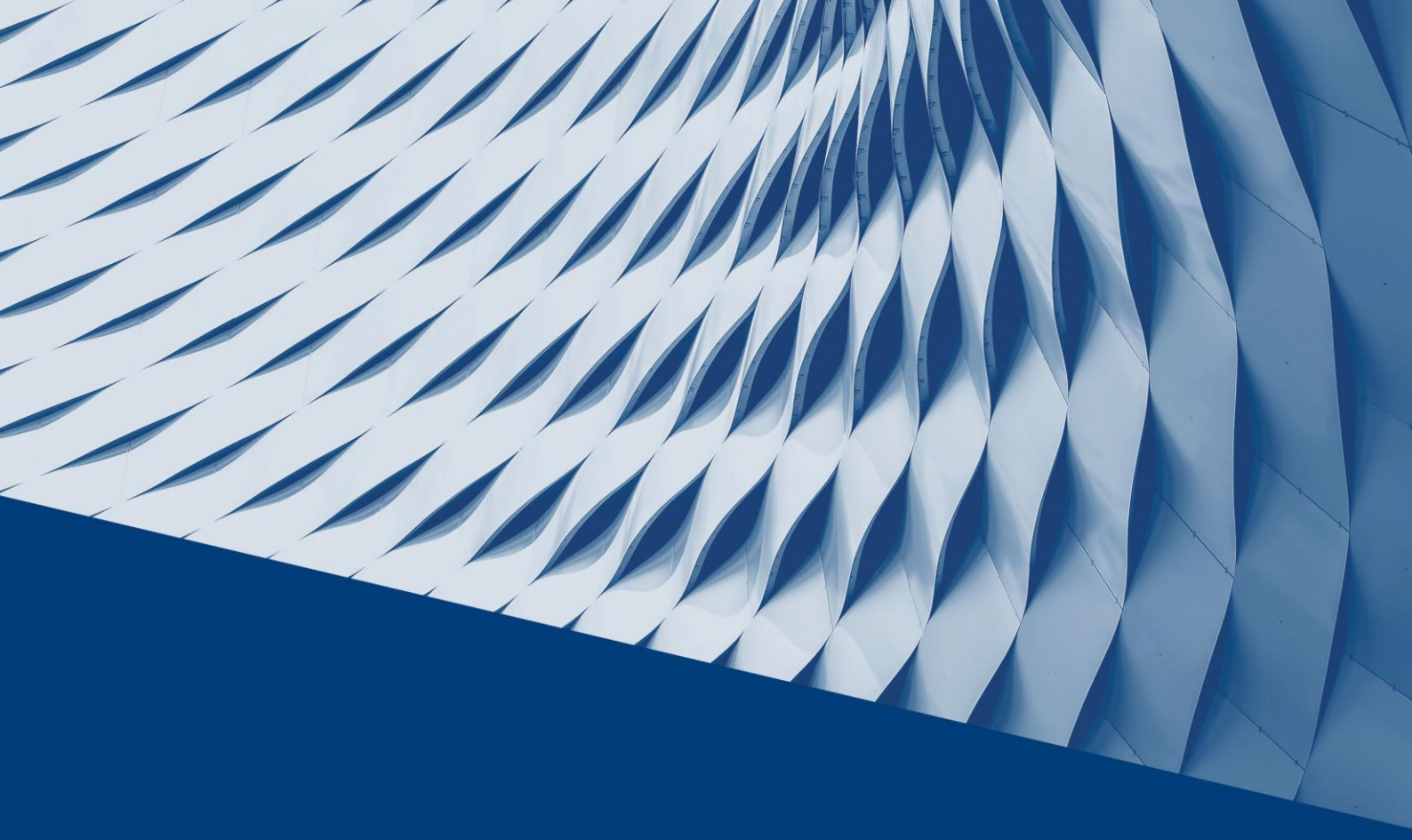

Respect@Work Bill

ACTU Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Anti-Discrimination and Human Rights Legislation Amendment (Respect@Work) Bill 2022

ACTU Submission, 14 October 2022
ACTU D. No 36/2022

ACTU
australian council of trade unions

Contents

Contents 0

Introduction 1

About the ACTU 1

Background 1

Summary of ACTU Recommendations 2

Hostile Workplace Environments 4

Third party conduct 5

Matters to be taken into account in determining compliance with the positive duty 7

Compliance with the positive duty 9

Guidelines should be enforceable 9

Compliance notices 10

Resourcing of the Commission 10

Enforcement by unions and workers 11

Compliance functions to include worker and union views 13

Liability of directors and officers 14

Costs Protection provisions 14

The Costs Model 15

The No Costs Model 15

The Costs Neutrality Model 16

The Equal Access Model 18

Explanatory Memorandum 19

Conclusion 21

Introduction

About the ACTU

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. It has played the leading role in advocating for, and winning the improvement of working conditions, including on almost every Commonwealth legislative measure concerning employment conditions and trade union regulation. The ACTU has also appeared regularly before the Fair Work Commission and its statutory predecessors, in numerous high-profile test cases, as well as annual national minimum and award wage reviews.

The ACTU is Australia's sole peak body of trade unions, consisting of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates who together have over 1.7 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector.

Background

The ACTU welcomes the opportunity to make a submission on the Anti-Discrimination and Human Rights Legislation Amendment (Respect@Work) Bill (**the Bill**) to the Senate Legal and Constitutional Affairs Legislation Committee. The Bill implements some of the key recommendations of the Respect@Work Report published by the Australian Human Rights Commission (**the Commission**) following *its National Inquiry into Sexual Harassment in Australian Workplaces*. The ACTU is in full support of the Bill, which delivers on crucial reforms to anti-discrimination legislation that were recommended by the Respect@Work report and advocated for by unions and others for many years. In particular, the introduction of a positive duty to prevent sexual harassment, and the ability for the Commission to enforce that positive duty represents a huge paradigm shift that should finally start to see the burden of sexual harassment shifted from individuals to employers, duty holders and the Commission. The significance of this for workers in all industries across the country cannot be overstated. Almost two in five women (39%) and just over one in four men (26%) had experienced sexual harassment in the workplace in the past five years according to earlier research by the Commission.[1] Yet only 17% of people who experience sexual harassment will make a complaint. Those who choose not to do so because they fear the impact that complaining will have on their reputation, career prospects and relationships within their community or industry.[2]

---

[1] Australian Human Rights Commission (2018) Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces, page 8.
[2] Australian Human Rights Commission (2020) Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces, page 14 (**Respect@Work Report**).

The ACTU makes the following recommendations that will strengthen the Bill and help to achieve the aims and objectives of the Respect@Work Report.

Summary of ACTU Recommendations

Recommendation 1 - Amend s28M(3) to include additional circumstances to be taken into account in determining whether there is a hostile workplace environment, such as: whether the conduct was unwelcome to the second person, the profile and gender composition of the workforce, power imbalances, and other factors making workers vulnerable such as age, gender, racial or cultural background.

Recommendation 2

a) Amend the heading above s47C(4) to include the underlined words "Other conduct towards employers and workers, including conduct by third parties";

b) Add a note under s47C(4) to explain that this section includes conduct by third parties, which can include for example customers, patrons, clients, service users, patients, residents, visitors, suppliers, contractors, volunteers, students and parents; and

c) Industry specific guidance and resources should be developed by the Australian Human Rights Commission in consultation with the Respect@Work Council, unions and industry on how to prevent and respond to third party harassment.

Recommendation 3

Amend S47C(6) to include the following additional matters to be taken into account in determining whether a duty holder has complied with the positive duty:

a) The circumstances and needs of employees and/or workers in the duty holder's business or undertaking;
b) The type of industry and work performed;
c) Any specific drivers, risks or systemic issues present within the particular industry or workforce, including culture, workforce profile (including gender balance and insecure work), power imbalances, and work design and systems of work;
d) The benefits of implementing the measures;
e) The consequences and risks of failing to implement measures; and
f) The extent to which the duty holder has complied with any relevant guidelines published by the Commission.

Recommendation 4

a) Guidelines published by the Commission pursuant to s35A are enforceable and are taken into account in any application under the law, including:

   i. when considering whether a duty holder has complied with the positive duty by adding this as a matter to be considered in s47C(6) (as described in the section above); and

   ii. as a specific reason for the Commission to issue a compliance notice in s35F(1) by adding the underlined words: "If, as a result of an inquiry into a person's compliance with the positive duty in relation to sex discrimination, the Commission finds that the person is not complying, including with any guidelines published by the Commission, the President may give the person a written notice."

b) s35A is amended to include the underlined words: "to prepare, and publish in such a manner as the Commission considers appropriate, guidelines for complying with the positive duty in relation to sex discrimination, which will be reviewed and updated regularly".

Recommendation 5 - s35F(e) be amended to remove the words "if the President considers it appropriate."

Recommendation 6 – provide the Commission with appropriate funding and resources to perform its enforcement and compliance functions, and provide funding and resources to the Commission, unions and industry to support the effective roll out of the new laws.

Recommendation 7 – Consider providing the Commission with access to the powers of WHS inspectorates to utilise as part of its enforcement and compliance functions.

Recommendation 8 – Insert provisions into the Bill that enable workers and trade unions to make complaints and bring claims regarding non-compliance with the positive duty in s47C.

Recommendation 9 – Amend s35J to include provisions allowing for independent enforcement of compliance notices in the courts by trade unions and workers where the Commission does not do so within a period of time.

Recommendation 10 – Insert provisions into the Bill that require the Commission to notify, consult with, and give an opportunity to make submissions, to workers (former and current) and trade unions when exercising its compliance functions.

ACTU

Recommendation 11: Insert provisions into the Bill that make directors and officers liable for breaches of the positive duty of in s47C.

Recommendation 12 – Schedule 5 of the Bill is amended to insert the Equal Access Model for costs into the AHRC Act, as it provides for the most appropriate cost protection in discrimination matters.

Recommendation 13

a) Paragraph 15 in the existing EM be removed from any Supplementary or Revised Explanatory Memoranda;

b) A note be added in the appropriate spot in the Bill that the positive duty applies in addition to other duties[3], and that compliance with a positive duty does not automatically mean that all reasonable steps to prevent the offending conduct were taken in a particular case for the purpose of s106 of the SD Act, or vice versa; and

c) Paragraph 21 be amended in any Supplementary or Revised Explanatory Memoranda to include the words "information or advice provided by unions and/or worker representatives."

Hostile Workplace Environments

S28M as currently drafted uses an objective 'reasonable person' test to determine whether a person has subjected another person to a workplace environment that is hostile on the grounds of sex. One of the requirements of the section is that a reasonable person, having regard to all of the circumstances, would have anticipated the possibility that the conduct would result in the workplace being offensive, intimidating or humiliating to the second person.

This is a different test to that used in s28A of the *Sex Discrimination Act 1984* (Cth) (**SD Act**), which also includes a subjective component when determining whether a person has been sexually harassed, namely that the conduct was unwelcome. Relevant case law defines unwelcome conduct as conduct that was not solicited or invited by the person, and the person regarded the conduct as undesirable or offensive. Whether the behaviour was unwelcome is a subjective question and will depend on the response of the particular person alleging sexual harassment. Importantly, it is irrelevant that the behaviour may not offend others or may have

[3] As per s15(6) of The Equal Opportunity Act 2010 (Vic) s 15(6), and as contemplated in the Explanatory Memorandum at paragraph 16.

been seen as an accepted feature of the work environment in the past. Past decisions have also clarified that it does not matter if a person does not voice disapproval or goes along with behaviours, because often those people fear victimisation or are in a vulnerable position due to age, gender, racial or cultural background, and power imbalances.[4]

The subjective element of how the conduct is perceived by the second person is an important consideration in determining whether sexual harassment has occurred, and a subjective element should be included in s28M regarding hostile workplace environments. This could be done by including additional circumstances in s28M(3) such as whether the conduct was unwelcome to the second person, the profile and gender composition of the workforce, power imbalances, and factors making workers vulnerable such as age, gender, racial or cultural background.

Recommendation 1 - Amend s28M(3) to include additional circumstances to be taken into account in determining whether there is a hostile workplace environment, such as: whether the conduct was unwelcome to the second person, the profile and gender composition of the workforce, power imbalances, and other factors making workers vulnerable such as age, gender, racial or cultural background.

Third party conduct

Hospitality, retail, healthcare, education, transport and community and public services are some of the industries most affected by third party sexual harassment – that is sexual harassment perpetrated by third parties such as customers and patrons (in industries including hospitality, retail, transport and public services), patients, clients, residents, service users and visitors (in industries including healthcare, disability and aged care, and community and public services), students and parents (in the education industry), and contractors, suppliers, volunteers and visitors (in many industries). One in five (21%) members of the SDA, the union for retail and fast food workers, reported that they had been sexually harassed by a customer in their current job, according to a survey conducted by the Commission.[5] For women and younger workers the figure was far higher.

The Exposure Draft of the legislation did not initially include third party conduct within the scope of the positive duty. The Bill has addressed this gap through S47C (4), which extends the positive duty to capture acts of sexual harassment, sex based harassment, victimisation and subjecting

[4] *Aldridge v Booth & **Ors*** (1986) EOC 92-177**;** *Hall & Ors v A. A. Sheiban Pty Ltd & Ors* (1989)
[5] Australian Human Rights Commission (2019), *Everyone's Business: Sexual harassment of SDA members* page 11.

others to a hostile workplace environment (**unlawful conduct**) that are perpetrated by anyone present in the workplace other than employers or a person conducting a business or undertaking (**duty holders**) and their employees, workers and agents – that is, people who do not have an employment or worker type relationship with the employer and can be broadly referred to as 'third parties'. This means that employers must take reasonable and proportionate measures to eliminate, as far as possible, unlawful conduct carried out by third parties.

This is a very welcome addition. If third party conduct had not been included in the positive duty, it would have rendered the duty of little utility in many industries and workplaces, and been inconsistent with the findings of the Respect@Work Report in relation to the prevalence of, and need to address, third party harassment.[6]

However, s47C(4) as currently drafted does not explicitly refer to third parties, and there is a risk that duty holders and workers do not understand that the subsection is directed at the conduct of third parties, and that duty holders have an obligation to prevent unlawful third party conduct. This should be clarified in the Bill, in order to assist all parties to understand this aspect of the positive duty.

Recommendation 2:

a) Amend the heading above s47C(4) to include the underlined words "Other conduct towards employers and workers, including conduct by third parties";

b) Add a note under s47C(4) to explain that this section includes conduct by third parties, which can include for example customers, patrons, clients, service users, patients, residents, visitors, suppliers, contractors, volunteers, students and parents; and

c) Industry specific guidance and resources should be developed by the Australian Human Rights Commission in consultation with the Respect@Work Council, unions and industry on how to prevent and respond to third party harassment.

[6] For example, the Respect@Work Report states at page 467: "The Commission is of the view that every worker, whether paid, unpaid or self-employed, should have access to legal protections from workplace sexual harassment, no matter who sexually harasses them in the course of their work, as well as access to adequate remedies."

Matters to be taken into account in determining compliance with the positive duty

S47C(6) provides for matters which are to be taken into account when determining whether a duty holder has complied with the positive duty. The list of relevant factors will provide important guidance for users of the legislation.

These factors are currently limited to considerations of the duty holder's circumstances, and do not include any considerations from an employee or worker perspective, any factors relevant to people who may experience discrimination and harassment, or any consideration of specific risks or drivers of sexual harassment in the particular industry or workplace. This gives the impression that the attributes and needs of the duty holder are paramount in assessing whether the positive duty has been met. This could result in the practical effect of the positive duty being significantly diluted, by making it too easy for duty holders to show that they have complied with the positive duty, and by not requiring any consideration of the specific drivers and risks in a workplace, and the severe consequences for workers of those risks not being addressed.

If the positive duty is to achieve its goal of shifting the burden from individuals making complaints to employers taking proactive and preventative action, the list of relevant factors should provide more balanced guidance. The profile (including any vulnerable groups)[7] and culture of the workforce and any systemic issues or risks present are relevant factors. For example, if there is a high proportion of workers from culturally and linguistically diverse backgrounds, a reasonable and proportionate measure might be that policies are translated into relevant languages and training is delivered in those languages. Other examples of relevant considerations and risks that may require specific measures to address include a male dominated workforce, third party harassment, insecure work, power imbalances , and work design and systems of work (such as risks inherent in physical spaces, rostering practices, requirements to work in isolation, etc).

Such guidance is present in similar legislative provisions – for example s28A(1A) of the SD Act, which requires factors relevant to the person harassed to be taken into account in cases of sexual harassment, and s180(5) and (6) of the *Fair Work Act 2009* (Cth) (**FW Act**), which provide

[7] In addition to gender, certain workers are more likely to be harassed than others, including young workers, LGBTQI workers, Aboriginal and Torres Trait Islander workers, workers with disability, workers from culturally and linguistically diverse backgrounds, migrant workers and workers on temporary visas, and people in precarious or insecure work: Respect@Work Report, page 19.

that an employer must take all reasonable steps to ensure that the terms of a proposed enterprise agreement and their effect are explained to the relevant employees, and that such explanation is provided in an appropriate manner taking into account the particular circumstances and needs of the relevant employees. S180(6) provides particular examples of classes of employees whose circumstances and needs are to be taken into account – employees from culturally and linguistically diverse backgrounds, young employees, and employees who did not have a bargaining representative for the agreement.

Whilst s47C(6)(d) of the Bill provides for the consideration of any other relevant matter, this is insufficient to address considerations and circumstances that are relevant to the workforce and to individual workers, especially where the preceding three factors all concern the duty holder's circumstances. Guidance provided by way of additional matters to be taken into account will ensure that circumstances relevant to workers are also considered, and that a balanced view is taken.

Finally, there is currently no reference to whether a duty holder has complied with any relevant guidelines published by the Commission, which is a significant oversight, especially given s35A specifically provides for the Commission to develop and publish such guidelines.

Recommendation 3

Amend S47C(6) to include the following additional matters to be taken into account in determining whether a duty holder has complied with the positive duty:

a) The circumstances and needs of employees and/or workers in the duty holder's business or undertaking;
b) The type of industry and work performed;
c) Any specific drivers, risks or systemic issues present within the particular industry or workforce, including culture, workforce profile (including gender balance and insecure work), power imbalances, and work design and systems of work;
d) The benefits of implementing the measures;
e) The consequences and risks of failing to implement measures; and
f) The extent to which the duty holder has complied with any relevant guidelines published by the Commission.

Compliance with the positive duty

Guidelines should be enforceable

Section 35A of the Bill provides for functions to be performed by the Commission in relation to the positive duty, including to prepare and publish guidelines for complying with the positive duty. This is consistent with existing provisions in both the SD Act and the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) that provide for the Commission to make non-enforceable guidelines.

Whilst guidelines are necessary to provide guidance to duty holders, unless they are enforceable - such as prescribing the guidelines by regulation, or giving them an equivalent status as a code of practice under Work Health and Safety legislation (which makes them admissible in court proceedings and which the court can rely upon to determine compliance) - there will not be enough of an incentive for duty holders to take all reasonable and proportionate measures to comply with the positive duty. As an absolute minimum, the guidelines should be explicitly referred to in all relevant provisions of the Bill regarding compliance, such as being included as a matter to be taken into account in assessing compliance with the positive duty in s47C(6) (as discussed in the above section), and as a specific reason for the Commission to issue a compliance notice in s35F(1). Finally, guidelines should be subject to regular review and update to ensure they remain relevant and responsive to current issues, circumstances and needs.

Recommendation 4:

a) Guidelines published by the Commission pursuant to s35A are enforceable and are taken into account in any application under the law, including:

   i. when considering whether a duty holder has complied with the positive duty by adding this as a matter to be considered in s47C(6) (as described in the section above); and

   ii. as a specific reason for the Commission to issue a compliance notice in s35F(1) by adding the underlined words: "If, as a result of an inquiry into a person's compliance with the positive duty in relation to sex discrimination, the Commission finds that the person is not complying, including with any guidelines published by the Commission, the President may give the person a written notice."

b) S35A is amended to include the underlined words: "to prepare, and publish in such a manner as the Commission considers appropriate, guidelines for complying with the

positive duty in relation to sex discrimination, which will be reviewed and updated regularly".

Compliance notices

S35F provides that the Commission can give written compliance notices to a person regarding their non-compliance with the positive duty and sets out the various things a compliance notice must do. S35F(e) provides that the notice must specify a reasonable period within which the person must provide the Commission with evidence that they have taken the action as specified in the notice, but only if the President considers it appropriate. This is the only element of a compliance notice that is subject to the President's discretion. By only requiring evidence that the specified action has been taken in some circumstances, the Bill as currently drafted significantly weakens the compliance function of the Commission. A crucial part of that compliance function must be to ensure that the required action has actually been undertaken.

Furthermore, without the provision of such evidence, it would be difficult for the Commission to enforce a compliance notice in the Federal Court or Federal Circuit and Family Court of Australia pursuant to s35J of the Bill. s35J(1)(d) provides that the President may apply to the Courts for an order to enforce the compliance order if the President considers that the person has not complied with the notice. It would be very difficult, if not impossible, for the President to know whether the person has complied with the notice, unless evidence of compliance is routinely required under s35F(e). Therefore, s35F(e) should be amended to remove this discretion.

Recommendation 5 - s35F(e) be amended to remove the words "if the President considers it appropriate."

Resourcing of the Commission

The Commission needs to be appropriately funded and resourced in order to perform the new functions conferred on it by the Bill, including the enforcement and compliance functions. If the Commission does not have adequate resources to perform these functions, the reforms introduced by this Bill (in particular the positive duty) will have little utility in practice. The Commission had its budget substantially cut under the previous government and in March 2022 it was reported that one in three jobs had to be cut and the Commission itself warned that its current funding did not provide it with the resources required to perform its existing statutory functions.[8] In order for the new legislative provisions to have effect and meaning, they need to

[8] Australian Human Rights Commission to slash staff after budget cuts and surge in workload | Australia news | The Guardian, Paul Karp, 17 March 2022.

be backed by an appropriately resourced Commission that is able to effectively pursue both its traditional educative and complaint functions as well as its new enforcement functions.

Resources and funding should also be provided to the Commission and to unions and industry to support the effective roll out of the new laws.

In addition to the compliance functions contemplated by the Bill, consideration should be given to providing the Commission with similar powers to those of WHS regulators, by establishing an inspectorate that can undertake the investigation powers contained in WHS legislation. This would enable the Commission to carry out inspections and interviews in the workplace and seize documents, rather than being limited to relying on written or oral submissions received from a person or duty holder. Alternatively, the Commission could be given access to the powers of State, Territory and Comcare WHS inspectorates (for example by forming service agreements with them), in order to give the Commission the ability to utilise the powers of an inspectorate in its investigations (which are far greater than what the Bill provides for.)

Recommendation 6 – provide the Commission with appropriate funding and resources to perform its enforcement and compliance functions, and provide funding and resources to the Commission, unions and industry to support the effective roll out of the new laws.

Recommendation 7 – Consider providing the Commission with access to the powers of WHS inspectorates to utilise as part of its enforcement and compliance functions.

Enforcement by unions and workers

In addition to ensuring that the Commission has adequate resources, the compliance burden should be shared with unions and workers. Currently, all of the enforcement options for the positive duty lie with the Commission. There is no ability for workers or trade unions to make a complaint or bring claims regarding non-compliance with the positive duty. Currently, individuals can only make complaints (pursuant to s46P of the AHRC Act) if they are aggrieved by acts, omissions or practices alleged to be unlawful discrimination. Trade unions can only make complaints on behalf of people who are aggrieved by acts, omissions or practices alleged to be unlawful discrimination. The ability for workers and unions to be able to make complaints and bring claims regarding non-compliance with the positive duty (including prior to any unlawful discrimination actually occurring) is crucial as it will share the burden of compliance, improve enforcement by allowing actors other than the Commission to enforce the law, and will help to

drive systemic change.[9] This is especially urgent in circumstances where the Commission's budget has been substantially cut, but even with improved funding, the pervasive nature and prevalence of sexual harassment in all industries is beyond the ability of one small regulator to address.

The dangers of an individual cause of action not attaching to the positive duty are illustrated in a recent Victorian case[10] where the Tribunal found that it did not have jurisdiction to hear the Applicant's claim that the Respondents had breached their positive duty under s15 of the *Equal Opportunity Act 2010* (Vic) (**EO Act**) to take reasonable and proportionate measures to eliminate sexual harassment as far as possible, because the EO Act does not allow a person to apply to the Tribunal in respect of a contravention of s15. However, the Tribunal found that had the EO Act allowed the Applicant to allege that the Respondents had breached the positive duty, it would have found that allegation to be proven.[11]

Without the ability for workers and unions to make complaints and bring claims regarding a breach of the positive duty, there will be countless missed opportunities for enforcement and consequent systemic change. Allowing actors other than the Commission to enforce the law will greatly improve compliance especially in small-medium workplaces which may not be priorities for the Commission to investigate.[12] The experience of unions with the enforcement of the Victorian positive duty is instructive in this respect. The Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) has seemed reluctant to pursue its compliance functions (for reasons which could include underfunding, under resourcing and difficulties in transitioning from its traditional educative functions to enforcement and compliance functions.) As a result, there have largely been no consequences for employers who fail to comply with the positive duty.

In addition to having the ability to bring complaints and claims regarding the positive duty, trade unions and workers should also be given the right to pursue enforcement of compliance notices in the courts where the Commission does not do so within a period of time. Unfortunately, the experience of many unions with WHS regulators across the country is that compliance notices are often issued but not enforced (due to resourcing constraints and regulator capture), and only

---

[9] It was a recommendation of the Ministerial Taskforce on Workplace Sexual Harassment (Victoria, 2021) that the Equal Opportunity Act 2010 (Vic) be amended to allow for unions to commence representative claims on behalf of members in relation to enforcement of the positive duty - see Recommendation 11 - Ministerial Taskforce into Workplace Sexual Harassment - Recommendations.pdf (www.vic.gov.au)

[10] *Oliver v Bassari (Human Rights)* [2022] VCAT 329

[11] Ibid, at [110].

[12] For example, the Fair Work Ombudsman tends to limit its enforcement action (for example of wage theft) to larger employers and systemic breaches, due to resourcing constraints. The lack of provision for independent enforcement by any other actors means that wage theft goes largely unchecked amongst smaller to medium businesses.

affected workers are able to challenge the non-enforcement. Unions have had enforcement powers in relation to WHS laws in various jurisdictions at different points in time.

Recommendation 8 – Insert provisions into the Bill that enable workers and trade unions to make complaints and bring claims regarding non-compliance with the positive duty in s47C.

Recommendation 9 – Amend s35J to include provisions allowing for independent enforcement of compliance notices in the courts by trade unions and workers where the Commission does not do so within a period of time.

Compliance functions to include worker and union views

Despite having the ability to conduct independent investigations into a breach of the positive duty for 11 years, VEOHRC has only recently undertaken its first investigation, which took two years to complete.[13] Unfortunately, it did not speak to a single worker as part of that process. Whilst there was some limited consultation with relevant unions during the investigation, comprehensive recommendations provided by unions regarding what steps should be part of the investigation process were not followed. This resulted in an investigation process that largely consisted of reviewing policies and procedures and speaking to franchisees and managers. The outcomes of the investigation were largely concerned with the updating of policies and procedures, development of training, and communication to employees about complaints processes. Without a process for speaking to workers and unions about their experiences, the investigation was limited in the outcomes it could provide.

Union experiences of enforceable undertakings being used as an alternate to investigations or other enforcement action under WHS legislation is that they often impose no further obligations or requirements on duty holders than the statutory duty already does, limiting their utility. They are often limited to a commitment to comply with the law in future, leaving workers who have raised issues disempowered and less likely to proactively report issues in future. Further, the Fair Work Ombudsman is moving away from using enforceable undertakings to a more coercive approach of using compliance notices, in what could be a further sign of their limitations. Workers and unions should be consulted prior to the adoption of an enforcable undertaking to ensure they will have utility, and to give workers agency.

[13] Victorian Equal Opportunity & Human Rights Commission (August 2022) Preventing sexual harassment in retail franchises: Investigation under the Equal Opportunity Act 2010.

The Bill should specify that in exercising its compliance functions (including the inquiry and enforcable undertakings functions), the Commission needs to notify, consult with and give an opportunity to make submissions to workers (both former and current) and trade unions. This will ensure that investigations have regard to worker experiences and perspectives, not just those of the employer or duty holder and their official documentation such as policies and procedures, and will therefore lead to more substantive change.

Recommendation 10 – Insert provisions into the Bill that require the Commission to notify, consult with, and give an opportunity to make submissions, to workers (former and current) and trade unions when exercising its compliance functions.

Liability of directors and officers

Directors and officers of companies should be held accountable for breaches of the positive duty in s47C. This has precedent under WHS legislation, where directors and officers of companies are held liable for certain breaches.[14] This would ensure that accountability for compliance with the positive duty is created at the highest level of organisations, and would be a significant driver of compliance and systemic change. This does not create an additional duty (given that duty holders are already subject to the positive duty), but does create a powerful incentive for compliance, and accountability where there is non-compliance with the duty.[15]

Recommendation 11: Insert provisions into the Bill that make directors and officers liable for breaches of the positive duty of in s47C.

Costs Protection provisions

Recommendation 25 of the Respect@Work Report called for a costs protection provision to be inserted into the AHRC Act that is consistent with the cost protection provisions in s570 of the FW Act. The Bill provides for a different model of 'costs neutrality'. Currently the AHRC Act contains costs provisions whereby costs follow the event.

These different costs models all have advantages and disadvantages. The ACTU is of the view that there is a better model than all of these, being the 'Equal Access' Model. The essence of the Equal Access Model is that costs orders against an unsuccessful defendant are allowed, but costs orders

[14] For example, s 27 of the *Work Health and Safety Act 2011* (NSW), s144 and s145 of the Occupational Health and Safety Act 2004 (Vic).
[15] This was also a recommendation of the Ministerial Taskforce on Workplace Sexual Harassment (Victoria, 2021) – see Recommendation 17 - Ministerial Taskforce into Workplace Sexual Harassment - Recommendations.pdf (www.vic.gov.au)

against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation. This is the best model to drive the change needed, especially where sexual harassment is widespread, so damaging, and the barriers to victims being able to report it are immense.

The Costs Model

The costs provisions currently in the AHRC Act (**the Costs Model**) provide that as a general rule, costs follow the event – that is, the unsuccessful party will pay the successful party's costs, with a broad discretion for courts to award costs in any manner they see fit.

The advantage of the costs model is that when applicants are successful, their legal costs are largely covered by respondents. The disadvantage is that when applicants are unsuccessful, they become liable for the legal costs of respondents. The risk of an adverse costs order is a strong deterrent to applicants seeking redress, particularly given the economic power imbalance between most applicants and perpetrators in the area of employment. The costs model also has the following disadvantages:

- a lack of certainty for applicants
- does little to mitigate the risk of paying the costs of the respondent where an applicant is unsuccessful
- deters applicants from initiating civil proceedings, even if they have a strong claim
- favours parties with significant resources, such as large employers, creating imbalance between parties and access to justice issues for marginalised communities
- perpetuates a culture where applicants lose the opportunity to have a judicial determination which results in a lack of development of legal precedent and decisions that may encourage systemic change to workplace cultures

These were among the reasons that the Respect@Work Report recommended moving to a different costs model, consistent with cost protection provisions in the FW Act.

The No Costs Model

The costs provisions in s570 of the FW Act (**the no costs model**) provide that each party bears their own costs, unless a party instituted proceedings vexatiously or without reasonable cause, or a party's unreasonable act or omission cause the other party to incur costs.

The advantage of the no costs model is that unsuccessful applicants are protected from paying the legal costs of respondents, unless their claim is made vexatiously or without reasonable cause,

or there has been an unreasonable act or omission. The disadvantage is that successful applicants are unable to recoup their legal costs from respondents. In practice, this is also a significant deterrent to applicants seeking redress, as regardless of the outcome they will need to pay their own legal costs, which can be prohibitive, and the reality often is that their legal costs will be equal to or greater than the compensation awarded. Under the no costs model, applicants are far more unlikely to be able to secure pro bono assistance or assistance from private solicitors on a "no win, no fee" basis, avenues which provide many applicants with access to claims that they could not otherwise afford to bring. In practice, this means that many of the most vulnerable people are effectively left without any recourse, as they face significant financial hurdles in accessing legal representation.

The Respect@Work Report recommended that the costs provisions in the AHRC Act be changed from the current costs model to a no costs model consistent with s570 of the FW Act. This was in recognition of the fact that costs orders act as a disincentive to applicants pursuing discrimination and sexual harassment matters, and concerns about the negative impact of costs orders on access to justice, especially for vulnerable members of the community. The Respect@Work Report did also acknowledge, however, that a no costs model would disadvantage successful applicants.[16] Unfortunately, the reality is that the failure to reward successful applicants with a favourable costs order often has the opposite effect than what was intended by the Respect@Work Report's recommendation, by acting as a deterrent to applicants. Finally, we understand that the Commission itself has moved away from advocating for this model, including on these grounds.[17]

The Costs Neutrality Model

The Bill did not follow Recommendation 25 of the Respect@Work Report. Instead, the Bill provides for a 'cost neutrality' model pursuant to s46PSA. Under this model, the general rule is that the parties will bear their own legal costs (s46PSA(1)), unless the court considers that there are circumstances that justify making an order as to costs (s46PSA(2)). Pursuant to s46PSA(3), there are a number of factors the court can have regard to when considering whether there are circumstances justifying a costs order, including the financial circumstances of the parties, the conduct of the parties, whether any party has been wholly unsuccessful, whether any settlement offers have been made, whether the subject matter of the proceedings involves an issue of public importance, and any other relevant matters.

[16] Respect@Work Report, p 507.
[17] Australian Human Rights Commission (December 2021) Free and Equal, a reform agenda for federal discrimination laws, pages 191-200.

Part of the reasoning for this approach given in the Explanatory Note (at [41]) was that it would provide applicants with "a greater degree of certainty".

Whilst the costs neutrality model is an improvement on the current costs model in the AHRC Act, it still gives courts a very wide discretion to order costs against a party. Whilst this may sometimes result in applicants recouping their legal costs, it may equally result in applicants being liable for the costs of the Respondent. There is therefore still a large degree of uncertainty for applicants in this model.

Problems with the costs neutrality model include:

- the matters to be taken into account are so broad as to allow courts an extremely wide latitude to make costs orders against applicants;
- it will not reduce the uncertainty faced by applicants, as wide judicial discretion already exists in the current costs model, and has done little to alleviate issues of access to justice;
- well-resourced respondents will be able to pursue effective strategies to obtain costs orders, including through the well-timed and cynical use of settlement offers;
- applicants are more unlikely to secure pro bono assistance or assistance from private solicitors on a no-win no fee basis under this model due to the presumption being that the parties are to bear their own legal costs;
- In circumstances where applicants are likely to be individuals, and respondents are more likely to be well-resourced corporate entities capable of both engaging highly expensive legal teams, and bearing the costs of their decision to do so, the retention of a large discretion to order costs against applicant will in practice deter many from coming forward to seek redress, especially vulnerable applicants and applicants without ample financial resources.

If this model was to be used, consideration should be given to either removing any reference to settlement offers made in the matters to be taken into account in section 46PSA(3), or to giving this factor minimal weight. This is because it can easily be exploited as part of a litigation strategy (especially by well resourced respondents) to ensure that a party is able to recoup its costs, and has little to do with the circumstances or conduct of the parties or the merits of the claim.

The Equal Access Model

There is another model which has found significant support[18], and has been put forward as the most appropriate model by the Power to Prevent coalition[19] after engaging in extensive research and consultation about the issue – namely, the Equal Access Model (also known as vertical costs shifting or qualified one-way costs shifting).

Under this model, the following general rules would apply:

- Where an applicant is unsuccessful, each party will bear their own costs, unless the unreasonable behaviour of the respondent has caused the applicant to incur additional costs

- An unsuccessful applicant is only liable to pay the costs of the respondent if they made vexatious claims or their unreasonable behaviour in the course of proceedings caused the respondent to incur costs
- Where an applicant is successful and the court has found a respondent has engaged in unlawful conduct in breach of the relevant act, the respondent will be liable to pay the applicant's costs because respondents should not be excused from paying costs where they have been found by a court to have breached anti-discrimination law.

The Equal Access Model has been adopted in different jurisdictions both internationally and domestically.[20] For example, it is the approach taken in discrimination cases in the United States[21], and the US Supreme Court has held that there are at least two strong equitable considerations favouring this approach, being that discrimination law is a law that Congress considered of the highest priority, and when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. The model is also consistent with the concerns raised in the Respect@Work Report about the negative impact of cost models on access to justice, especially for vulnerable members of the community, and the disadvantages of no costs models for successful applicants.

---

[18] For example, see 'Change the Culture, Change the System: Urgent Action Needed to End Sexual Harassment at Work' - Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces, 28 February 2019, Victorian Legal Aid, at page 39.

[19] The Power to Prevent Coalition represents over 100 diverse organisations from around the country and across the health, family violence, business, community, union and legal sectors and was formed to advocate for key reforms regarding sex discrimination and sexual harassment.

[20] For example, section 1317 AH of the *Corporations Act 2001* (Cth) and section s 14ZZZC of *the Taxation Administration Act 1953* (Cth) and United Kingdom's Rule 44.13-44.17 *Civil Procedure Rules 1998.*

[21] Christianberg Garment Co v EEOC 434 US 4012 (1978).

Under section 43 of the *Federal Court of Australia Act 1976* (Cth) and section 79 of the *Federal Circuit Court of Australia Act 1999* (Cth), the Courts' costs powers are subject to any restrictions placed by other Acts. The AHRC Act could be amended to insert a provision adopting the Equal Access Model.

The Equal Access Model should be inserted into the AHRC Act, as it provides for the most appropriate cost protection in discrimination matters, and is the most closely aligned with the intention and policy objective of Recommendation 25 of the Respect@Work Report. It solves the access to justice problems and the deterrent effect that are inherent to the other three costs models (namely the costs model, the no costs model and the costs neutrality model.) Given that there are so many systemic barriers to applicants bringing claims,[22] this is a significant opportunity to remove one of the largest barriers and thereby improve access to justice for applicants.

Recommendation 12 – Schedule 5 of the Bill is amended to insert the Equal Access Model for costs into the AHRC Act.

Explanatory Memorandum

The Explanatory Memorandum (**EM**) currently contains the following paragraph (paragraph 15):

> The positive duty is aligned with section 106 of the SD Act, which relates to the vicarious liability of employers for unlawful acts done by their employees or agents. Under this provision, an employer is not liable for the unlawful conduct of their employees or agents if they have taken 'all reasonable steps' to prevent their employees from engaging in the conduct. This means that employers should already be preventing discrimination and harassment by their employees or agents in order to manage their potential liability under the SD Act.

Whilst we understand this may simply be an attempt to reassure duty holders as to the nature of the proposed change, we are concerned that this paragraph sends a message (whether inadvertent or otherwise) that the positive duty does not entail any real or substantive change. The introduction of a positive duty to eliminate sex discrimination, sexual harassment and victimisation is a substantial change to the existing law, and this is something to be celebrated rather than resiled from. There should be no suggestion in any associated explanatory material to the effect that no change is occasioned by the introduction of a positive duty. Such a suggestion

[22] Respect@Work Report, page 14.

will only serve to aid arguments in favour of a weakened interpretation of the enacted provision, especially given the significance of explanatory memoranda in the task of statutory construction. Paragraph 15 is misplaced and misleading and should not form part of any Supplementary or Revised Explanatory Memoranda.

At paragraph 21, the EM states:

> The Commission is able to initiate an inquiry into a person's compliance with the positive duty if it 'reasonably suspects' that a person is not complying. The Commission may form this view based on information or advice provided by other agencies or regulators, information disclosed by impacted individuals, or media reporting, for example.

The Commission should also be able to initiate an inquiry on the basis of information provided by unions on behalf of their members. This is an important inclusion, as often unions have knowledge of systemic issues in an industry or workforce that individual workers do not have. Furthermore, given the issues inherent in relying on individual complaints to drive compliance, and the Bill's aim to shift the burden from individual complainants to employers and regulators, this would provide an important mechanism for unions to provide information on behalf of their members, without having to rely on individuals coming forward and making individual complaints. The EM should be amended to include the words "information or advice provided by trade unions and/or worker representatives" at paragraph 21.

Recommendation 13:

d) Paragraph 15 in the existing EM be removed from any Supplementary or Revised Explanatory Memoranda;

e) A note be added in the appropriate spot in the Bill that the positive duty applies in addition to other duties[23], and that compliance with a positive duty does not automatically mean that all reasonable steps to prevent the offending conduct were taken in a particular case for the purpose of s106 of the SD Act, or vice versa; and

Paragraph 21 be amended in any Supplementary or Revised Explanatory Memoranda to include the words "information or advice provided by unions and/or worker representatives."

[23] As per s15(6) of The Equal Opportunity Act 2010 (Vic) s 15(6), and as contemplated in the Explanatory Memorandum at paragraph 16.

Conclusion

For the reasons detailed above, the ACTU strongly recommends the changes as set out in the Summary of Recommendations, in order to strengthen the Bill and bring it closer to the findings, intent and objectives of the Respect@Work Report. These recommendations would:

- Include subjective elements in the provisions regarding hostile workplace environments, ensuring that how conduct is perceived, and the particular circumstances of workers, are taken into account when considering a breach of these provisions;
- Ensure that workers and duty holders understand that the positive duty captures the unlawful conduct of third parties, which is a significant issue and driver of sexual harassment in many industries;
- Expand the matters to be taken into account when considering whether a duty holder has complied with the positive duty pursuant to s47C(6) to include factors that are relevant to the workforce and individual workers, thereby providing balanced guidance and ensuring the positive duty can achieve its aim of shifting the burden from individuals to duty holders;
- Ensure guidelines regarding the positive duty are enforceable and taken into account in any application under the law, and are reviewed and updated regularly;
- Improve compliance with the positive duty by routinely requiring evidence that a duty holder has complied with any actions required of them that are set out in a compliance notice;
- Ensure the Commission is appropriately resourced to undertake all of its functions, and that unions and industry are resourced to support an effective roll out of the new laws;
- Give the Commission access to the powers of an inspectorate which would allow it to conduct inspections and interviews in the workplace instead of relying on a 'paper based' compliance system;
- Enable workers and trade unions to enforce the positive duty, thereby sharing the burden of compliance with the Commission, strengthening enforcement and increasing the likelihood of systemic change;

- Ensure that the views of workers and unions are taken into account when the Commission exercises its compliance functions, ensuring that compliance action leads to substantive and meaningful change;

- Make directors and officers liable for breaches of the positive duty, thereby creating accountability at the highest level of organisations and driving systemic change;

- Provide for an Equal Access costs model into the AHRC Act, which would solve the access to justice problems and deterrent effect to applicants that are inherent to other costs models; and

- Amend Explanatory Memoranda to ensure that the positive duty is not subject to a weakened interpretation and that unions have a recognised role in notifying the Commission of potential breaches of the positive duty.

address

ACTU

Level 4 / 365 Queen Street

Melbourne VIC 3000

phone

1300 486 466

web

actu.org.au

australianunions.org.au

ACTU Australian Unions