without an explicit obligation to consult with relevant parties such as employees, that consultation as a ‘reasonable step’ will be left open to interpretation. We believe that *good-faith consultation* with employees must be an explicit factor to be taken into account under 47C(4) of the SDA. The survey report on sexual harassment of members of the SDA, found that in the absence of employers making reasonable adjustments to protect female staff from customer stalking and abuse, some would take the initiative to swap name badges, thereby thwarting customer attempts to

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<sup>3</sup> [No One Deserves A Serve – Eliminating abuse and violence towards retail workers | SDA Union](#)

stalk their social media profiles.<sup>4</sup> Reasonable steps is contextual, as addressed in 47C(4), but employees being consulted on what those reasonable steps could include, should be an explicit step in the first instance.

#### **4) Positive duty enforcement**

We support the Bills's intention to confer enforcement powers on the Australian Human Rights Commission in regard to positive duties. Despite this, there are concerns that the absence of reporting obligations, as well as the 'reasonably suspect' threshold at 35B(1) will limit the Commission's scope to enforce and promote compliance.

Without any reporting obligations, workers and other stakeholders including the Commission will be limited in being able to monitor and report non-compliance of positive duties. In ensuring the Bill adequately captures compliance promotion, we refer the drafters to the advice from ADLEG in their submission. Primarily, that provision be made for information regarding complaints be available to those inquiring into compliance and that the Respect@Work Council be empowered to promote and share information about sexual harassment between agencies to promote compliance. The 'reasonably suspect' threshold hinders the Commission's scope to, on the one hand, initiate an investigation into non-compliance while also remaining vague about how any such reasonable suspicion could be formed. We acknowledge that the Explanatory Note [26] endeavours to clarify this, but it is not reinforced in the Bill.

We also urge the government to explore opportunities to align any potential compliance mechanisms of the Bill in a similar way to the enforcement powers of the Workplace Gender Equality Agency. In this vein, larger duty holders could be compelled to report on compliance and make an undertaking that they have taken 'all reasonable steps' to prevent the conduct covered in 47C.

The Alliance is grateful for the opportunity to contribute to this important legislative reform and for the guidance of ADLEG in developing this feedback.

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<sup>4</sup> [Everyone's Business: Sexual harassment of SDA members \(2019\) | Australian Human Rights Commission](#)

