Senator Louise Pratt
Senator for Western Australia
Shadow Assistant Minister for Manufacturing
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Parliament of Western Australia
Legislative Assembly
Community Development and Justice Standing Committee

Dear Committee

RE: **An inquiry into sexual harassment against women in the FIFO mining industry**

Please accept this submission (this letter and attached report) to your Committee inquiry into sexual harassment against women in the FIFO mining industry. The attached report was written by Labor Senators who participated in the Senate's inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021.

Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 – Parliament of Australia (aph.gov.au)

In addition to the report of Labor Senators as attached, I would like to draw the attention of the committee to the Respect@Work report from the Australian Human Rights Commission, and undertaken by Commissioner Kate Jenkins, which assessed the prevalence, nature, outcomes and reporting of sexual harassment in Australian workplaces.

https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020

The report found that mining industries had a higher than average prevalence of sexual harassment and that contributing factors included 'atypical' jobs performed by women and male-dominated workplace cultures.

Respect@Work found;

- In mining, the rate of sexual harassment overall was 40%, higher than the rate across all industries of 31%. Women were more than twice as likely as men to be sexually harassed (74% compared to 32%). In 2018–19, women made up just 16% of workers in the mining industry.[i]
- Mining was also the industry with the highest average number of harassers (with an average of 3.0 harassers involved in the most recent incident compared to an average of 1.7 across all industries).[ii]

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- Close to half (48%) of sexual harassment in the mining industry occurred in a social area for workers, such as a lunch room, substantially more than the average across all industries (26%).[iii]
- Sexual harassment was more likely to be witnessed by someone else in the mining industry (48% compared to 40% across all industries).[iv]

In addition, the report makes a number of other findings and observations relevant specifically to mining, for example drawing attention to the way that lost time injuries are captured, which are an important driver for Occupational Health and Safety outcomes in FIFO environments, and that these injuries are not currently capturing sexual harassment or sexual violence.
I encourage the committee to examine the reports evidence regarding gender balance in the workplace, workplace cultures, rosters, drug and alcohol policies and recruitment practices and the contributing factors for sexual harassment. The report highlighted that that there is a need to recruit more women into these industries and address gender inequality in order to change workplace culture.

Notably, the Australian Resources and Energy Group (a national employer group), acknowledged in the report that the AHRC 2018 National Survey data, 'indicates a cultural issue within the resources and energy industry where people (especially women) are more likely to be harassed by groups of co-workers in open, common areas (such as crib rooms or social areas at camp) than other industries.'[v]

Commissioner Jenkin's, author of this report, submitted to our committee that the current legislation, regulations, policies and practices applicable to Australian workplaces overall are inadequate and behind global best practice.

Commissioner Jenkin's put forward a comprehensive set of recommendations for reform. This included support for a positive duty of care to be applied to employers which Labor Senator's were pleased to see was supported by the Minerals Council of Australia. Commissioner Jenkin's recommendations are supported by the Labor Party at a national level and are consistent with the submission made by Western Australian Minister McGurk to our Senate inquiry.

The report of Labor Senator's highlights the substantial limitations, including it's failure to support a positive duty, in the Commonwealth Government's response to the Respect@Work report of January 2020, which is yet to be legislated.

I encourage the Community Development and Justice Standing Committee to work with Australian Human Rights Commission to see if the committee is able to drill down further into the data and stories it collected relevant to sexual harassment in the mining industry.

The Respect@Work report also steps carefully through variations in law across jurisdictions. Currently, the key areas of legislation relating to sexual harassment in the workplace in Australia are the Sex Discrimination Act*,* state and territory anti-discrimination laws, the *Fair Work Act 2009* (Cth) (Fair Work Act), state workplace relations laws, and work, health and safety (WHS) laws, observing that WHS laws are based on the Model Work Health and Safety Act in all states and territories, except in Victoria and Western Australia which have their own WHS schemes. Therefore, I encourage the committee to consider the intersection of both State and Commonwealth laws when in the course of it's inquiry.

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I note that the Respect@Work report found that the Model Work Health and Safety Act, is far from model in its effectiveness for psychosocial workplace hazards, including sexual harassment. It may therefore be difficult for the state of WA to look to best practice in other Australian jurisdictions.

In closing, I encourage the committee to pay close attention to the Resect@Work report's very comprehensive set of recommendations and I look forward to drawing on your committee's public evidence and findings to complement my own work at a national level.

If I can be of any assistance to the committee, including by giving evidence please don't hesitate to contact me.

Yours sincerely,

Senator Louise Pratt
Labor Senator for Western Australia

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[i] Australian Bureau of Statistics, *ABS Gender Indicators November 2019* (Catalogue No 4125.0, 1 November 2019) Table 1.3.
[ii] Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 62.
[iii] Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 62.
[iv] Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 63.
[v] AMMA, Submission 376, *Sexual Harassment Inquiry*, 5.

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Labor Senators' dissenting report

Introduction

1.1 More than a year and a half has passed since the release of the Australian Human Rights Commission's (AHRC) landmark 'Respect@Work' report written by Australia's Sex Discrimination Commissioner, Kate Jenkins.

1.2 The report was a world-first national inquiry into workplace sexual harassment. It consulted extensively, receiving 460 submissions from government agencies, business groups, community bodies and from victims. The AHRC conducted 60 consultations across Australia, and held three roundtables and numerous meetings with key stakeholders. The report reveals that sexual and sex-based harassment is a pervasive and damaging form of violence, largely targeted against women in Australian workplaces. Most notably for the purposes of this inquiry, the Respect@Work report makes 55 recommendations for reform, many of which are interdependent, and designed to address this national scourge.

1.3 The personal stories in the report were a call for urgent change. As a submitter to the Respect@Work inquiry shared:

> The outcome of all of this for me was catastrophic. My health was destroyed. I lost my job and my income and everything I had ever studied and worked for. My family was greatly affected, and my life has never recovered from the betrayal and injustice.[1]

1.4 Labor thanks all those who have recounted their experiences of sexual harassment or abuse in order to push the Australian Government (the government) to action. We understand this can be distressing and that it takes enormous courage. The case for change has been made for some time and urgent action is required.

1.5 In 2018, an ACTU survey of 10,000 people found that two in three women had been subjected to one or more forms of sexual harassment at work. Only a quarter had made a formal complaint, less than half had reported the incident to management or someone else, and 40 per cent told no-one at all.[2]

1.6 In the Respect@Work report, Commissioner Jenkins made clear that the prevention of sexual and sex-based harassment in the workplace required long-term sustained effort, high-level leadership, and political will to be effective.

1.7 Despite knowing this, the government sat on the report for more than a year before responding. An advanced copy was provided at least as early as January 2020 and the report was released publicly on 5 March 2020.

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[1] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report* (2020), p. 257.

[2] ACTU, *Submission 8*, p. 3.

1.8 The government's position at the time was that it would 'take the time to carefully consider the report and its recommendations, recognising that states and territories, and the private sector also have a key role to play'.[3] And that it was 'committed to ensuring Australian workplaces are safe and free from sexual harassment'.[4]

1.9 However, it appears now that this was merely shallow rhetoric. Questioning in a Senate Committee revealed that then Attorney-General Christian Porter did not once meet with Commissioner Jenkins about the report or its recommendations. In March 2021, when the Prime Minister asked Minister Porter to step down as Attorney-General amid allegations of workplace sexual assault and harassment in the Parliament itself and historic rape allegations against Minister Porter, the government still had not responded.

1.10 Following Senator Cash's appointment as Attorney-General, the government rushed to respond to the report. However, it is apparent from the limited legislation put before the Parliament by the government that the response itself had not been deeply considered.

1.11 Plainly, the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill (the bill) is a face-saving device for a government weighed down by allegations made inside the Parliament against its own members and about how such harassment, abuse and assault has been, and continues to be, tolerated and treated by the government as no more than a political problem to be managed.

1.12 Victims of sexual harassment and discrimination at work deserve better. The case for change and the path forward was made clear by Commissioner Jenkins and the Parliament has a responsibility to act on her recommendations.

1.13 The government argued that it was busy managing COVID-19 and Australia's recovery. But as Commissioner Jenkins explained in late 2020 when the government still hadn't responded:

> I'm particularly concerned at the moment about the disproportionate impacts of COVID-19 on women's economic position. But I also see the great opportunity of unleashing the social and economic potential of women to fast-track our recovery which is also critical as part of our primary prevention of violence against women.

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[3] The Hon Marise Payne, Minister for Women, Minister for Foreign Affairs, 'Launch of the Australian Human Rights Commission report into sexual harassment in Australian workplaces', *Media Release*, 6 March 2020.

[4] The Hon Marise Payne, Minister for Women, Minister for Foreign Affairs, 'Launch of the Australian Human Rights Commission report into sexual harassment in Australian workplaces', *Media Release*, 6 March 2020.

1.14 In crude financial terms, Deloitte Access Economics has estimated that workplace harassment cost the Australian economy $3.8 billion in 2018 alone.[5] It is telling that a government that has driven Australia into over a trillion dollars of debt does not appear to be motivated by even the financial benefits of reform in this area.

1.15 The effect of the government's decision to only partially implement a handful of Commissioner Jenkins' 55 recommendations is that the bill in its current form does not make the substantive and holistic change needed to address systemic sexual and sex-based harassment in Australian workplaces provided for by the recommendations of the Respect@Work report. Victoria Legal Aid (VLA) submitted to this inquiry that:

> The 55 recommendations made in Respect@Work present strategies to better prevent gendered violence and harassment at work, hold perpetrators accountable, and support victim-survivors to recover and receive redress. Respect@Work takes a system-wide approach that lifts some of the burden of achieving these goals from the individual, and has the potential to drive cultural and behavioural change. However, the recommended solutions cannot work in isolation – they are a complementary and mutually reinforcing suite of reforms that will only be effective if they are comprehensively implemented as a whole.[6]

1.16 For the government to have sat on the Respect@Work report for over a year without responding, or indeed, the responsible minister even once meeting with the Commissioner about it, and to now, some 18 months later, be presenting to the Parliament a bill that only partially implements around 10 per cent of the recommendations, does not suggest to Labor members that the government is genuine about making the significant and systemic changes that Commissioner Jenkins has called for.

1.17 Labor has called for action on this issue for some time and believes the Parliament should make the most of the opportunity to ensure the legislation before it properly implement the urgent reforms recommended in the Respect@Work report.

Outline

1.18 This report outlines Labor Senators' recommendations for amendments to the bill alongside support for Commissioner Jenkin's other recommendations yet to be implemented or responded to by the government.

1.19 Labor Senators would like to thank those stakeholders who engaged constructively in this inquiry process. Changing workplace laws to eliminate

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[5] Ms Kate Jenkins, Sex Discrimination Commissioner, Australian Human Rights Commission, House of Representatives Standing Committee on Social Policy and Legal Affairs, *Committee Hansard*, 7 September 2020, p. 42.

[6] Victoria Legal Aid, *Submission 27*, p. 3.

sexual and sex-based harassment is a central feature of Labor's industrial relations platform.

1.20 More broadly, implementation of the recommendations of the Respect@Work report is entirely consistent with Labor's commitment to achieve genuine equality for women by making structural changes to address the power inequalities in our society that lead to unequal outcomes.

1.21 Labor supports the purpose of the bill to amend the *Australian Human Rights Commission Act 1986* (the AHRC Act), *Sex Discrimination Act 1984* (the SD Act) and the *Fair Work Act 2009* (the FW Act) to strengthen and streamline national frameworks for addressing and preventing workplace sexual harassment.

1.22 Labor also supports the full adoption of all recommendations included in the AHRC's landmark Respect@Work report.

1.23 The bill in its current form does not provide the substantive change needed to address systemic sexual and sex-based harassment in Australian workplaces and does not fully implement the recommendations of the Respect@Work report.

1.24 Of particular concern in this context is that the bill does not implement Recommendation 17 of the Respect@Work report, which called for the introduction of a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible in their workplaces. The government's attempt to dismiss this recommendation as unnecessary because it is already created by WHS laws suggests a fundamental lack of understanding on the part of the government about how workplace laws work, and that key decision-makers in the government did not understand or did not even read Commissioner Jenkins' report, in which she makes abundantly clear that:

> The current legal and regulatory system is simply no longer fit for purpose. In this report, I have recommended a new model that improves the coordination, consistency and clarity between the anti-discrimination, employment and work health and safety legislative schemes.[7]

1.25 The bill:

- does not implement Recommendation 17 of the Respect@Work report to insert a positive duty into the SD Act requiring all constitutionally-covered employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation in their workplace, supported by inquiry and enforcement powers (Recommendation 18 and 19);

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[7] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report* (2020), p. 10.

- does not implement Recommendation 28 of the Respect@Work report to amend the FW Act to expressly prohibit sexual harassment;
- does not amend the FW Act to provide all workers with access to 10 days paid family and domestic violence leave;
- does not implement Recommendation 23, amending the AHRC Act to allow representative groups to bring representative claims to court;
- does not implement Recommendation 25, amending the AHRC Act to to insert a costs protection provision consistent with section 570 of the FW Act;
- does not provide broadened stop sexual harassment orders to cover sex-based harassment extending to 'any circumstances connected with work';
- does not implement Recommendation 16(a) amending the objects of the SD Act to include 'to achieve substantive equality between women and men';
- does not implement Recommendation 16(b) and 16(c) to prevent the creation of hostile work environments';
- does not provide 10 days paid family and domestic violence leave in the National Employment Standards; and
- does not implement Recommendation 15, requiring the government to undertake the necessary treaty implementation processes required to implement ILO Convention C.190.

Sexual and sex-based harassment in the workplace

1.26 The committee heard evidence that sexual harassment remains a serious issue causing physical, psychological, sexual, and economic harm to Australian workers, particularly women. Many submitters highlighted the personal as well as social and economic impacts of sexual harassment, including in the areas where it is more prevalent such as the mining, education, health, retail, and hospitality sectors.

1.27 Ms Tania Constable, Chief Executive Officer, Minerals Council of Australia, told the committee:

> Workplace sexual harassment in the mining industry [is] notably higher, at 40 per cent, than the national prevalence rate of 33 per cent. The proportion of male perpetrators [is] higher, at 83 per cent, than the national average of 79 per cent. The likelihood of being sexually harassed by more than one person [is] higher. The mean number of perpetrators of sexual harassment in the mining industry [is] 3.0, compared to 1.7 overall. Almost half of those who experienced sexual harassment in the mining industry reported that the perpetrator was a co-worker at the same level as them, compared with 30 per cent of people who were sexually harassed in the workplace, overall. Close to half of all sexual harassment in the mining industry occurred in a social area for employees, such as a break or lunchroom, compared to one-quarter of all workplace sexual harassment.[8]

[8] Ms Tania Constable, Chief Executive Officer, Minerals Council of Australia, *Proof Committee Hansard*, 20 July 2021, p. 9.

1.28 The Australian Salaried Medical Officers' Federation submitted:

> In 2019, ASMOF surveyed NSW members on sexual harassment and gender equity for the National Inquiry into Sexual Harassment in the Workplace. Our findings confirmed that sexual harassment is far too commonly experienced by doctors, with an alarming 55% of female doctors reporting that they had experienced sexual harassment in their workplace. Furthermore, the internal and external processes around reporting sexual harassment and outcomes for doctors are of a significant concern to ASMOF. ASMOF's survey found that the vast majority of doctors who had experienced sexual harassment did not report it, citing the power dynamics in the health workplace, the fear surrounding reporting and the impact on career options.[9]

1.29 Similarly, Ms Julia Fox, National Assistant Secretary, Shop, Distributive and Allied Employees Association, told the committee:

> Working in retail and fast food, our members are also exposed to an increased risk of sexual harassment due to their customer-facing roles, with one in five members sexually harassed by a customer. The impact that sexual harassment on workers is profound. A quarter of our members who experienced sexual harassment said that it negatively impacted their employment, career opportunities, and work. Almost half of those who have been sexually harassed reported experiencing mental health issues as a result, with six per cent reporting they'd experienced suicidal thoughts and four per cent with PTSD. Employers need to recognise the health and safety impacts of sexual harassment in the workplace and take steps to ensure the workplace is safe.[10]

1.30 Existing workplace laws do not adequately protect Australian workers from sexual and sex-based harassment at work. Plainly, legislative change to enshrine appropriate protections into the AHRC Act, SD Act and FW Act is urgently required.

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

1.31 The bill implements 6 of the 55 recommendations of the Respect@Work report. Of the 6 recommendations it does adopt, the bill presents weakened versions that fail to capture the purpose of proposed legislative change.

1.32 The Australian Council of Trade Unions (ACTU) noted:

> The government's response to Respect@Work falls well short of what the Respect@Work Report says is necessary to prevent sexual harassment and other forms of gendered violence at work. The government's decision to refuse to take the actions recommended by Respect@Work - an Inquiry commenced by them - to end sexual harassment and other forms of

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9 Australian Salaried Medical Officers' Federation, *Submission 22*, p. 2.

10 Ms Julia Fox, National Assistant Secretary, Shop, Distributive and Allied Employees Association, *Proof Committee Hansard*, 19 July 2021, p. 11.

> gendered violence in Australian workplaces is unforgivable. Workers at Parliament House and countless other workplaces around the country who have had the courage to speak up about these injustices deserve much better.[11]

1.33 Similarly, the Kingsford Legal Centre argued:

> This Bill is a missed opportunity for the widescale reform that we believe is required and the Respect@Work Report called for. It is disappointing that the Government has only sought to implement 6 of the 55 recommendations of the Respect@Work Report in the Bill, and not even fully implemented those 6 recommendations. Many of the 49 neglected recommendations from the Respect@Work Report are key legislative reforms that are absolutely vital in preventing sexual harassment. These include introducing a positive duty on employers to take reasonable and proportionate measures to eliminate sexual harassment, and ensuring and clarifying that sexual harassment is expressly prohibited within the Fair Work system. The Government cannot claim to be taking sexual harassment seriously while neglecting these key reforms.[12]

1.34 The National Foundation for Australian Women (NFAW) also submitted:

> The Explanatory Memorandum states that the government's Roadmap for Respect, including the proposed legislative measures, will provide 'a clear and comprehensive path forward to prevent and address workplace sexual harassment' (para. 3). In fact, the legislative package is far from comprehensive and rejects any preventative measure. The government has declined to act on Respect@Work recommendations 15, 17, 18, 19, 23, 25, 26, 28, 35 and 39, in some cases by ignoring them and in others by calling for further consideration at some unspecified future time.[13]

Introduction of a positive duty to eliminate sex discrimination, harassment and victimisation

1.35 The bill does not adopt Recommendation 17 of the Respect@Work report calling for amendment of the SD Act to include a positive duty on employers to take reasonable measures to eliminate sex discrimination, sexual harassment and victimisation in their workplace.

1.36 Labor argues that implementing Recommendation 17 is a key legislative change that must made to appropriately respond to the Respect@Work report. In failing to address this fundamental recommendation for reform, the government's bill leaves the existing, reactive and often adversarial regulatory system largely unchanged. Consequently, the law will continue to fail to adequately protect Australian workers from the types of sexual and sex-based harassment identified by Commissioner Jenkins.

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[11] ACTU, *Submission 8*, p. 1.

[12] Kingsford Legal Centre, *Submission 42*, pp. 3–4.

[13] National Foundation for Australian Women, *Submission 13*, [p. 1].

1.37 In its submission, the AHRC reiterated its recommendation from the Respect@Work report that the SD Act include a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation. It argued that this would be 'a powerful tool to promote broad systemic and cultural change that sits outside the current adversarial framework of discrimination law'.[14] The Sex Discrimination Commissioner, argued:

> The national inquiry found that our laws must move from a reactive approach that relies on complaints by victims to one that requires positive action from employers, proportionate to their size and nature. Relying on responses to complaints has not been effective to reduce the incidence of sexual harassment. It is shocking to realise that the only law that currently explicitly prohibits sexual harassment, the Sex Discrimination Act, contains no obligation for employers to prevent sexual harassment. While employers have been taking action with a genuine desire to prevent sexual harassment, those actions have been ineffective, because they have designed to meet legal requirements which only focus on response. Introducing a positive duty will align the Sex Discrimination Act with safety laws and shift employer action to more effective approaches to eliminate harassment.[15]

1.38 Ms Jenkins also responded to concerns that the introduction of such a duty could create further complexity, uncertainty, and duplication:

> This would not impose an undue regulatory burden and would have a greater chance of reducing the cost of sexual harassment to business. Similar duties have been on the books in Victoria for a decade without any adverse impact on business, and the Respect@Work Council would work to ensure the duties are clear, streamlined, easy to implement.[16]

1.39 Ms Tania Constable, Chief executive Officer, Minerals Council of Australia, told the committee:

> MCA agrees with the government and others that a positive duty already exists in workplace health and safety law. It is an all-encompassing duty. We also note that specifying some hazards as having positive duties gives rise to the risk of diminishing other hazards. However, the positive duty that already exists works for traditional physical health and safety risks; it is clearly not working for sexual harassment. Therefore, given the significant issue, we support there being a positive duty in the Sex Discrimination Act.[17]
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> …

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[14] Australian Human Rights Commission, *Submission 19*, pp. 4–5 and 15–17.

[15] Ms Kate Jenkins, Sex Discrimination Commissioner, Australian Human Rights Commission, *Proof Committee Hansard*, 19 July 2021, p. 1.

[16] Ms Kate Jenkins, Sex Discrimination Commissioner, Australian Human Rights Commission, *Proof Committee Hansard*, 19 July 2021, p. 1.

[17] Ms Tania Constable, Chief Executive Officer, Minerals Council of Australia, *Proof Committee Hansard*, 20 July 2021, p. 9.

> As I said, under the workplace health and safety laws there is an all-encompassing duty that includes addressing sexual harassment. However, on this particular issue, it's clearly not working. If it were, we would not see high numbers of sexual harassment across industries, not least the minerals industry. So making it very explicit under workplace health and safety law would ensure that it gets the recognition, acknowledgement and attention that is required to eliminate sexual harassment from every workplace, and, importantly, it would be done within a safety framework. I think that is the game changer that we need to see sexual harassment eliminated from the workplace.[18]

1.40 Kingsford Legal Centre also observed that existing vicarious liability provisions are no substitute for a positive duty. It argued:

> A positive duty would be more effective than vicarious liability provisions because it would apply across all employers and have a mechanism of enforcement without a complaint through the AHRC. While vicarious liability provisions sometimes are used by employers to proactively improve their practices and response, they are only enlivened after a complaint of harassment or discrimination is made. The evidence suggests these are not an effective prevention measure.[19]

1.41 In addition, Ms Melanie Schleiger, Program Manager, Equality Law Program, Victoria Legal Aid, told the committee:

> One of the things that Victoria Legal Aid think a positive duty can achieve is a change in the mindset of employers about the role that they can play, that everyone can play, to prevent sexual harassment at work. At the moment, too many people see sexual harassment as an individual problem—a problem of some bad apples acting on their own in a vacuum—but we know that that's not the case. We know that the organisational culture, the systems of work in place and the practices around reporting and responding to sexual harassment all have a really significant impact on the incidence of sexual harassment at that workplace. If the workplace tolerates sexual harassment and doesn't respond effectively then there will be higher rates of sexual harassment at that workplace. So the positive duty, we say, is really important, because employers can take proactive and effective steps to prevent sexual harassment.[20]

1.42 The Law Council of Australia (LCA) also supported an amendment to the bill to include a positive duty on employers, or as an alternative that this be done in any further amendment bills arising from the Respect@Work Report. The LCA argued:

> The Law Council considers that the lack of implementation of Recommendation 17 and positive duties is a missed opportunity to give

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[18] Ms Tania Constable, Chief Executive Officer, Minerals Council of Australia, *Proof Committee Hansard*, 20 July 2021, p. 13.

[19] Kingsford Legal Centre, *Submission 42*, p. 7.

[20] Ms Melanie Schleiger, Program Manager, Equality Law Program, Victoria Legal Aid, *Proof Committee Hansard*, 19 July 2021, p. 48.

> effect to the stated intent of the Bill and to promote a focus among employers on actively preventing sexual harassment in the workplace, rather than relying upon individuals to bring forward complaints once the harm has been done.[21]

1.43 The recommendation to introduce a positive duty was also supported by other stakeholders, including the Women's Legal Centre ACT, Australian Discrimination Law Experts Group (ADLEG), and the Queensland Human Rights Commission.[22]

1.44 The government contends that introduction of a positive duty would require 'further consideration and assessment'. Consideration and assessment of the merits of a positive duty have already occurred through the extensive consultations undertaken in preparation of the Respect@Work report, as well as during the examination of this bill in this committee. There is overwhelming support for a positive duty, including from employer groups. There is no excuse for the government to delay its introduction further.

Existing positive duties

1.45 The government argues that existing WHS laws already contain a positive duty to prevent exposure to health and safety risks, so far as is reasonably practicable, including the risk of being sexually harassed.

1.46 The Respect@Work report notes that existing WHS laws impose a positive duty on employers to prevent sexual harassment in the context of a broad duty to eliminate or manage hazards and risks to a worker's health. However, they do not currently contain specific regulation and a Code or Practice dealing with sexual harassment, and as noted above, do not operate in a practical manner to prevent sexual harassment.[23]

1.47 The absence of specific regulation and a Code of Practice in WHS laws and the lack of a positive duty in the SD Act means that workplace sexual harassment is not addressed by WHS regulators or employers in a consistent, robust or systemic way.[24]

1.48 Consistent with the Respect@Work report, Labor argues that the right of workers to be free from sexual harassment is a 'human right, a workplace right

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[21] Law Council of Australia, *Submission 45*, p. 26.

[22] Women's Legal Centre ACT, *Submission 3*, p. 7; Australian Discrimination Law Experts Group, *Submission 35*, pp. 15 – 20; Queensland Human Rights Commission, *Submission 7*, p. 3.

[23] Australian Human Rights Commission, Respect@Work: *National Inquiry into Sexual Harassment in Australian Workplaces Report* (2020), p. 31.

[24] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report* (2020), p. 31.

and a safety right' and that 'all three schemes, while recognising their distinct jurisdictions, have an important and mutually reinforcing role to play'.[25]

Compliance and enforcement of a positive duty

1.49 The introduction of a positive duty must be accompanied by appropriate enforcement powers through the AHRC. The associated powers should include the function of assessing compliance with a positive duty and for enforcement in line with Recommendations 18 and 19 of the Respect@Work report.

1.50 The Chief Executive Officer of Our Watch told the committee:

> In order to prevent sexual harassment from occurring, Our Watch also recommends the Sex Discrimination Act be amended to give the Sex Discrimination Commissioner the power to undertake systemic investigations. The proposed amendments to increase the Fair Work Commission's powers to intervene following a single act of sexual harassment may create improved outcomes for some individuals; however, in order to prevent sexual harassment in the workplace from occurring, it's important that these legal reforms ensure industries, organisations and sectors implement strategies to prevent sexual harassment and drive cultural and structural change by addressing the gendered drivers of violence against women.[26]

1.51 Similarly, the ACTU argued:

> The Bill should be amended to empower the Commission to conduct own motion inquiries in relation to unlawful sex discrimination, sex-based harassment, sexual harassment and victimisation, with enforcement mechanisms attached. The Commission's own-motion inquiries should not be limited to acts or practices of the Commonwealth, or under Commonwealth laws, or be confined to ILO workplace discrimination matters.[27]

1.52 Not In My Workplace submitted:

> While the Government has noted Recommendation 18 in its response, it has also committed to further consider this recommendation pending the outcome of its assessment of Recommendation 17 (relating to a positive duty to eliminate sex discrimination). The Government Response also recognises that there are advantages to the Commission having a broader suite of powers to be exercised upon the referral of a matter for investigation by Government. It is not clear why this consideration of recommendations 18 and 19 are contingent on consideration of recommendation 17 and we

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[25] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report* (2020), p. 445.

[26] Ms Patricia Kinnersly, Chief Executive Officer, Our Watch, *Proof Committee Hansard*, 19 July 2021, p. 37.

[27] ACTU, *Submission 8*, p. 21.

> believe that these recommendations should be adopted as part of this amendment.[28]

Recommendation 1

1.53 The bill be amended to adopt Recommendations 17, 18 and 19 of the Respect@Work report.

FW Act prohibition

1.54 The Respect@Work report found that the FW Act does not expressly prohibit sexual harassment and does not clearly or specifically provide an enforceable right for victims of sexual harassment in the workplace.

1.55 While the government has accepted Recommendation 29 to introduce a 'stop sexual harassment order' into the FW Act, it has failed to accepted Recommendation 28 to explicitly prohibit workplace sexual harassment in the FW Act.

1.56 The LCA notes that the bill has failed to address this gap:

> The [Fair Work Act 2009 (Cth) (FWA)] currently allows a worker who reasonably believes they have been bullied at work to apply to the FWC for a 'stop bullying order'…. However, the Law Council cautions that sexual harassment is not directly covered by the general protections provisions of the FWA. That is, the definition of 'adverse action' does not explicitly include sexual harassment, and, while the protections against discrimination in section 351 of the FWA prohibit adverse action due to sex, it is not clear that sexual harassment is prohibited by this section. Section 351 applies to 'employers', and does not apply to the conduct of an employee towards another employee. Sexual harassment by definition is perpetrated by an individual who may or may not also be the 'employer'. In order for the FWA to apply in relation to sexual harassment, section 351 of the FWA could be amended to include sexual harassment (whether perpetrated by employer or employee) in the definition of 'adverse action'.[29]

1.57 VLA submitted that:

> Our experience suggests that changes to the Fair Work Act would reduce the need for employees to bring multiple claims, offer a faster process for resolving sexual harassment complaints at the Fair Work Commission, increase community understanding of rights and obligations relating to sexual harassment, and empower the Fair Work Ombudsman to educate and enforce matters relating to sexual harassment.[30]

1.58 Sexual harassment is a workplace issue and must be addressed by Australia's workplace laws. The bill should be amended to include a clear prohibition on sexual harassment in the FW Act, as recommended by Commissioner Jenkins,

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[28] Not In My Workplace, *Submission 18*, p. 4.

[29] Law Council of Australia, *Submission 45*, p. 22–23.

[30] Victoria Legal Aid, *Submission 27*, p 11.

and a new complaints process in the Fair Work Commission which is available to workers who experience current or historical sexual harassment.

1.59 A prohibition in the FW Act will ensure that employers are incentivised to take steps to prevent workers from being sexually harassed and will improve access to justice by providing workers with an accessible process to resolve sexual harassment issues at work.

Recommendation 2

1.60 The bill be amended to include a clear prohibition on sexual harassment in the *Fair Work Act 2009*, as recommended by Commissioner Jenkins, and a new complaints process in the Fair Work Commission which is available to workers who experience current or historical sexual harassment.

Representative claims

1.61 Labor members of this committee support allowing representative groups to bring representative claims to court, consistent with the existing provisions in the AHRC Act that allow unions and other representative groups to bring a representative complaint to the AHRC. This is consistent with the existing AHRC framework and addresses the 'chilling effect that these costs have on victim-survivors taking action'.[31]

1.62 Several submissions supported amending the AHRC Act, consistent with Recommendation 23, to allow unions and other representative groups to bring representative claims to court.[32]

1.63 For example, the ACTU pointed out:

> The government has rejected this recommendation without detailed reasoning; simply noting that there is an 'existing mechanism' to enable representative proceedings in the Federal Court. However, this mechanism is onerous, legally complex and not fit for purpose for sexual harassment matters. It is well recognised that workers are extremely hesitant to even come forward and report sexual harassment to their employers (for reasons including fear of reprisals); let alone pursue risky, costly, complex and lengthy complaints processes in court at their own cost and expense. This reluctance to pursue complaints in court results in a denial of justice for workers and has been a significant contributing factor to the persistence of sexual harassment in Australian workplaces. [33]

1.64 Not In My Workplace noted:

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[31] Victoria Legal Aid, *Submission 27*, p. 17.

[32] See, for example, Australian Salaried Medical Officers' Federation, *Submission 22*, p. 3; Queensland Council of Unions, *Submission 23*, p. 6; Community and Public Sector Union, *Submission 25*, p. 12–13; Victoria Legal Aid, *Submission 27*, p. 13.

[33] ACTU, *Submission 8*, p. 23.

> While a complaint with the Commission can be lodged by person or trade union, this differs from the ability to bring proceedings in the Federal Court, which is limited to an "affected person" or the technical and complex representative proceedings process. Adoption of this recommendation would provide greater access to justice for employees or victims of sexual harassment or assault in the workplace.[34]

Recommendation 3

1.65 The bill be amended to implement Recommendation 23 of the Respect@Work report, to amend the *Australian Human Rights Commission Act 1986* to allow representative groups to bring representative claims to court.

Costs protection for claimants

1.66 Labor members are also concerned that the bill fails to address Recommendation 25 of the Respect@Work report, which calls for the AHRC Act to be amended to insert a cost protection provision consistent with section 570 of the FW Act. Such a provision would help provide access to justice to applicants by removing the threat of financial ruin should an adverse costs order be made against a complainant providing their claim is not vexatious, without reasonable, or where unreasonable actions or omissions have caused the other party to incur costs.[35]

1.67 Ms Betheny Hender, Head of Practice, Employment and Discrimination Practice, Women's Legal Centre ACT, told the committee:

> We're disappointed that the bill fails to provide a cost protection provision for complainants. Many women worry that they will not be believed and will be forced to pay the other side's legal fees. In the case of large businesses and government departments, these fees can be so significant that the average person would face financial ruin. It's no surprise many women decide not to take this gamble. We'd like to see the Sex Discrimination Act amended to include a provision similar to section 570 of the Fair Work Act, which provides that a party can only be ordered to pay costs in limited circumstances, including where proceedings are brought vexatiously or without reasonable cause. This is a balanced and fair provision. Without it, cost risks will continue to be a significant deterrent to claimants, making justice inaccessible for most.[36]

1.68 The ACTU argued:

> Costs operate as a significant disincentive to pursuing sexual harassment matters under the SDA. The Bill should be amended to amend the AHRC Act to ensure costs may only be ordered against a party by the court if satisfied that the party instituted the proceedings vexatiously or without

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34 Not In My Workplace, *Submission 18*, p. 5.

35 See, for example, Australian Salaried Medical Officers' Federation, *Submission 22*, p. 3; Community and Public Sector Union, *Submission 25*, p. 12; Victoria Legal Aid, *Submission 27*, p. 12.

36 *Proof Committee Hansard*, 19 July 2021, p. 20.

> reasonable cause, or if the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs.[37]

1.69 Similarly, Kingsford Legal Centre advised that:

> The costs risk associated with applications to the federal courts in discrimination matters is daunting for most of our clients and means that court proceedings are on the whole an unrealistic option, even for meritorious complaints.[38]

1.70 Not in My Workplace also submitted that it was 'not clear why such an amendment should not be included in the Bill if the recommendation is Agreed in Principle, nor is it clear why any further review of cost procedures in sexual harassment matters should be required'.[39]

1.71 Queensland Council of Unions supported limiting cost provisions for complainants as 'essential to ensure that complainants are not dissuaded from bringing forward complaints with reasonable cause'.[40]

1.72 Labor members are concerned by the government's arrogant dismissal of the need to act on this recommendation because, as it claims in its 'Roadmap to Respect' response, 'the determination of costs orders is already at the discretion of the court'. While courts do have discretion in relation to costs orders, the usual rule of litigation is that the losing party pay the costs of the other side, as well as their own. This can be financially crippling for an individual, while for large companies it is simply an ongoing business expense factored into annual budgets.

1.73 It appears the government has either not read, not understood, or arrogantly rejected this recommendation and the extensive consultations and evidence it is based on – all while claiming in its response to the Respect@Work report that Recommendation 25 is 'agreed-in-principle'. Commissioner Jenkins has made clear that the reforms in her report are urgently required to deal with sexual and sex-based harassment in Australia workplaces.

1.74 The government dithered for over a year before responding to this report. Further dithering only demonstrates the government's indolent approach to dealing with the pressing problems of workplace sexual and sex-based harassment. If a recommendation is agreed-in-principle by the government, it should be implemented in practice without further delay.

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37 ACTU, *Submission 8*, p. 22.

38 Kingsford Legal Centre, *Submission 42*, p. 15.

39 Not In My Workplace, *Submission 18*, p. 5.

40 Queensland Council of Unions, *Submission 23*, p. 7.

Recommendation 4

1.75 The bill be amended to implement Recommendation 25 of the Respect@Work report to amend the *Australian Human Rights Commission Act 1986* to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009*.

Broadening the application of stop orders

1.76 In addition to stop-sexual harassment orders recommended by the Respect@Work report, Labor argues that the FW Act should be amended to allow the FWC to also make stop sex-based harassment orders. This would extend beyond the scope of the bill in its current form.

1.77 The AHRC argued that as the bill:

> …treats sexual harassment and sex-based harassment in the same way throughout the SDA, for example in relation to the availability of ancillary liability or vicarious liability. It is appropriate that they are also treated the same way in the Fair Work Act. This will improve the coordination, consistency and clarity between the anti-discrimination and work health and safety legislative schemes. It will also ensure, appropriately, that there is a range of graduated alternatives available to respond to sex-based harassment.[41]

1.78 VLA also argued:

> VLA is concerned that without broadening the application of stop sexual harassment orders, the regime will fail to address conduct in contexts where sexual harassment is rife. Respect@Work found that sexual harassment often occurs away from the usual workplace, while travelling for work, restaurants, conferences and function spaces, hotel rooms, in lunchrooms, at cafés, restaurants and bars, at end-of-year parties, and other similar functions.
>
> Accordingly, VLA recommends that the Fair Work Act be amended to ensure that stop sexual harassment orders can be made to deal with gendered violence and harassment at work in the fullest range of circumstances possible. This should reflect, at a minimum, the circumstances set out in section 28B of the Sex Discrimination Act, which prohibits persons from sexual harassing others in a range of employment relationships, irrespective of where the sexual harassment takes place.[42]

1.79 The LCA also supported the introduction of stop sexual harassment orders, but it commented:

> …that the new section 789FD(2A) requires the sexual harassment to occur while the worker is at work, which is the same requirement in respect of bullying. This requirement, however, contrasts with the amendments in the Bill to the SDA, which require a 'connection' to work. The Law Council

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41 Australian Human Rights Commission, *Submission 19*, p. 20.

42 Victoria Legal Aid, *Submission 27*, p. 13.

> suggests that further consideration be given to amending new section 789FD(2A) to reflect the "in connection to" threshold.[43]

Recommendation 5

1.80 The bill be amended to broaden stop sexual harassment orders to cover sex-based harassment extending to 'any circumstances connected with work'.

Making the object of the SD Act clearer

1.81 Current objects of the SD Act include: (a) to give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments; […] (c) to eliminate, so far as is possible, discrimination involving sexual harassment in the workplace, in educational institutions and in other areas of public activity; and (d) to promote recognition and acceptance within the community of the principle of the equality of men and women.

1.82 The government recommends amending the SD Act to make it clear that the SD Act aims to achieve 'so far as practicable, equality of opportunity between men and women'.

1.83 Labor believes that a comprehensive understanding of equality must include the drivers of gender inequality and gender-based discriminations. This should underpin the objects of the SD Act.

1.84 The department has argued that the terms of the SD Act are 'really concerned with the elimination of discrimination; it's not necessarily concerned with the implementation of positive measures that would go to achieving substantive equality'. Labor notes that the government has an opportunity to introduce a positive duty to this bill, as recommended by the Jenkins Inquiry, but have failed to do so. The objects set the ambition for what this bill should achieve. The government has lowered its ambition in the pursuit of equality between women and men.

1.85 The ADLEG recommended amending the SD Act to explicitly state in the objects clause the purpose of achieving substantive equality between men and women. They argued:

> Amending the objects clause would help ensure the Act is underpinned by a comprehensive understanding of the drivers of gender inequality and gender-based discrimination, and would be consistent with international commentary.

1.86 Stakeholders and the Respect@Work report endorsed this position, concluding that SD Act be amended with the aim of 'achieving substantive equality' rather

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[43] Law Council of Australia, *Submission 45*, p. 22.

than the more qualified 'as far as practicable, equality of opportunity' that the bill recommends.

1.87 In line with the Respect@Work report, Labor recommends amending the SD Act to state in the objects clause 'to achieve substantive equality between men and women.'

Recommendation 6

1.88 The bill be amended to accurately implement Recommendation 16(a) of the Respect@Work report by amending the objects of the *Sex Discrimination Act 1984* to include 'to achieve substantive equality between women and men'.

The 'seriously demeaning' test

1.89 The bill includes an express prohibition in the SD Act of sex-based harassment of a 'seriously demeaning nature' in circumstances where a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated.

1.90 Labor believes that the test requiring 'seriously demeaning' conduct as well as offensive, humiliating and intimidating is excessive and does not adequately address Recommendation 16(c) of the Respect@Work report to expressly prohibit the '[creation] or [facilitation of] an intimidating, hostile, humiliating or offensive environment on the basis of sex'.

1.91 The ACTU submitted that:

> Sexual harassment is closely linked with gender inequity at work, and is often accompanied by non-sexual, sex-based discrimination and harassment, such as patronising treatment or hostile behaviour. These behaviours may not be specifically directed towards a particular individual, but cumulatively they create an environment of hostility on the basis of sex. Hostile and sexist work environments of this kind are key drivers of sexual harassment. This is why it is important to prohibit both sex-based harassment and 'creating or facilitating a hostile working environment on the basis of sex'. While obligations under WHS laws do already require employers to take measures to create safe working environments, there is no individual complaints process under WHS laws, which is why complementary protections in the SD Act and FW act are required.

1.92 This is undoubtedly the case. The inclusion of a 'seriously demeaning' threshold in the SD Act would create a uniquely burdensome test in Australian sex discrimination law and it should not be included in the bill.

Recommendation 7

1.93 The 'seriously demeaning' test be amended so that it is consistent with existing legal standards and objects of the Respect@Work recommendations, and the bill be amended to adopt Recommendation 16(b) and 16(c) of the Respect@Work report.

Family and domestic violence leave

1.94 Employers are bearing a heavy cost due to the impact of family and domestic violence on employees. KPMG and PWC estimate the cost of lost productivity due to violence against women to be between $1.9 and $2.03 billion per year.

1.95 The annual cost to employers of search, hiring and retraining employees who have left the workforce due to family and domestic violence is $96 million per year. The cost of absenteeism of victims and perpetrators is estimated at a further $860 million per year.

1.96 Evidence suggests that the costs associated with providing access to paid family and domestic violence leave are likely to be manageable.

1.97 Paid family and domestic violence leave will reduce the costs of lost productivity and save lives. Introducing a minimum of 10 days family and domestic violence leave will allow victims the time and income stability they need to escape and recover from violence and rebuild their lives.

1.98 The provision of 10 days paid family and domestic violence leave as a minimum employment standard in the FW Act is a critical measure for safety at work. Five days unpaid leave is inadequate to protect employees and help them to cope with the severe health impacts and financial stress caused by escaping and recovering from family and domestic violence. The reduction of family and domestic violence is a national priority. We will not succeed unless employees are entitled to sufficient paid time off work to enable them to attend critical support services needed to escape and recover from violence.

Recommendation 8

1.99 The bill should be amended to provide 10 days paid family and domestic violence leave in the national employment standards.

Ratification of the ILO convention of the elimination of violence and harassment at work 2019

1.100 Labor believes Australia should be a global leader in workers' safety and other industrial protections. To do this, the government must adopt and surpass the minimum standards set by multilateral institutions Australia is party to.

1.101 The government must work toward ratification of the ILO Convention on Violence and Harassment at Work (C.190), consistent with Recommendation 15 of the Respect@Work report.[44]

1.102 4.51 The Community and Public Sector Union argues:

> ILO Convention C.190 emphasises the importance of positive employer obligations to prevent violence and harassment in the workplace. As such,

[44] ACTU, *Submission 8*, pp. 23–24. See also, ACT Government, *Submission 51*, p. 5; Unions NSW, *Submission 9*, p. 1.

> C.190 obliges States to adopt laws to require employers to take steps, commensurate with their degree of control, to prevent workplace violence and harassment. This includes identification of hazards, assessment of risks and implementing relevant controls in consultation with workers and their representatives.
>
> The Respect@Work Report expressly supports the ILO Convention C. 190 approach and cites the Report's recommended regulatory model to be consistent with ILO Convention 190 and its accompanying Recommendation.[45]

Recommendation 9

1.103 The Australian Government undertake the necessary treaty implementation processes required to implement ILO Convention C190, consistent with Recommendation 15 of the Respect@Work report.

Conclusion

1.104 Australia's workplaces continue to provide inadequate prevention of, and protection from sexual and sex-based harassment. Labor laments the lack of action by the government in appropriately responding to the Respect@Work report. It has stood idly by while people, especially women, continue to be victimised in their workplaces.

1.105 It is shameful that the government has only introduced this legislation after its own rape, sexual assault and harassment scandals were revealed. The response is half-hearted and inadequate. Victims of sexual and sex-based harassment deserve much better and action is urgently needed to prevent future harm.

1.106 Labor calls on the government to fully implement the Respect@Work recommendations in the bill currently before the Parliament.

1.107 Labor condemns the government for its delay. Every day that passes without real action allows the scourge of sexual and sex-based harassment to continue in Australian workplaces across the country.

Recommendation 10

1.108 The Australian Government prepare amendments to implement in full the remaining recommendations of the Respect@Work report which are not addressed by the bill or in the recommendations above.

Senator Louise Pratt
Deputy Chair

Senator Deborah O'Neill
Member

[45] Community and Public Sector Union, *Submission 25*, p. 13.