nfaw.org

Attorney-General's Department

Respect@Work – consultation on remaining legislative recommendations

Prepared by: Dr Kathy MacDermott
11/3/22

Authorisation

This submission has been authorised by the NFAW Board

Professor Helen Hodgson
Chair, Social Policy Committee,
National Foundation for Australian Women

Marie Coleman AO PSM
Advisor, Social Policy Committee

Inquiries about this submission should be directed to Helen Hodgson at h.hodgson@tpg.com.au

Note: The text which follows is a compilation of responses provided in the online survey format required by the agency concerned. While we have not reproduced tick-boxes embedded in the survey format, the full text of this document was provided as part of our response, which can be found in full at https://consultations.ag.gov.au/rights-and-protections/respect-at-work/consultation/my_response.pdf

NFAW response to the Attorney-General's Department – consultation on remaining legislative recommendations from Respect@Work

NFAW is concerned that, while women want meaningful action to prevent sexual harassment, this consultation paper appears focused on reasons for legislative inaction.

Over and over again, the consultation paper deploys the four standard reasons for not implementing critical amendments to Commonwealth anti-discrimination legislation. These are:

1. that change is complicated,
2. that existing legislation should address the matter,
3. that education will make everything better, and
4. that empowering the relevant agency will threaten its cooperative relationship with employers.

We note that the last reason seems to apply only to regulators addressing discrimination against women, and not for example the Fair Work Ombudsman or WHS regulators or AUSTRAC or the ACCC.

These reasons have been recycled for at least fourteen years (see *Respect@Work*, p. 477), during which change has been made only at the margins. Over that time, the Sex Discrimination Act (SDA) has remained reactive, costly and a deterrent to complainants. Employers have been educated, and yet workplace harassment increases. According to WGEA, 98.2% of reporting organisations have sexual harassment policies in place, 98.1% have a grievance process, and 87.1% provide training for managers – and the prevalence rates of sexual harassment have continued to rise from 11% in 2003 to 33% in 2018.

Our comments address both what the consultation paper says and what it fails to say. Those silences indicate a deep reluctance to engage with any significant policy or legislative change.

Issue 1: Recommendation 16: Preventing Sexual Harassment

16a

Discussion of recommendation 16 simply ignores 16a, which calls on government to amend the object of the SDA to make it an aim of the Act 'to achieve substantive equality between women and men'.

It is not possible to apply any of the four standard responses to exclude a positive response to recommendation 16a. This is because the Workplace Gender Equality Act (WGE Act) already includes at s. 2A(a) the principal object 'to promote and improve gender equality (including equal remuneration between women and men) in employment and in the workplace'.

There is no practical reason why substantive equality should not also be an object of the SDA.

Key points:

- *Section 2A(a) of the WGE Act shows that there is no practical reason why substantive equality should not also be an object of the SDA.*

- *Silence on 16a suggests that there is an unspoken policy view that the SDA should remain reactive and complaints-based.*

16c

The silence on recommendation 16a leaves the focus of this section of the consultation paper wholly on 16c: 'creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited'.

The key argument made in the consultation paper against action on recommendation 16c is that the SDA is a complaints-based and reactive institution and this is a pro-active recommendation (para 44). That is, *the anticipated failure to act on recommendations 17 and 18 is made a reason for failing to act on recommendation 16c, and by extension 16a.*

In addition to disposing of the legislative option with this circular argument, the consultation paper deploys the usual reasoning (that change is complicated, that existing legislation should address the matter, that education will make everything better) at paras 40-41:

> Recommendation 16(c) seeks to prohibit conduct that creates a hostile work environment in a general sense, rather than requiring conduct be directed towards a particular person. There are complexities associated with this type of proposal, including the potential scope of any prohibition, and setting a suitable threshold to ensure only relevant conduct would be captured and the interaction with existing frameworks.
>
> Non-legislative options could also be considered to increase awareness and to clarify that a hostile work environment on the basis of sex is a form of sexual harassment and/or sex discrimination. The AHRC, SWA and workplace regulators have extensive

> guidance material on their websites about meeting existing obligations to prevent sexual harassment. In addition, WHS regulators offer training about managing and addressing sexual harassment in the workplace. The development of further guidance materials and education programs specifically relating to hostile work environments could build on this foundation.

Data available since 2003 shows that falling back onto issuing more educational material does not work.

Key points:

- *The anticipated failure to act on recommendations 17 and 18 should not be made a reason for failing to act on recommendation 16c (and by extension 16a).*

- *More guidance and educational material have made no substantive difference to the growth of sexual harassment.*

Issue 2: Recommendation 17: A Positive Duty

Recommendation 17 of Respect@Work is:

> Amend the Sex Discrimination Act to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate *sex discrimination, sexual harassment and victimisation* [our italics] as far as possible. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered including, but not limited to:
>
> a. the size of the person's business or operations
> b. the nature and circumstances of the person's business or operations
> c. the person's resources
> d. the person's business and operational priorities
> e. the practicability and the cost of the measures
> f. all other relevant facts and circumstances.

This has been neatly abridged in the consultation paper to:

> **Recommendations 17 and 18** – introduce a positive duty on employers to prevent sexual harassment *from occurring* and provide the AHRC with the function of assessing compliance with the positive duty, and for enforcement

As with recommendation 16, the consultation paper simply remains silent about critical parts of the recommendation. In this case the recommendation has been abridged to remove any proposed positive duty to eliminate discrimination, including systemic discrimination, or victimisation. The introduction of into the recommendation 'from occurring' confirms the intention to rely on individual instances of harassment and not to recognise the presence of ongoing systemic discrimination in workplaces.

Respect@Work spent an entire chapter (3) on establishing how workplace sexual harassment is part of a broader cultural practice of disempowering women though employment systems including pay, working hours and conditions:

> The Commission recognises that the prevention of sexual harassment is most effective when gender inequality—the key underlying driver of sexual harassment —is identified and targeted. Government strategies that address gender inequality are a critical means through which governments can commit to action that will enhance efforts to address gender inequality, including structural inequalities in the workforce such as the gender pay gap, women's workforce participation and gender segregation. (381; see also 479-80)

By deleting discrimination, including indirect or systemic discrimination, from the recommendation, the analysis closes off substantive discussion of preventing sexual harassment.

The consultation paper then recycles three of the four reasons for legislative inaction: that change is complicated (para 68), that existing legislation should address the matter (paras 56, 65), that education will make everything better (para 67). (The fourth reason -- that empowering the relevant agency will only threaten its cooperative relationship with employers – gets a thorough airing in relation to recommendations 18 and 19 below, which introduce investigation and enforcement options.)

It should be noted in particular that reason 2 -- existing legislation will address the matter – ignores the point raised in *Respect@Work* that Workplace Health and Safety (WHS) legislation does not deal effectively with sexual harassment:

> In essence, the WHS positive duty, as it relates to sexual harassment, is focused on psychological health broadly and frames sexual harassment as a safety risk and hazard. The Sex Discrimination Act positive duty would have a more specific and targeted focus on sexual harassment, sex discrimination and victimisation, and would importantly operate within a human rights framework that takes into account the systemic and structural drivers and impacts of sexual harassment. (p. 480)

Even more importantly, ***WHS legislation will not address all the systemic discrimination issues that enable sexual harassment***, such as structural inequalities in the workforce including the gender pay gap, women's workforce participation and gender segregation.

Key points:

- *By deleting discrimination, including indirect or systemic discrimination, from the recommendation, the analysis closes off substantive discussion of prevention of workplace sexual harassment.*

- *Having significantly narrowed the scope of the recommendation, the consultation points to even narrower WHS legislation as the answer, despite Respect@Work.*

Issue 3: Recommendation 18: Compliance and Enforcement Powers

Recommendation 18 of Respect@Work is as follows:

> The Commission be given the function of assessing compliance with the positive duty, and for enforcement. This may include providing the Commission with the power to:
>
> a. undertake assessments of the extent to which an organisation has complied with the duty, and issue compliance notices if it considers that an organisation has failed to comply
> b. enter into agreements/enforceable undertakings with the organisation
> c. apply to the Court for an order requiring compliance with the duty.

The stripped back version of recommendation 18 set out in the consultation paper is 'provide the AHRC with the function of assessing compliance with the positive duty, and for enforcement.' This formula at least appears to envisage the existence of a positive duty in the SDA, although that duty remains the stripped-back version which focuses on harassment in isolation from enabling forms of workplace discrimination.
The consultation paper proposes three options for implementing this pared back recommendation
Omit enforcement options and leave it complaints- based

- Option 1: A positive duty in the Sex Discrimination Act, enforced by individuals making complaints to the AHRC through existing complaints mechanisms.

  This minimalist proposal is to introduce the stripped-back duty to prevent only harassment (called 'standalone' in the consultation paper). Nothing else is proposed: the SDA would continue to rely on victims to bring complaints. Given the key benefit of a positive duty is that it shifts the burden from individuals making complaints to employers taking proactive and preventative action, this coupling of a positive duty with individual complaints is inexplicable as policy.

- Option 2: Positive duty modelled on the Equal Opportunity Act 2010 (Vic)

  Option 2 would enable the Sex Discrimination Commissioner (SDC) or the Australian Human Rights Commission (AHRC) to investigate a contravention of the stripped back positive duty, but would not enable it to enforce any findings. They could only refer the matter to the relevant WHS authority, leaving us back where we started. NFAW notes that the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) itself has argued that its positive duty needs to be accompanied by investigation, compliance and enforcement mechanisms, and that the same should apply to any positive duty in the SDA (p. 477).

This is also NFAWs view.

Options 1 and 2 are so minimalist that they can only be called token.

- Option 3: A positive duty in the Sex Discrimination Act that is enforceable by the AHRC

> Option 3 recognises the possibility of providing for investigation and enforcement powers, though these would only apply to the stripped-back, harassment-only duty.
>
> However, arguments are put against this option so quickly that operational questions are not even raised. Instead, the fourth of the standard reasons against reform of anti-discrimination laws is deployed: the one about how empowering the relevant agency will only threaten its cooperative relationship with employers (paras 117-120). From this the argument segues into reason 1: the complexity of change.

Key points:

- *Options 1 and 2 addressing compliance and enforcement mechanisms raised in Respect@Work are designed to have no substantive impact. Option 3 is raised only to be dismissed.*

- *There is no discussion of the role of WGEA in making Option 3 workable, although that body has a legislated standard-setting and benchmarking function already in relation to the full range of workplace systemic discrimination issues. This function is currently constrained by the relevant government Instrument.*

- *If government is actively interested in implementing recommendations 17, 17 and 18, NFAW would be happy to work with relevant NGOs and discrimination specialists to prepare a range of proposals for implementation.*

Issue 4: Recommendation 19: inquiring into systemic discrimination

Recommendation 19 of *Respect@Work* is:

> Amend the Australian Human Rights Commission Act to provide the Commission with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment. Unlawful discrimination includes any conduct that is unlawful under the federal discrimination laws. The Commission should be given powers to require:
>
> a. the giving of information
> b. the production of documents
> c. the examination of witnesses
> d. with penalties applying for non-compliance, when conducting such an inquiry.

Implementation of this recommendation is suffocated in the consultation paper using rationale 4 (the threat posed to 'cooperative relations with employers), with a brief reference to arguments 1 (the complexity of change) and 3 (the value of education). No substantive effort is made to examine actual options for implementation.

Again, we note that the 'cooperative engagement' argument seems to apply only to regulators addressing discrimination against women (both the SDA and the WGE Act), and not for example the Fair Work Ombudsman or AUSTRAC or the ACCC. In these cases a way appears to have been found through operational issues concerning the scope and application of the regulatory provision.
In fact, the whole model of the regulatory pyramid, common to most if not all government regulation, envisages the coexistence of education, compliance, and enforcement functions. Why the consultation paper argues that this will not work well in the case of the SDA is unclear. It simply asserts that that is the case.

Key points:

- *No substantive effort is made to examine actual implementation options for recommendation 19.*

- *If government is actively interested in implementing the recommendation, NFAW would be happy to work with relevant NGOs and discrimination specialists, many of whom have been recommending this change since at least 2008, to prepare a range of proposals.*

Issue 5: Recommendation 23: Representative Actions

Recommendation 23 of *Respect@Work* is

> Amend the Australian Human Rights Commission Act to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.

The Respect@Work Report recommended that the AHRC Act be amended to allow unions and other representative groups to bring representative claims to court on behalf of others. The recommendation is not restricted to harassment, but extends to matters brought to the AHRC by representative groups.

The consultation paper proposes that a response, if any, to the recommendation should be restricted to harassment cases only.

It also falls back on argument 2, the existence of 'alternative legislation', in this case the scope for class actions (para 145). This is an extraordinary proposal in the light of the recent release by the government of an exposure draft of a bill that would' 'render a large number of class actions financially unviable [and] … impact Australians' access to justice.

Key points:

- *The consultation paper proposes to strip back the subject matter of this recommendation to exclude all forms of discrimination other than harassment. It then proposes, yet again, to fall back onto existing legislation. The government is currently proposing to severely restrict the scope of this legislation.*

- *If government is actively interested in implementing the recommendation, NFAW would be happy to work with relevant NGOs and discrimination specialists to provide advice.*

Issue 6: Recommendation 25 – Costs protections

We are not confident that the consultation paper exhausts the available options and so do not have a comment on this matter.