

13 July 2021

Our ref: LP:MC

Mr Michael Tidball
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By email: [REDACTED]

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Dear Mr Tidball

Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

Thank you for the opportunity to provide comments for inclusion in the Law Council's submission to the Senate Education and Employment Legislation Committee on the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (**Bill**).

The Queensland Law Society (**QLS**) appreciates the Law Council considering these comments within such a short timeframe.

Preliminary comments

First, we broadly support the reforms proposed by the Bill which implement some of the recommendations of the Respect@Work report. These are important reforms. However, there are several other recommendations from the report that have not been included in the Bill which require legislative change. We call on the Government to implement the outstanding recommendations.

We also refer to the relatively short timeframes the Senate Education and Employment Legislation Committee have to receive submissions and produce a final report. These have prevented QLS from undertaking a comprehensive review of the specific items in the Bill and the issues raised.

Amendments to the *Human Rights Commission Act 1986*

We agree with the amendments in items 1 and 2 of the Schedule 1 of the Bill. In addition, we agree, based on the evidence cited in the Respect@Work report to support recommendation 22, with item 3. This amendment will provide the President of the Australian Human Rights Commission (**AHRC**) with the discretion to terminate a complaint where the complaint was lodged more than 24 months, rather than 6 months, after the alleged acts, omissions or practices took place.

Amendments to the Fair Work Act 2009

Including leave following a miscarriage into the personal leave entitlements under the FWA

QLS supports including leave following a miscarriage into the personal leave entitlements under the *Fair Work Act 2009* (**FWA**). Item 6 inserts a definition of "miscarriage" to be inserted into section 12 of the FWA. We note page 19 of the Explanatory Memorandum (**EM**) provides:

"The amendment provides that 'miscarriage' means a spontaneous loss of an embryo or fetus before a period of gestation of 20 weeks. This definition is based on the standard medical meaning of the term miscarriage. The term 'embryo' is generally used up to nine weeks' gestation, after which the term 'fetus' is generally used. The definition of miscarriage would include the spontaneous loss of an embryo or fetus, for example, where a non-viable embryo stops developing. It would also include a spontaneous loss of an embryo or fetus where a subsequent medical procedure is needed to remove tissue associated with the miscarriage (such as a 'dilation and curettage' procedure)."

As to the amendment to section 104, we believe the drafting excludes a circumstance where the employee is either the:

- parent, for example the father, of the baby and is in a relationship with the mother, but that relationship is not classed as a de facto relationship; or
- intended adopted parent.

These people will be unable to access this leave under the current drafting of the amendment when the reasons why the leave is and should be available will also be experienced by these people.

We make the same comments in respect of subsection (2)(b) relating to former partners. The relevant factor should be whether the person was the intended parent.

We therefore recommend the leave be available to the biological parent and a person who, whilst not a spouse, de facto partner or biological parent, would otherwise have had responsibility for the care of the child.

Sexual harassment

Amendment to section 387

We agree with the addition of the note in section 387 of the FWA which implements recommendation 30 of the Respect@Work report to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable.

Amendments to Part 6-4B to include sexual harassment

The Respect@Work report recommended a 'stop sexual harassment order' equivalent to the 'stop bullying order' be included in the FWA and that this should be designed to facilitate the order's restorative aim.

Part 6-4B of the FWA relates to workers who are bullied at work and section 789FD in this Part outlines when a worker is bullied at work. Item 22 of the Bill inserts subsection (2A) into section 789FD to provide that a worker is sexually harassed at work if, while the worker is at work in a constitutionally-covered business, one or more individuals sexually harasses the worker. Item

12 of the Bill inserts the meaning of when a worker is sexually harassed at work into section 789FD of the FWA. "Sexually harass" has the same meaning as section 28A of the *Sex Discrimination Act 1984 (SDA)*. Item 4 replaces section 789FF(1) with a new subsection which adds in sexual harassment.

We agree that the definition of "sexually harass" should align with the meaning of this term pursuant to section 28A of the SDA.

We support the intent of these amendments. However, we note the comments at pages 523 to 526 of the Respect@Work report about the practical limitation of these provisions. We consider there should be a review of the amendments to assess their effectiveness, particularly give the comments cited in the report that these applications are difficult to establish, which is also a common problem in sexual harassment matters.

In addition, we note the new section 789FD(2A) requires the sexual harassment to occur while the worker is at work, which is the same requirement in respect of bullying. This requirement, however, contrasts with the amendments discussed below to the SDA which require a connection to work, but which do not require the conduct to have taken place at work. We know from the Respect@Work report, cases and literature that sexual harassment of a worker by an employer or co-worker can occur both at work and outside of work. We consider a worker who is subjected to this conduct, regardless of where it occurs should be able to make an application to the Fair Work Commission (**FWC**) under section 789FC where there is a connection to their work.

Section 789FF permits the FWC to make orders to stop bullying and this will be amended to allow for orders to be made to stop sexual harassment.

Item 28 of the Bill inserts transitional arrangements for these amendments into Part 11 of the FWA to:

- provide that an order in place before section 789FF(1) is amended continues; and
- confirm that a person can have been sexually harassed before the amendments and still apply an order. Given the intention of these provisions, which is essentially to stop the subject behaviour/conduct from continuing, we consider it appropriate for the conduct to have commenced or occurred before the commencement of the amendments, noting the FWC is prohibited from making an order for a pecuniary payment.

QLS has been able to read to FWC's submission to the inquiry. The FWC has asked for a delay in the commencement of some of the provisions after royal assent, noting that it has not received any additional funding or resources for this new jurisdiction. For the jurisdiction to be effective both of these are important items for the committee to consider.

We support this submission and call on the Government to provide the FWC with appropriate funding and resources to determine these matters under these new amendments.

Amendments to the Sex Discrimination Act 1984

We support the addition of subsection (e) into section 3 as well as items 29 and 30.

Expanding the coverage of the SDA to members of parliament, their staff, judges and public servants

QLS supports the intention of the amendments in the Bill to expand the scope of the SDA to members of parliament, their staff, and judges at all levels of government and to remove the existing exemptions for state public servants in the SDA to ensure that the protections from workplace discrimination and sexual harassment (as well as sex-based harassment) apply to these workers.

Item 59 of the Bill

Item 59 of the Bill amends section 28A of the SDA so that the definition of sexual harassment applies to the SDA as a whole, rather than just Division 3. The EM notes this amendment will ensure that references to the term "sexual harassment" used throughout the SD Act, such as the objects clause, will be interpreted using the same definition contained in section 28A. We note also the inclusion of "sexually harass" in the definitions in section 4 of the SDA by item 40 of the Bill. We support these amendments.

Harassment on the ground of sex

Item 60, inserts a new section, 28AA into the SDA which provides:

28AA Meaning of harassment on the ground of sex

(1) For the purposes of this Act, a person harasses another person (the person harassed) on the ground of sex if:

(a) by reason of:

(i) the sex of the person harassed; or

(ii) a characteristic that appertains generally to persons of the sex of the person harassed; or

(iii) a characteristic that is generally imputed to persons of the sex of the person harassed;

the person engages in unwelcome conduct of a seriously demeaning nature in relation to the person harassed; and

(b) 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.

Note: See also section 8 (acts done for 2 or more reasons).

(2) For the purposes of subsection (1), the circumstances to be taken into account include, but are not limited to, the following:

(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.

(3) In this section:

conduct includes making a statement to a person, or in the presence of a person, whether the statement is made orally or in writing.

The reasons for this new section are explained in the Respect@Work report and noted at page 37 of the EM. These include that people may experience forms of harassing conduct based on their sex, but which are not necessarily sexual in nature. A number of cases have been referenced in the report and EM where this distinction has been made. The new section provides that sex-based harassment is unlawful, in addition to sexual harassment.

We note the new section 28AA(1)(a)(i), (ii) and (iii) mirror the provisions in section 5 of the SDA related to sex discrimination, however, the final part of subsection (a) (lines 19 and 20 of page 14 of the Bill) is different. The section requires the unwelcome conduct to be of a seriously demeaning nature. The EM advises that this term should be interpreted in accordance with its ordinary meaning and goes on to define "demean" as to debase or degrade another person. It is stated that the inclusion of this term is intended to provide an appropriate limit on the scope of conduct captured under this provision (see paragraph 141 of page 40). By contrast, the current section 28A(1) provides the meaning of sexual harassment and refers to the subject of the harassment as being, "offended, humiliated or intimidated" only, without the additional requirement of the conduct being "seriously demeaning".

If the purpose of the insertion of section 28AA is to *clarify* that harassment on the basis of a person's sex is prohibited, we query the need for the additional higher bar under the new provision. We note the same "reasonable person" test is proposed for this section, which is not problematic in itself, but with the requirement to establish that person would consider the conduct to be seriously demeaning, we are concerned that the types of conduct and complaints contemplated by this amendment might not be captured.

This issue is further discussed at page 45 of the EM, where, at paragraph 157 it is noted:

"It is not intended that this provision would capture mild forms of inappropriate conduct based on a person's sex that are not of a sufficiently serious nature to meet the threshold of offensive, humiliating or intimidating, as well as seriously demeaning. For example, if a mechanic provided an overly simplistic and condescending explanation to a female client about the car repairs the mechanic had undertaken on her car, this would not meet the threshold of offensive, humiliating or intimidating simply because it was irritating for the female client. As such, it would not constitute sex-based harassment under section 28G (as amended by this Bill)."

This example demonstrates that by simply using the terms, *offensive, humiliating or intimidating*, with the "reasonable person" test, such cases would not be established.

We therefore recommend that the requirement for the conduct to be of a “seriously demeaning nature” be reconsidered.

We also consider that section 28AA(2)(c) should read:

(c) any disability of the person harassed including any disability imputed by the person who engaged in the conduct;

This would at least also cover the intersecting issue of sexual harassment on the basis of mental health (or other impairment).

As to Item 41, we agree with the amendment proposed and the comments in pages 32 to 33 of the EM.

Amendments to section 28B, PCBU and worker in a business or undertaking

To facilitate certain amendments to the SDA, including to section 28B, item 40 inserts a definition of a person conducting a business or undertaking (**PCBU**) into the section 4 which states that it has same meaning as in the *Work Health and Safety Act 2011 (WHS Act)*. We agree with this definition and with the meaning given to “worker” which is also the same as in the WHS Act.

In addition, the Bill insert new section 28AB into the SDA which provides:

28AB Meaning of worker in a business or undertaking

For the purposes of this Act, if a person (the first person) is a worker because the first person carries out work for a person conducting a business or undertaking, the first person is a worker in the business or undertaking.

Item 63 repeals the current subsections (3) to (7) in section 28B and substitutes new ones. In our view, however, rather than reform to these specific provisions, there should instead be a general prohibition against sexual harassment in the SDA. Sections 28B to 28L should not be express prohibitions depending on a particular circumstance or relationship, but could perhaps be retained as examples in a general provision. In this regard we note section 118 of the *Anti-Discrimination Act 1991 (QLD)* which states, “(a) person must not sexually harass another person.” We submit this provision would be preferable to a list of provisions on the basis that:

1. All sexual harassment should be prohibited and should be able to be the subject of a complaint to the AHRC. This would signal to workplaces that society considers this behaviour to be unacceptable in all contexts.
2. At the least, retention of a list of provisions outlining specific relationships and times where sexual harassment is prohibited may have the unintended consequence of excluding someone from making a complaint when it was actually intended that their circumstance be covered.

As to the specific amendment proposed, we support the simplification and broadening of these subsections including the use of the term, “in connection with” so that the harassment need not occur at a workplace.

Item 77 – Division 5 - Victimisation

The rationale for this amendment is outlined in the EM. The following is extracted from paragraph 191, pages 52:

"The Respect@Work Report highlighted there have been three cases since 2011 that questioned whether the FCC or the FC has jurisdiction to hear a civil application of 'unlawful discrimination' under the AHRC Act that relates to victimisation under subsection 94(1) of the SD Act. This legal uncertainty has arisen predominantly because subsection 94(1) of the SD Act is set out as a criminal offence with criminal penalties."

Further at paragraph 195 on pages 53, the EM notes:

"The creation of new section 47A, alongside the amendments to the definition of 'unlawful discrimination' by items 1 to 2 of this Bill, will clarify that people who experience victimisation conduct for the purposes of the SD Act can make a complaint to the AHRC and, if their complaint is terminated, initiate civil proceedings against the alleged perpetrator under section 46PO."

On the basis there is a gap, or at least confusion about whether a victimisation complaint can be the subject of a civil proceeding, we support this amendment. While there should not be an unnecessary duplication in the law, where there is a gap or unintended consequence of the drafting or interpretation of a provision, this needs to be corrected.

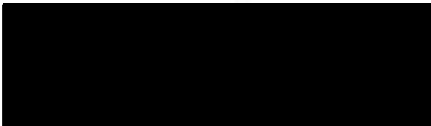
As to the transitional provisions applicable to this new provision, the new section 88(a) provides that the 47A(1) can apply retrospectively. Generally, QLS objects to laws imposing retrospective obligations, penalties and processes. In relation to the new section 47A, however, it is arguable that the same rights and obligations, or at least the intended rights and obligations, in section 94 are provided for in new section 47A. However, we note that for a potential respondent, they now may need to face defending a civil claim in a court when this may not have been possible under the current section 94.

Items 78 – 83 and 87

We support these amendments.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Kara Thomson
Vice President