



Submission on the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (the Bill).

Date Submitted:	14 October 2022
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INTRODUCTION

1. The Shop, Distributive and Allied Employees' Association (SDA) is one of Australia's largest trade unions with over 215, 000 members. The majority of these members are women and young people. Approximately 60% of SDA members are female, equating to approximately 131,000 women. The SDA has members in retail, warehousing, online retail, fast food, hairdressing, pharmacy, online retailing and modelling.
2. The SDA has a long history of advocating for improved entitlements for our members and healthy and safe workplaces free from all forms of discrimination, bullying and harassment, including sexual harassment.
3. The SDA does this through enterprise bargaining; ensuring Awards and the NES provide a relevant safety net; and through numerous submissions made to Senate Inquiries and other important reviews such as those conducted by the Australian Human Rights Commission (AHRC).

EXECUTIVE SUMMARY

4. The SDA believes that every worker has the right to work in a safe and healthy environment free from all forms of harassment and violence, including sexual harassment.
5. The SDA welcomes the opportunity to make a submission on the draft *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (the Bill).
6. The SDA supports the Government's commitment to fully implement all 55 Respect@Work Recommendations (Recommendations) of the Respect@Work Report (Report).

7. The SDA supports the Submission of the Australian Council of Trade Unions (ACTU), and will focus our comments on three key issues in the draft Bill;
 - The scope of the positive duty and third parties,
 - The Explanatory Memorandum and the legislative intent; and
 - The costs provision.

Prevalence of Sexual harassment in the Retail and Fast Food industries

8. In 2018 the AHRC conducted a sexual harassment prevalence survey to measure the nature and prevalence of sexual harassment in Australian society and importantly Australian workplaces. The survey found that sexual harassment in Australian workplaces had increased significantly since the last survey conducted in 2012 with 33% of workers experiencing sexual harassment at work, 39% of women and 26% of men in the last 5 years compared to 21 % in 2012.
9. The survey also found that the retail industry had the 4th highest prevalence of sexual harassment and the fast-food industry had the 7th highest.
10. In recognition of the serious and extensive nature of this issue the SDA, in 2019, partnered with the AHRC to survey almost 3500 SDA members on sexual harassment at work. The report, [Everyone's business: Sexual harassment of SDA members](#) found that 39% of members had experienced sexual harassment in the last 5 years, 46% of female members and 29% of male members.
11. The retail and fast-food industries share some key characteristics; they are low paid, feminised sectors which employ large numbers of young workers who are often in their first job. Concerningly the report found

that if you are a young female working in retail or fast food you are more likely to have been sexually harassed at work than not (51% of those 15-17 years and 60% of those 18-24 years).

Sexual harassment by third parties

12. One of the key findings of the SDA's research into the prevalence of customer abuse and violence in the retail and fast-food industries in 2016 highlighted the issue of sexual harassment by third parties, i.e customers.
13. This issue was further explored in the 2019 AHRC/SDA sexual harassment survey which found that 21% of SDA members said they have been sexually harassed by a customer in their current job. Female SDA members (28%) were more likely than male SDA members (11%) to have been sexually harassed by a customer. Customers were the perpetrator of the sexual harassment experienced by SDA members in 36% of cases.
14. Retail and fast-food workers experience very concerning levels of sexual harassment and are regularly subjected to sexual harassment perpetrated by customers. Unfortunately, the issue of third party perpetrated sexual harassment is not unique to the industries we represent, it is also a common feature in a number of workplaces across Australia where third-party interactions are part of the job.
15. While the Explanatory Memorandum notes that the scope of the positive duty extends to third parties, it is not easily discernible from the drafting of the Bill. Customer / client perpetrated sexual harassment is a significant issue and the Bill needs to be drafted in a way that makes it clear to duty holders that the scope of the positive duty encompasses the elimination of sexual harassment perpetuated by third parties.

SDA Recommendation

16. Amend s47C(4) of the draft Bill to include the underlined words “Other conduct towards employers and workers, including conduct by third parties.”
17. 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, visitors, suppliers, students and parents.

Explanatory Memorandum

18. The Explanatory Memorandum plays an important role in articulating the purpose and intent of the legislation. As per Recommendation 17 of the Respect@Work Report, this Bill seeks to introduce a *new* positive duty on duty holders in relation to their obligations in eliminating sexual harassment. However, paragraph 15 states;

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.

19. The introduction of a positive duty is intended to *change* the current federal anti-discrimination law by imposing a new and distinct duty. The text highlighted above from paragraph 15 suggests that there will be little change to obligations with the introduction of a positive duty, which does not reflect the intent. It suggests that a duty holder meeting its obligations under s106 would also be meeting their duty under s47C, which is incorrect and contrary to the intended purpose of s47C. The introduction of a positive duty is intended to be a change to the current obligations on duty holders in relation to sexual harassment, yet paragraph 15 incorrectly suggests otherwise.

20. As with any new law there will inevitably be questions of interpretation which courts will need to determine. In doing so courts will often look to the Explanatory Memorandum to assist with that interpretation. The concern with paragraph 15 is that it has the potential to undermine the intention of the legislation. The intention is to impose a new duty; a positive duty on duty holders in the elimination of sexual harassment and therefore paragraph 15 is incorrect.

SDA Recommendation

21. Delete Paragraph 15 from the Revised Explanatory Memoranda.
22. Ensure the Revised Explanatory Memorandum accurately reflects that the positive duty applies in addition to other duties, and that compliance with s106 by taking all reasonable steps to prevent the offending conduct does not automatically mean that the new positive has been met.

Costs Provision

23. Retail is a low paid industry, proliferated by insecure work, with a predominance of women and young people. Any complaints process must be supported by a mechanism which provides free or low-cost advocacy to complainants to assist them through the process. For many workers the cost of taking a complaint through to court can have a severe financial impact and can act as a key deterrent in determining whether to proceed through the complaints resolution process.
24. Providing a costs provision which has significant judicial discretion will be a deterrent for complainants because of the uncertainty around whether a costs order will be determined after the case has been run. It is vitally important that we recognise the power disparity that already exists between well-resourced employers and corporations, and an individual, often unrepresented complainant. The system of complaints handling should not keep reinforcing this disparity.

25. An individual's ability to finance a complaint should not be a criterion for someone's ability to pursue a complaint. Uncertainty and fear of a costs order which is heavily reliant on judicial discretion will discourage workers from pursuing their sexual harassment complaint.

SDA Recommendation

26. The Bill should provide for a fair costs provision by amending the broad judicial discretion. A fair costs provision is one which supports, rather than discourages workers from accessing complaint resolution.