Australian Institute of Company Directors

Governance Institute of Australia

9 July 2021

Committee Secretary
Senate Education and Employment Committee
PO Box 6100
Parliament House
Canberra ACT 2600

via email: eec.sen@aph.gov.au

Dear Committee Secretary

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

Thank you for the opportunity to provide a submission to the Senate Education and Employment Committee on the provisions of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (**Bill**).

The Australian Institute of Company Directors' (**AICD**) mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership reflects the diversity of Australia's director community, with our membership of more than 45,000 being drawn from directors and leaders of not-for-profits, large and small businesses, and the government sector.

Governance Institute of Australia (**Governance Institute**) is a national membership association, advocating for our network of 40,000 governance and risk management professionals from the listed, unlisted, public and not-for-profit sectors. As the only Australian provider of chartered governance accreditation, we offer a range of short courses, certificates and postgraduate study. Our mission is to drive better governance in all organisations, which will in turn create a stronger, better society.

## 1. Executive Summary

The AICD and Governance Institute acknowledge the extensive consultation undertaken by the Australian Human Rights Commission (**AHRC**) as part of its landmark National Inquiry into Sexual Harassment in Australian Workplaces in 2018 (**National Inquiry**).

We welcomed the AHRC's comprehensive findings and recommendations detailed in the Respect@Work Report, and most notably, its recommendations to simplify and clarify the overarching legal frameworks to ensure that employers and workers are able to effectively address sexual harassment in the workplace.

Accordingly, we support the Government's proposed legislative amendments to both the *Sex Discrimination Act 1984* (**SD Act**) and the *Fair Work Act 2009* (**FW Act**) the subject of this Bill, which would give effect to Respect@Work Report recommendations 16, 20, 21, 22, 29 and 30.

Our submission provides high-level comments in support of these proposals which we recognise are intended to help government, employers and the community to better prevent and respond to sexual harassment in the workplace. Although beyond the scope of this Bill, we also provide additional

comment on Recommendation 19 of the Respect@Work Report, and would encourage the Government to give further consideration to this suggested reform.

## 2. Amendments to the SD Act and FW Act

The AICD and Governance Institute support the following proposed amendments to the SD Act:

### Clarifying the object of the SD Act

We support the Bill's proposed amendment to make it clear that in addition to the elimination of discrimination and harassment, it aims to achieve, so far as practicable, equality of opportunity between men and women. We consider that explicitly stating this as an object of the legislation can assist in clarifying that equality should underpin the Sex Discrimination Act, and would provide guidance to both the community and the courts.

### Prohibiting sex-based harassment

While sexual harassment misconduct has always been actionable under the SD Act, we agree that expressly prohibiting sexual harassment serves to provide clarity and certainty to the law.

We further support an express prohibition on creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex. This will assist in setting clear boundaries in the workplace for what is and is not acceptable.

### Expanding the coverage of the SD Act

Work health and safety (**WHS**) laws already impose a duty on employers and PCBUs to ensure workers are not exposed to health and safety risks. This duty requires risks to health and safety to be eliminated or minimised so far as is reasonably practicable, including the risk of sexual harassment. However, as identified by the AHRC in its Respect@Work Report, there are gaps in coverage and legal protections for a wider population of work.

Accordingly, we support the Bill's proposals to:

- adopt the concept of 'worker' and 'PCBU' (person conducting a business or undertaking) used in the model WHS laws to ensure that persons not previously covered under the SD Act, such as interns, volunteers and those who are self-employed are protected from sexual harassment; and
- extend the scope of the SD Act to public servants, including members of parliament, their staff, and judges at all levels of Federal, State and Territory government, in the same way as all other workers.

We also understand that the existing ancillary liability provision in section 105 of the SD Act currently only applies to Division 1 (discrimination at work) or Division 2 (discrimination in other areas) of Part II of the SD Act, and therefore does not apply to sexual harassment. This is inconsistent with comparable provisions in the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth) which apply to discrimination and harassment.

In our view, there is no sound policy basis for excluding sexual harassment from the coverage of section 105. It is critical that there are robust prohibitions against, and accountability for, any behaviours that encourage or facilitate sexual harassment or sex-based harassment in the workplace.

It is our understanding that the proposed amendments to section 105 will not impact the existing vicarious liability provision in section 106 of the SD Act, which to avoid liability, requires employers to take all reasonable steps to prevent their employees or agents from engaging in sexual harassment misconduct

occurring in the workplace. On the basis that a due diligence defence remains in place for employers, we support the Bill's proposed amendment to section 105 of the SD Act to ensure that any person who causes, instructs, induces, aids or permits someone else to engage in sexual harassment, or sex-based harassment, can also be found legally responsible.

**Simplified processes for complaints to the AHRC**

As identified in the Respect@Work Report, we understand that recent case law has created uncertainty as to whether a civil complaint can be made to, and heard by, the Federal Court and the Federal Circuit Court's jurisdiction for victimising conduct under the SD Act.

Accordingly, we support the Bill's proposal to clarify that victimising conduct can form the basis of a civil action for unlawful discrimination, in addition to a criminal complaint under the SD Act.

We also support the Bill's proposed amendment to provide workers a lengthier window of time to make complaints of sexual harassment misconduct to the AHRC before the complaint may be terminated. We agree that the current six-month timeframe is inadequate and fails to recognise the many complex reasons an applicant may have in making a sexual harassment complaint immediately following an alleged incident. We therefore support the proposal for this timeframe to be extended to 24 months after the alleged unlawful conduct took place.

**Clarify and expressly provide for the availability of 'stop orders'**

We support the Bill's proposal to introduce a power for the Fair Work Commission (**FWC**) to issue a 'stop sexual harassment order', equivalent to the currently available 'stop bullying order'. In our view, such a mechanism has value in supporting an early intervention approach to ensure the employee and employer working relationship can remain intact where appropriate, and to prevent the risk of future harm to complainants.

**Clarify sexual harassment as a valid reason for dismissal**

As acknowledged by the AHRC in the Respect@Work Report, proven sexual harassment has always been conduct that may amount to a valid reason for dismissal, however, a dismissal may still be found to be harsh, unjust or unreasonable based on the broad range of other factors the FWC takes into account.

Moreover, the AHRC identified that there is currently a misconception that unfair dismissal provisions prevent employers from dismissing employees who have engaged in sexual harassment. This has resulted in some employers taking an overly legalistic approach to workplace investigations of sexual harassment complaints.

Accordingly, we support the Bill's proposed amendment 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. We agree this would assist in ensuring that sexual harassment misconduct is weighted appropriately against procedural and other factors, as well as supporting consistency in decision-making by the FWC.

**Miscarriage leave**

We support the Bill's proposal to vary the existing entitlement to compassionate leave in the FW Act to enable an employee to take up to two days of paid compassionate leave (unpaid for casuals) if the employee, or employee's current spouse or de facto partner, has a miscarriage.

## 3. AHRC own-motion investigations

While not contemplated by the Bill, we understand that the Respect@Work Report Recommendation 19 recommended the AHRC be provided with a broad inquiry function in order to conduct own-motion investigations into systemic unlawful discrimination and sexual harassment, including powers to require the giving of information; the production of documents; and the examination of witnesses, when conducting such an inquiry.

We note that the Government's response to the Respect@Work Report recommendations, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces*, agreed-in-part to Recommendation 19, but cited concerns that were the AHRC to adopt the role of investigator this may undermine the effectiveness of the AHRC's existing functions to conduct investigations cooperatively with organisations.[1]

However, as identified by stakeholders as part of the AHRC's National Inquiry, WHS state and territory regulatory agencies that currently have investigative powers into workplace sexual harassment are adopting different approaches to sexual harassment. For example, the Respect@Work Report notes that some regulators ordinarily refer sexual harassment matters to human rights and anti-discrimination agencies, unless the presence or indication of a systemic issue means they may review the matter, while others may review the matter themselves, while also suggesting concurrent recourse through an anti-discrimination body.[2]

Moreover, the AHRC heard concerns in the course of consultation that WHS regulators do not have the necessary skills and expertise in sexual harassment, and gendered violence or gender inequality more broadly, or in some cases, the resources to appropriately handle sexual harassment matters.[3]

We consider the ability for the AHRC to conduct own-motion investigations based on, for example, anonymous reports of sexual harassment or where the AHRC believes there has been a breach of the SD Act, could provide a more sensitive and trauma-informed approach to a sexual harassment investigation than one led by a WHS regulator. In our view, the AHRC is at present better equipped to also take into account the systemic and structural drivers and impacts of sexual harassment within a human rights framework as part of its investigation.

Accordingly, we encourage the Government to give further consideration to the Respect@Work Report's Recommendation 19 for the AHRC to have the ability to conduct own-motion investigations.

## 4. Next steps

We hope our submission will be of assistance to the Committee's consultation. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy, at cgergis@aicd.com.au or Laura Bacon, Policy Adviser, at lbacon@aicd.com.au.

Yours sincerely,

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[1] Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), p. 12.
[2] Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces (2020), p.545.
[3] Ibid, p. 551.