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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au.

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

Dear Committee Secretary,

Thank you for the opportunity to provide a submission in response to the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*.

Diversity Council Australia (DCA) is the independent not-for-profit peak body leading diversity and inclusion in the workplace. We have a wealth of experience providing advice to our members on the business benefits of diversity and inclusion.

Workplace sexual harassment is an issue of significant interest to DCA and our member organisations and DCA welcomes the introduction of this Bill, which will implement recommendations 16, 17, 18, 19, 23, 25 and 43 of *Respect@Work*.

Please feel free to contact myself or Cathy Brown, Director of Communications and Advocacy, on 0424 578 698 or advocacy@dca.org.au, you require any further information about this matter.

Yours sincerely

Lisa Annese
Chief Executive Officer

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ABOUT DIVERSITY COUNCIL AUSTRALIA

Who we are

Diversity Council Australia (DCA) is the independent not-for-profit peak body leading diversity and inclusion in the workplace. We provide unique research, inspiring events and programs, curated resources and expert advice across all diversity dimensions to a community of member organisations.

DCA's Membership represents over 20% of the Australian workforce

DCA's prestigious group of over 1,100 members is drawn from business and workplace diversity leaders and includes some of Australia's biggest employers. Our membership reaches over **20%** of the Australian labour market.

About our members

1,100 member organisations, including almost 40 ASX100 Listed companies.

Our members are drawn from across the corporate, government and not-for-profit sectors and vary from small to large workforces in size.

Our founding members include ANZ, AMP, BHP, Boral, Coles, IBM Australia, Myer, Orica, Rio Tinto and Westpac.

DCA's Members are listed on our website here: <https://www.dca.org.au/membership/current-dca-members>.

Our belief, vision and mission

Our **belief** is that diversity and inclusion is good for people and business.

Our **vision** is to create a more diverse and inclusive Australia.

Our **mission** is to encourage and enable Australian organisations to create diverse and inclusive workplaces.

What we do

DCA, formerly known as the Council for Equal Opportunity in Employment Ltd, was established in 1985 as a joint initiative of the Australian Chamber of Commerce and Industry and the Business Council of Australia to demonstrate the business community's commitment to equal opportunity for women.

Our focus since then has expanded to cover all aspects of diversity in employment, reflecting changes in practice to embrace all areas of the diversity of human resources.

DCA is not government funded - its income is generated from membership fees, sponsorships and services to business/employers.

Our Research

DCA works in partnership with members to generate ground-breaking evidence-based diversity and inclusion resources that enables Australian organisations to fully leverage the benefits of a diverse talent pool.

DCA research is grounded in the contributions of people with lived experience. DCA projects use expert panels, focus groups, think tanks and surveys to make people with lived experience central to the project findings.

DCA resources are ahead of the curve. They establish leading diversity thinking and practice, enabling Australian organisations to re-imagine and reconfigure the way they manage talent in today's dynamic operating environments.

DCA resources drive business improvement. They are high impact, driving business improvement through providing evidence-based guidance on how to fully leverage the benefits of a diverse talent pool.

DCA resources are practice focused. They respond to the information needs of industry leaders and the people they employ.

DCA resources speak to the Australian context. DCA projects generate leading diversity thinking and practice that speaks to Australia's unique and distinctive institutional, cultural and legal frameworks.

DCA resources considers all diversity dimensions. The full spectrum of diversity dimensions are investigated including age, caring responsibilities, cultural background and identity, disability, Aboriginal and/or Torres Strait Islander status, sexual orientation, gender identity, intersex status, social class and work organisation.



POSITIONING

The importance of taking an intersectional approach

Intersectionality refers to the ways in which different aspects of a person's identity can expose them to overlapping forms of discrimination and marginalisation.

As the Australian Human Rights Commission's *Fourth national survey on sexual harassment in Australian workplaces* points out, women with intersectional identities experience an increased prevalence of sexual harassment.

For example, almost all (92%) women who identify as gay, lesbian, bisexual, pansexual, queer, asexual, aromantic, undecided, not sure, questioning or other have experienced sexual harassment in their lifetime; and nine in ten (89%) women with disability have experienced sexual harassment in their lifetime.¹

DCA's research has also found that culturally diverse women experience specific types of harassment where gender and cultural biases have a compounding or 'amplifying' effect, as evidenced in this quote from a DCA research participant:

"He said, 'Why are Asian women's feet so small? So they can stand closer to the sink!' Then he got angry when I didn't like it and said, 'Why are you so uptight? You're misconstruing what I'm saying.' But it's not that, it's just that I want to be treated with respect."²

It is therefore critical that in understanding and responding to workplace sexual and sex-based harassment that legislators, policymakers and those implementing such policies, understand intersectionality, and take an intersectional approach implementing such policies.

A note on binary language used in this submission

While neither sex nor gender exist in binary categories, these categories still have very real effects.

As noted by the Australian Human Rights Commission, the majority of workplace sexual harassment in the past five years was perpetrated by men against women.³

This submission therefore uses binary language to convey the gendered nature and dynamics of perpetration and victimisation.

At the same time, however, DCA recognises that there are people whose experiences and identities cannot be captured by the use of binary language, and these limitations should be acknowledged whenever binary language is used.

DCA also recognises that non-binary and gender diverse people experience high levels of sexual harassment, and for this reason it is critical that responses to sexual and sex-based harassment take an intersectional approach that recognises the experiences of people of all genders in our community.

SUMMARY

DCA welcomes the opportunity to make this submission. Workplace sexual harassment is an issue of significant interest to DCA and our member organisations.

DCA was a strong supporter of the *National Inquiry into Sexual Harassment in Australian Workplaces*, and made a [comprehensive response to that inquiry in 2019](#)⁴ in consultation with our member organisations.

DCA commends the outcome of this inquiry and supports the recommendations made in the *Respect@Work* report.

We welcome the changes proposed in the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* and commend the Government's efforts in taking action in this area.

BACKGROUND

DCA welcomes the opportunity to make this submission. Workplace sexual harassment is an issue of significant interest to DCA and our member organisations.

DCA previously made a submission to the [National Inquiry into Sexual Harassment in Australian Workplaces](#)⁵ in consultation with our member organisations.

We were pleased to see the comprehensive outcome of that inquiry and supported the recommendations made in the *Respect@Work* report.

DCA also made a submission in response to the *Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021*.

In that submission, DCA argued that the changes under that Bill were insufficient and made a range of recommendations for the implementation of the remaining recommendations of the Sex Discrimination Commissioner's *Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020) Report (Respect@Work Report)*.

As such we are pleased about the introduction of this Bill which will implement recommendations 16, 17, 18, 19, 23, 25 and 43 of *Respect@Work*.

DCA'S RESPONSE TO THE PROPOSED LEGISLATION

DCA supports the following proposals under the Bill:

Subjecting a person to a hostile workplace environment on the ground of sex

5. The Bill would insert a new provision in the SD Act to prohibit conduct that subjects another person to a workplace environment that is hostile on the ground of sex. This amendment would implement recommendation 16(c) of the Respect@Work Report.

DCA supports the new provision in the SD Act to prohibit conduct that subjects another person to a workplace environment that is hostile on the ground of sex (recommendation 16(c) of the Respect@Work Report).

DCA has previously advocated for this change in our [submission](#) in response to the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021*. We believe this is an important provision because our submission to the *National Inquiry into Sexual Harassment in Australian Workplaces*⁶ detailed many examples of workplace experiences characterised by inappropriate sexual comments, innuendo and offensive jokes. We believe that this change is necessary to provide greater certainty on the illegality of creating a hostile work environment on the ground of sex, and it will assist to provide greater clarity on what constitutes acceptable workplace behaviour.

Positive duty to eliminate unlawful sex discrimination

11. The Bill would insert a new provision in the SD Act to introduce a positive duty on all employers and PCBUs to take 'reasonable and proportionate measures' to eliminate unlawful sex discrimination, including sexual harassment, as far as possible. These amendments would implement recommendation 17 of the Respect@Work Report.

DCA strongly supports the insertion of a new provision in the SD Act to introduce a positive duty on all employers and persons conducting a business or undertaking to take 'reasonable and proportionate measures' to prevent unlawful sex discrimination, including sexual harassment (recommendation 17 of the *Respect@Work Report*).

DCA welcomes this crucial amendment to the SD Act. We had previously advocated for the inclusion of a positive duty in our [previous submission on the Sex Discrimination and Fair Work \(Respect at Work\) Amendment Bill 2021](#), where we argued that the 2021 amendment bill was a missed opportunity.

We believe this is a crucial amendment because, under the current complaints-based legislative framework, the onus is on people who experience sexual harassment to make a complaint. Therefore, while employers must take steps to prevent sexual harassment, an employer's practices would only come under scrutiny once a complaint has been made.

Given that significant numbers of sexual harassment incidents go unreported (and therefore are not investigated), we believe that requiring employers to proactively identify and take

action to eliminate sexual harassment at work is a critical first step in making workplaces safer for everyone.

A positive duty will incentivise employers to address systemic drivers of sexual harassment and help prevent it occurring in the first place. We believe this is a crucial recommendation of the *Respect@Work* report, as it expands the focus from responding to incidents after the fact to taking steps to prevent sexual harassment occurring in the first place.

The meaning of 'reasonable and proportionate measures' will vary between employers and PCBUs in accordance with their particular circumstances. The Bill would provide that the matters to be considered when determining whether the duty holder is complying with the positive duty include the size, nature and circumstances of the business or undertaking; the duty holder's resources, whether financial or otherwise; and the practicability and costs associated with the steps. These considerations would ensure that the positive duty is adaptable and can be applied by all employers and PCBUs.

Further, we support the 'reasonable and proportionate measures' approach to determining whether an employer has complied with the positive duty. We believe it is important that consideration is given to the size, nature and circumstances of the business or undertaking; the duty holder's resources, whether financial or otherwise; and the practicability and costs associated with the reasonable steps.

Enforcement of the positive duty

17. The Bill would insert new provisions in the AHRC Act to enable the Commission to monitor and assess compliance with the positive duty in the SD Act. These amendments would ensure that recommendation 18 of the Respect@Work Report is implemented.

DCA supports the introduction of provisions that enable the Australian Human Rights Committee to assess and monitor compliance with the positive duty (recommendation 18 of the *Respect@Work* Report). We believe that an appropriate enforcement mechanism is important to ensure that the introduction of the positive duty is effective in preventing unlawful sex discrimination and sexual harassment.

Systemic inquiries into unlawful discrimination

24. The Bill would insert a new provision in the AHRC Act to provide the Commission with a broad inquiry function to inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination. This amendment would implement recommendation 19 of the Respect@Work Report.

DCA supports the new provision in the AHRC Act to provide the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination (recommendation 19 of the *Respect@Work* Report). We believe these inquiry powers are important for addressing systemic unlawful discrimination without relying on individual complaints.

Representative applications

29. The Bill would amend the AHRC Act to enable representative bodies to make representative applications on behalf of people who have experienced unlawful discrimination in the federal courts. This amendment would implement recommendation 23 of the Respect@Work Report.

DCA supports the amendment to the AHRC Act to enable representative bodies to make representative applications on behalf of people who have experienced unlawful discrimination in the federal courts (recommendation 23 of the Respect@Work Report). We believe this is important given the significant financial and emotional costs for individuals pursuing legal action for discrimination.

Public Sector Reporting to WGEA

38. The Bill would amend the WGE Act to bring the Commonwealth public sector into line with the private sector by requiring Commonwealth public sector reporting to WGEA. This amendment would implement recommendation 43(a) of the Respect@Work Report for the Commonwealth public sector. Like private sector organisations, the public sector reporting program will require agencies to report annually on six gender equality indicators.

DCA supports amendments to the Workplace Gender Equality Act 2012 (WGE Act) to bring the Commonwealth public sector into line with the private sector by requiring Commonwealth public sector reporting to WGEA (recommendation 43(a) of the Respect@Work Report)

DCA has previously recommended that consideration be given to expanding the definition of 'relevant employer' to include government and public sector agencies in our [submission](#) to the Review of the Workplace Gender Equality Act in 2021.

Victimisation

39. The Bill would clarify that victimising conduct can form the basis of a civil action for unlawful discrimination in addition to a criminal complaint under the AD Act, DD Act and RD Act. This would implement recommendation 2 of the Senate Education and Employment Legislation Committee's report on the Respect at Work Bill 2021 and achieve consistency across Commonwealth anti-discrimination Acts.

DCA supports the clarification that victimising conduct can form the basis of a civil action for unlawful discrimination in addition to a criminal complaint under the Age Discrimination Act 2004 (AD Act), Disability Discrimination Act 1992 (DD Act) and Racial Discrimination Act 1975 (RD Act). DCA supports consistency across Commonwealth anti-discrimination Acts.

Timeframes for making a complaint

42. The Bill would also amend the discretionary grounds on which a complaint made under the AD Act, DD Act and RD Act may be terminated by the President of the Commission. This is consistent with the amendments to the SD Act made by the Respect at Work Act 2021. Instead of the current six months, a complaint under the AD Act, DD Act or RD Act could only be terminated if it is made more than 24 months after the alleged unlawful conduct took place.

DCA supports the proposed changes to timeframes for making a complaint under the AD Act, DD Act and RD Act, in order to make these Acts consistent with the timeframes now specified in the SD Act, as recommend in the Respect@Work Report.

CONCLUSION & RECOMMENDATIONS

DCA welcomes the Government's action in continuing to implement the recommendations of the *Respect@Work* report and welcome the changes proposed in the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022*.

DCA member organisations are committed to standing against gendered harassment and violence in all its forms and taking steps in their organisation to address sexual and sex-based harassment, to make the workplace safe for everyone.

As this Bill will implement recommendations 16, 17, 18, 19, 23, 25 and 43 of *Respect@Work*, we support the Bill.

Specifically, DCA supports the following proposals under the Bill:

1. Subjecting a person to a hostile workplace environment on the ground of sex

DCA supports the new provision in the SD Act to prohibit conduct that subjects another person to a workplace environment that is hostile on the ground of sex (**recommendation 16(c) of the *Respect@Work Report***).

2. Positive duty to eliminate unlawful sex discrimination

DCA strongly supports the insertion of a new provision in the SD Act to introduce a positive duty on all employers and persons conducting a business or undertaking to take 'reasonable and proportionate measures' to prevent unlawful sex discrimination, including sexual harassment (**recommendation 17 of the *Respect@Work Report***).

3. Enforcement of the positive duty

DCA supports the introduction of provisions that enable the Australian Human Rights Committee to assess and monitor compliance with the positive duty (**recommendation 18 of the *Respect@Work Report***). We believe that an appropriate enforcement mechanism is important to ensure that the introduction of the positive duty is effective in preventing unlawful sex discrimination and sexual harassment.

4. Systemic inquiries into unlawful discrimination

DCA supports the new provision in the AHRC Act to provide the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination (**recommendation 19 of the *Respect@Work Report***). We believe these inquiry powers are important for addressing systemic unlawful discrimination without relying on individual complaints.

5. Representative applications

DCA supports the amendment to the AHRC Act to enable representative bodies to make representative applications on behalf of people who have experienced unlawful discrimination in the federal courts (**recommendation 23 of the *Respect@Work Report***). We believe this is important given the significant financial and emotional costs for individuals pursuing legal action for discrimination.

6. Public Sector Reporting to WGEA

DCA supports amendments to the Workplace Gender Equality Act 2012 (WGE Act) to bring the Commonwealth public sector into line with the private sector by requiring Commonwealth public sector reporting to WGEA (**recommendation 43(a) of the Respect@Work Report**)

7. Victimisation

DCA supports the clarification that victimising conduct can form the basis of a civil action for unlawful discrimination in addition to a criminal complaint under the *Age Discrimination Act 2004* (AD Act), *Disability Discrimination Act 1992* (DD Act) and *Racial Discrimination Act 1975* (RD Act). DCA supports consistency across Commonwealth anti-discrimination Acts.

8. Timeframes for making a complaint

DCA supports the proposed changes to timeframes for making a complaint under the AD Act, DD Act and RD Act, in order to make these Acts consistent with the timeframes now specified in the SD Act, as recommend in the Respect@Work Report.

The changes proposed by this Bill, in particular the inclusion of a positive duty, will be a crucial and significant shift in Australia's sex discrimination framework. We encourage the government to continue consultation throughout its implementation so that employers are adequately supported throughout these changes.

We would also encourage the government to ensure that implementation is adequately resourced.

DCA is committed to advising our members and assisting them with resources and education on how to fulfill their responsibilities under the positive duties. We would also be grateful for the opportunity to contribute our expertise to the government's implementation of the positive duty, and contribute to resources, education, and the public discussion.

ENDNOTES

¹ Australian Human Rights Commission, *Everyone's business*, pp. 24-27.

² Diversity Council Australia (O'Leary, J., Groutsis, D. and D'Almada-Remedios, R.) *Cracking the Glass-Cultural Ceiling: Future Proofing Your Business in the 21st Century*, Sydney, Diversity Council Australia, 2017.

³ Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces*, 2018, accessed at: <https://humanrights.gov.au/our-work/sex-discrimination/publications/everyones-business-fourth-national-survey-sexual>.

⁴ DCA, *Submission to the National Inquiry into Sexual Harassment in Australian Workplaces*, 27 February 2019, accessed at: https://www.dca.org.au/sites/default/files/dca_response_to_the_national_inquiry_into_sexual_harassment_2019.pdf.

⁵ DCA, *Submission to the National Inquiry into Sexual Harassment in Australian Workplaces*, 27 February 2019, accessed at: https://www.dca.org.au/sites/default/files/dca_response_to_the_national_inquiry_into_sexual_harassment_2019.pdf.

⁶ DCA, *Submission to the National Inquiry into Sexual Harassment in Australian Workplaces*.