

12 October 2022

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

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

Dear Committee Secretariat,

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

Thank you for the opportunity to provide a submission on the provisions of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (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 over 49,000 members drawn from directors and leaders of not-for-profits, large and small businesses and the government sector.

For the Committee's reference, the AICD has focused on the board's role in preventing and responding to workplace sexual harassment since the landmark release of the Australian Human Rights Commission (**AHRC**) *Respect@Work* Report in January 2020. *Respect@Work* recommended that the AICD develop education and training for board members on good governance in relation to gender equality and sexual harassment. AICD's response to date is summarised in Section 3 below, and includes a new Director Tool, Governance Snapshots, detailed Guide and educative webinars, content and event features.

The AICD has also contributed to several consultations on legislative and regulatory reform, including:

1. the former Government's 2021 consultation on the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 (Amendment Act)*, supporting legislative changes to both the *Sex Discrimination Act 1984 (SD Act)* and the *Fair Work Act 2009 (FW Act)*¹;
2. the former Government's 2022 consultation to progress further legislative recommendations, which we provided strong support for the implementation of Recommendation 17 to introduce a positive duty on employers to prevent sexual harassment²; and
3. the *Respect@Work* Taskforce's recent stakeholder consultation on proposed legislative reforms.

¹ AICD submission – 13 July 2021 – <https://www.aicd.com.au/news-media/policy-submissions/2021/aicd-submission-on-the-governments-respect-at-work-amendment-bill.html>

² AICD submission – 23 March 2022 – <https://www.aicd.com.au/news-media/policy-submissions/2022/aicd-submission-on-options-to-progress-further-respect-at-work-report-recommendations.html>

1. Executive summary

The AICD supports the Bill, while recommending amendment to the costs protections provisions.

In summary:

- The AICD welcomes the drafting of the positive duty for employers to take 'reasonable and proportionate measures' to eliminate, as far as possible, workplace sexual harassment, consistent with AICD's previous submissions.
- The AICD supports incorporating a cost protection provision in the AHRC Act. We recommend consideration of alternative drafting based on section 570 of the FW Act, as recommended by the Respect@Work Report, or AICD's alternative proposal (discussed below under Schedule 5).
- Beyond the amendments, the AICD emphasises that they will only operate as intended in practice with adequate resourcing of the AHRC, including resourcing to deliver a significant awareness raising campaign prior to formal commencement of the new obligations.
- The AICD encourages targeted training and support for the NFP and SME sectors which often have limited time, resources and expertise. The AICD stands ready to support those efforts.

The AICD's full responses to specific schedules of the Bill are noted in Section 2. We have also provided further detail of our work to address Recommendation 41 of the Respect@Work Report in Section 3.

2. Further detail on provisions of the Bill

Schedule 1 – Hostile workplace environments

The AICD welcomes the prohibition of a hostile workplace environment in the SD Act, which would create a complaints-based mechanism in to the AHRC. This could help surface broader behavioural or cultural issues in work environments that contribute to, and facilitate, sex discrimination and sexual harassment.

Schedule 2 – Positive duty (Part 1 – Duty)

The AICD supports the introduction of a positive duty on employers to take reasonable and proportionate measures to eliminate, as far as possible, sex discrimination, sexual harassment and victimisation (proposed subsection 47C) in the SD Act.

The AICD supports the clarification in the Explanatory Memorandum of what constitutes 'reasonable and proportionate measures.' The Bill provides that the matters to be considered when determining whether duty holders (e.g. employers and PCBUs) are 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.

The AICD has previously noted that this would help ensure the positive duty applies to organisations of different sizes and resourcing capabilities on a graduated basis. In other words, organisations as diverse as micro-businesses, SMEs, community and volunteer organisations will be held to a scalable standard on what constitutes 'reasonable and proportionate measures' in discharging the duty.

The AICD supports clarification that the model work health and safety (**WHS**) laws, which require employers and PCBUs to provide a safe working environment for workers, so far as is reasonably practicable, could operate concurrently with the SD Act. The AICD supports the twelve-month transitional period will allow time to educate the market on the new obligations.

Schedule 2 – Positive duty (Part 2 – Compliance)

The AICD supports the suite of proposed regulatory tools. Having a graduated range of enforcement options will provide the ability for the AHRC to tailor its approach appropriately, while removing the onus on individuals to bring a complaint. This includes options to conduct inquiries, issue compliance notices, apply to the federal courts for an order to direct compliance with the compliance notice, and enter into enforceable undertakings.

The AICD supports the AHRC's own motion inquiries (proposed subsection 35B) if it 'reasonably suspects' on a factual basis that a person is not complying based on information or advice provided by other agencies or regulators, information disclosed by impacted individuals, and media reporting.

We consider that while enforcement tools will sometimes be necessary to enforce the duty, their mere existence will facilitate cooperation from organisations. It is essential that there is adequate funding of the AHRC to carry out its expanded role and to signal to employers that their responsibilities must be taken seriously. Equally, it is critical that fundamental procedural fairness and appeal mechanisms are enshrined legislatively and applied equitably by the AHRC. The AICD notes the Explanatory Memorandum assurance that employers and PCBUs have access to measures such as reconsideration (proposed subsection 35G) or review (proposed subsection 35H) of a compliance notice.

Schedule 3 – Inquiries into unlawful discrimination

The AICD considers it appropriate for the AHRC to have powers to conduct sector-wide investigations relating to systemic unlawful discrimination or suspected systemic unlawful discrimination (proposed subsection 35L). This would provide an opportunity for organisations to have real-world insights into practices across their sector and to consider how they might apply key learnings internally.

In our view, the AHRC is at present better equipped to consider the systemic and structural drivers and impacts of sexual harassment within a human rights framework as part of its investigation, than one led by a WHS regulator.

Schedule 5 – Costs

The AICD has reservations with the proposed cost neutrality model (new subsection 46PSA(1)) in the AHRC Act, noting the Respect@Work Report raised the negative impact on access to justice, particularly for vulnerable members of the community, of current practice.

Although the AICD supported the 'cost neutrality' option over other outlined alternatives during the earlier 2022 consultation, we encourage the Committee to consider alternatives to the Bill's drafting. In our view, adoption of Recommendation 25 from the Respect@Work Report (based on section 570 of the FW Act) or the alternative approach recommended by AICD in previous consultations has merit. Under the AICD's alternative model, a successful complainant would always recoup their reasonable costs from a respondent. If a complainant were unsuccessful, they would only bear their own costs and not the respondents, except in the case of frivolous, vexatious or unmeritorious claims.

The AICD supports removing disincentives from initiating civil proceedings, such as unsuccessful parties being ordered to pay the other parties' costs. In our view, complainants would have a greater incentive to seek justice by proceeding through the court system under the AICD's alternative model. As the AHRC noted in *Free and Equal: A reform agenda for federal discrimination laws (2021)*, "costs rules frame the whole approach for complainants".

Under the Bill's proposed model, a successful complainant would still need to go to the legal expense of mounting detailed arguments to recoup their costs. This could disincentivise complainants from initiating civil proceedings.

Additional comments

The reforms must be accompanied by appropriate resourcing for the AHRC to support guidance on and awareness of the SD Act's obligations, and to administer these changes effectively.

The AHRC should also be resourced to deliver a significant awareness raising campaign prior to formal commencement of the new obligations.

We strongly urge guidance materials early in the transitional period that detail measures to assist an employer and PCBU in discharging the positive duty and relevant proportionality factors. It is also critical that the NFP and SME sectors are provided with tailored training and support. The AICD stands ready to assist with the development of guidance focused at the board level, as appropriate.

3. Further detail of the AICD's support for directors

The AICD has developed new resources to support director and board governance of strategies to prevent and respond to workplace sexual harassment. Sexual harassment in the workplace is relevant to various streams of the board's work including oversight of organisational culture; workplace health and safety; and risk management.

Recommendation 41 of the Respect@Work Report called for the AICD and the Governance Institute of Australia, in consultation with the Workplace Sexual Harassment Council, to develop education and training for board members and company officers on good governance in relation to gender equality and sexual harassment. The AICD's response to this call to action includes initiatives set out below.

Engaging members and directors by outlining the key findings and recommendations from the Respect@Work inquiry. This program has included:

- AICD *Company Director* magazine features during 2020, 2021 and 2022, including featuring the topic as the [June 2021 cover](#) with a 10-page overview of workplace sexual harassment;
- September 2020 AICD director webinar featuring experienced directors and Sex Discrimination Commissioner Kate Jenkins AO GAICD, on the Respect@Work findings and challenge to boards;
- Featuring the Board's role in preventing and responding to workplace sexual harassment at the AICD's flagship [Annual Governance Summit](#) in March 2022;
- Highlighting the need for board engagement and action on sexual harassment as part of the Essential Director Update, a flagship national event series delivered across the country;
- Engagement with AICD's state and territory Division Councils and member advisory forums;
- Promoting Safe Work Australia and the Champions of Change resources to AICD members.

Elevating the conversation at Board level through targeted resources and forums, with very strong engagement and utilisation by AICD's members. This has included:

- AICD Director Tool providing principles-based guidance: "[A director's guide to preventing and responding to sexual harassment in the workplace](#)"
- [Governance Snapshots](#) to support board oversight
- A detailed [Director Practical Roadmap](#) (developed with Clayton Utz) with member webinar
- Dialogue through member forums, including AHRC with AICD's ASX Chairs' Forum and Elizabeth Broderick AO on the *Everyday Respect* report with AICD's Corporate Governance Committee.

Education & alignment through AICD's curriculum and stakeholder engagement. This has included:

- Updates to the AICD's governance education programs to reference new resources and Respect@Work findings;
- Contributing to consultations on legislative reform;
- Contributing to the Respect@Work Council's consultations and forum;
- Support and promotion of resources for directors, including those of Chief Executive Women.

4. Next steps

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

Yours sincerely,



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