

Committee Secretary  
Senate Education and Employment Committees  
PO Box 6100  
Parliament House  
Canberra, Australian Capital Territory 2600

***Via email: [eeccsen@aph.gov.au](mailto:eeccsen@aph.gov.au)***

9 July 2021

Dear Committee Secretary,

**Re: Sex Discrimination and Fair Work (Respect At Work) Amendment Bill 2021**

Please find enclosed a submission from the Victorian Pride Lobby on the Sex Discrimination and Fair Work (Respect At Work) Amendment Bill 2021.

The Victorian Pride Lobby is a community based advocacy group that works towards equality, social justice and advancing human rights for lesbian, gay, queer, bisexual and same-gender attracted Victorians.

We do not speak in the place of trans and gender diverse, intersex and asexual community members, but rather work constructively, cooperatively and respectfully with transgender, intersex, asexual and other community organisations to achieve social change for the LGBTIQ+ community.

Our submission recommends a number of changes to the Bill to strengthen protections for LGBTIQ+ workers. We welcome any opportunity to speak to you further to ensure that the Bill responds to the needs of LGBTIQ+ workers.

Yours sincerely,

**Nevena Spirovska and Evie Potter**  
Co-Convenors, Victorian Pride Lobby

## Understanding the issue

The Australian Human Rights Commission's *Respect @ Work: National Inquiry into Sexual Harassment in Australian Workplaces* found that lesbian, gay, bisexual, transgender, intersex or queer/questioning (LGBTIQ) workers are more likely to experience sexual harassment in the workplace.<sup>1</sup>

It reported results from *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces*:

- 47% of people who identify as gay or lesbian have been sexually harassed in the workplace in the last five years,<sup>2</sup> and 83% over the course of their lifetime;<sup>3</sup>
- 57% of people who identify as bisexual have been sexually harassed in the workplace in the last five years,<sup>4</sup> and 90% over the course of their lifetime;<sup>5</sup>
- 55% of people who identify as pansexual, queer, asexual, aromantic, undecided, not sure or questioning have been sexually harassed in the workplace in the last five years,<sup>6</sup> and 81% over the course of their lifetime;<sup>7</sup> and
- 77% of people with an intersex variation have been sexually harassed in the workplace in the last five years,<sup>8</sup> and 90% over the course of their lifetime.<sup>9</sup>

However, there is a lack of research on the factors that lead to greater exposure to sexual harassment for LGBTIQ workers.<sup>10</sup> One factor could be a lack of mainstream understanding of sexual orientation, gender diversity and variations in sex characteristics.<sup>11</sup> As a result much of the discussion around workplace sexual harassment is heteronormative and assumes a male harasser and female victim.<sup>12</sup> Intersex experiences are also elided. This excludes experiences of LGBTIQ workers.

Furthermore, LGBTIQ people may find it harder to report sexual harassment due to fear, stigma and experiences of discrimination.<sup>13</sup> A survey conducted by the St Kilda Legal Service found that LGBTIQ workers would be more likely to report workplace sexual harassment if they could remain anonymous.<sup>14</sup>

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<sup>1</sup> Australian Human Rights Commission, *Respect @ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 19, 299, 352, 653.

<sup>2</sup> Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 26.

<sup>3</sup> *Ibid* 22.

<sup>4</sup> *Ibid* 26.

<sup>5</sup> *Ibid* 22.

<sup>6</sup> *Ibid* 26.

<sup>7</sup> *Ibid* 22.

<sup>8</sup> *Ibid* 28.

<sup>9</sup> *Ibid* 23.

<sup>10</sup> Australian Human Rights Commission, *Respect @ Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 22, 174, 198, 301.

<sup>11</sup> *Ibid* 177.

<sup>12</sup> *Ibid* 178.

<sup>13</sup> *Ibid* 92, 177, 769.

<sup>14</sup> *Ibid* 698.

The Commission recommended that consistent information and education should be provided through a wide range of channels to ensure that guidance on workplace rights relating to sexual harassment is accessible, culturally appropriate and more effectively reaches LGBTIQ workers.<sup>15</sup> The 2020-21 Budget and 2021-22 Budget provided some funding for initiatives to prevent workplace sexual harassment, but nothing specifically targeted to LGBTIQ workers.

The Commission also recommended that agencies collect an agreed de-identified data set relating to workplace sexual harassment and formal arrangements for information sharing.<sup>16</sup> The Respect @ Work Council is currently working on this.

Finally, the Commission also recommended that education and training programs and initiatives to address sexual harassment be accessible and tailored for LGBTIQ workers.<sup>17</sup> There has been no discernable work on this to date.

## Developing appropriate responses

### Issue 1: Outdated terminology

Clause 31 of the Bill, which inserts a new object into the *Sex Discrimination Act*, refers to “men and women”. This is also so for the existing section 3(d). This does not include gender diverse people.

The clause also uses the phrase “equality of opportunity”, which is an outdated term for discrimination and equality law.<sup>18</sup>

We recommended amending clause 31 of the Bill to replace “to achieve, as far as practicable, equality of opportunity between men and women” with “to achieve, as far as possible, substantive equality on the basis of sex.”

We further recommend amending clause 3(d) of the *Sex Discrimination Act* to replace “equality of men and women” with “equality on the basis of sex.”<sup>19</sup>

### Issue 2: Narrow definition of ‘sex-based harassment’

Clause 60 of the Bill, which defines sex-based harassment, includes only harassment on the ground of sex. This does not include sexual orientation, gender identity or intersex status.

The clause also requires that the conduct be “seriously demeaning”. This is not required for the existing definition of sexual harassment at section 28A(1)(b) of the *Sex Discrimination Act* and

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<sup>15</sup> *Ibid* 395-396.

<sup>16</sup> *Ibid* 122.

<sup>17</sup> *Ibid* 676.

<sup>18</sup> Discrimination Law Experts Group, ‘Submission to the Department of Attorney-General and Justice, NT, Inquiry into the Modernisation of the *Anti-Discrimination Act*’ (5 February 2018) 9-10. For further discussion, see Australian Council of Trade Unions, Submission 8.

<sup>19</sup> This differs from the recommendation in Australian Human Rights Commission, Submission 19.

would, according to Professor Beth Gaze, set such a high threshold as to suggest that “sex-based harassment that is not seriously demeaning is acceptable.”<sup>20</sup>

We recommend:

- amending clause 60 lines 14-18 of the Bill to include “sexual orientation, gender identity, sex characteristics, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities” alongside “sex”; and
- amending clause 60 line 19 to 20 of the Bill to delete “of a seriously demeaning nature”.

### **Issue 3: Lack of any protections against sex-based harassment in *Fair Work Act***

Clauses 4-5 and 11-28 of the Bill, which provide protections against sexual harassment under the *Fair Work Act*, do not provide protections against sex-based harassment. This would, according to Professor Beth Gaze, suggest that sex-based harassment is not “a workplace health and safety issue or... serious misconduct.”<sup>21</sup>

### **Issue 4: Lack of general protections against sexual harassment in *Fair Work Act***

The Bill provides no explicit protections against sexual harassment or sex-based harassment under the general protections provisions at part 3-1 of the *Fair Work Act*. This means that a person who is subjected to sexual harassment will not be able to seek compensation under the *Fair Work Act* and would need to bring a claim under anti-discrimination laws at the federal or state level.

As Professor Beth Gaze writes, in relation to this and the prior issue, “both of these omissions demonstrate an ongoing reluctance to full integrate anti-discrimination principles into workplace law.”<sup>22</sup>

### **Issue 5: No costs protections for claimants in *Sex Discrimination Act***

The Bill provides no costs protections for claimants under the *Sex Discrimination Act*, unlike section 570 of the *Fair Work Act*. This will hinder access to justice for people who are subjected to sexual harassment and sex-based harassment.<sup>23</sup>

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<sup>20</sup> Beth Gaze, ‘Can the government get its workplace harassment laws right? Its bill is a missed opportunity’, *The Conversation* (30 June 2021). For further discussion, see Australian Council of Trade Unions, Submission 8 and Australian Human Rights Commission, Submission 19.

<sup>21</sup> Beth Gaze, ‘Can the government get its workplace harassment laws right? Its bill is a missed opportunity’, *The Conversation* (30 June 2021). For further discussion, see Australian Council of Trade Unions, Submission 8.

<sup>22</sup> Beth Gaze, ‘Can the government get its workplace harassment laws right? Its bill is a missed opportunity’, *The Conversation* (30 June 2021). For further discussion, see Australian Council of Trade Unions, Submission 8.

<sup>23</sup> For further discussion, see Madeleine Castles, Tom Hvala and Kieran Pender, ‘Rethinking *Richardson*: Sexual Harassment Damages in the #MeToo Era’ (forthcoming) *Federal Law Review* and Australian Council of Trade Unions, Submission 8.

## **Issue 6: No positive duty to eliminate discrimination or harassment**

The Bill provides no positive duty to eliminate discrimination, sexual harassment or sex-based harassment in the *Sex Discrimination Act*, unlike section 15 of the *Equal Opportunity Act*. Such a positive duty would enable employers to be held liable if they do not make sufficient efforts to prevent harassment or discrimination in their workplace.<sup>24</sup>

## **Issue 7: No protection of trans, gender diverse or intersex workers in *Fair Work Act***

The Bill provides no protections for trans, gender diverse and intersex workers from discrimination under sections 153, 195, 351 and 578 and termination under section 772 of the *Fair Work Act*.

## **Issue 8: Outdated religious exemptions**

The Bill does not address religious exemptions under sections 153, 195, 351 and 772 of the *Fair Work Act* and sections 23(3)(b), 37(1)(d) and 38 of the *Sex Discrimination Act*.

What this means is that many workers have no choice but to hide their sexual orientation or gender identity at work lest they face discrimination and termination. This is an unthinkable reality due to care-outs in our workplace laws. As a teacher, Sam Cairns describes:

*When I came out as a lesbian to myself, it was the most relieving experience I have ever felt. I worked as a teacher in a religious school at the time of self-discovery. As my private life was just that, I only told close friends and my family and was so thankful for their positive response. However, I still felt that I couldn't fully be myself because the consequence was to be terminated from my job. Yes, you read that correctly: being me would mean losing my job... So I said nothing and carried on living my life in secret. This led to some pretty serious health concerns reflecting back. I was having panic attacks and really serious anxiety due to having to live a double life. So, I decided to leave on my own terms because I felt like otherwise I was eventually going to be fired and I'd lose all the leave I had accrued over that period of seven years.*

Later, when she went back to her former employer on a short-term contract, she was abruptly terminated:

*I was called into the Vice Principal's office. I was told, pretty bluntly, 'We don't want you here.' They let me finish out the day but the contract was basically torn up... It's taken me a long time to get over what happened.*

There are over 200,000 jobs in Australia today where a worker can be fired because of their sexual orientation or gender identity. These include teachers, school staff, doctors and health workers. These laws are outdated and out of step with community values.<sup>25</sup>

We recommend:

<sup>24</sup> For further discussion, see Queensland Human Rights Commission, Submission 7, Australian Council of Trade Unions, Submission 8 and Australian Human Rights Commission, Submission 19.

<sup>25</sup> 'When being yourself can get you fired: LGBTQ+ workers and legal discrimination', *Megaphone Journal* (24 June 2021). For further discussion, see just.equal, Submission 16 and Sex and Gender Education, Submission 2.

- amending section 153(1) of the *Fair Work Act* to insert “gender identity, sex characteristics,” after “sexual orientation,”;
- repealing section 153(2)(b) of the *Fair Work Act*;
- amending section 195(1) of the *Fair Work Act* to insert “gender identity, sex characteristics,” after “sexual orientation,”;
- repealing section 195(2)(b) of the *Fair Work Act*;
- amending section 351(1) of the *Fair Work Act* to insert “gender identity, sex characteristics,” after “sexual orientation,”;
- repealing section 351(2)(a), 351(2)(c) and 351(3) of the *Fair Work Act*;
- amending section 578(c) of the *Fair Work Act* to insert “gender identity, sex characteristics,” after “sexual orientation,”;
- amending section 772(1)(f) of the *Fair Work Act* to insert “gender identity, sex characteristics,” after “sexual orientation,”;
- repealing section 772(2)(b) of the *Fair Work Act*; and
- repealing section 23(3)(b), 37(1)(d) and 38 of the *Sex Discrimination Act*.