MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO RESPECT@WORK – CONSULTATION ON REMAINING LEGISLATIVE RECOMMENDATIONS

18 MARCH 2022

Table of Contents

1. EXECUTIVE SUMMARY

The Minerals Council of Australia provides this submission on the Respect@Work – consultation on remaining legislative recommendations. The content of the submission will also be incorporated into the survey on Citizen Space to ensure that the information can be collated appropriately through the survey tool.

The minerals industry acknowledges that sexual harassment causes profound physical, emotional and psychological impacts to those affected. It is unacceptable, against the law and must be eliminated from our industry's culture and workplaces.

It is two years since the Australian Human Rights Commission released its Respect@Work Report. The minerals industry acted swiftly by:

- Establishing a Respect@Work led by directors of the MCA board
- Developing a new safety and health policy to specifically incorporate psychological harm and respectful behaviours
- Explicitly committed to eliminate sexual harassment in workplaces
- Adopted a National Industry Code on eliminating sexual harassment
- Published a comprehensive toolkit of resources to support industry.[1]

The industry acknowledges that we are only part way on the journey to eliminate sexual harassment. Regrettably, we cannot change the past, but we will change the future.

Through committed leadership, the MCA is implementing an industry response that recognises and prevents sexual harassment, empowers people to speak up and take action where behaviours do not meet expected standards, and that ensures appropriate responses to sexual harassment incidents, including support for impacted persons.

The industry is using its successful approach to managing safety and health and engaging with a broad range of stakeholders to encourage this essential cultural change across its business partners and within the communities in which the industry operates.

The minerals industry continues to critically discuss the opportunities and challenges in achieving its commitment to eliminate sexual harassment.

Summary of the MCA's recommendations

Hostile environment

The MCA submits that there is no clear benefit for legislative change to the SDA given that the legislative protections under the *Sex Discrimination Act 1984 (Cth)* (SDA), the *Fair Work Act 2009 (Cth)* (FWA), and the Work Health and Safety laws (WHS laws) and case law prohibit the creation of hostile work environments. If legislative change is to proceed, the duty should apply to all persons, consistent with WHS laws, which require workers to take reasonable care to ensure that their acts and omissions do not adversely affect the health and safety of others at the workplace.

Positive duty

While acknowledging that the duty exists under WHS laws, the MCA supports the inclusion of a positive duty in the SDA to highlight the significance of the challenge society faces.

[1] Minerals Council of Australia, *Safe, healthy and respectful workplaces,* MCA policy, 20 January 2021; *Minerals industry's commitment to eliminating sexual harassment,* 20 January 2021; *Industry Code on Eliminating Sexual Harassment,* 7 July 2021; *Respect@Work Toolkit*, 7 December 2021.

Enforcement powers

The MCA recommends the Australian Government consider conferring the enforcement powers in relation to the proposed positive duty under the SDA to the relevant WHS regulator, rather than setting up the Australian Human Rights Commission (AHRC) as a regulator.

Inquiry powers

The MCA supports providing the AHRC with new or additional inquiry powers to inquire into systemic unlawful discrimination, limited to matters involving discrimination under the Sex Discrimination Act (e.g. discrimination on the ground of sex, sex-based harassment and sexual harassment, not discrimination regulated by other legislation), and with specific conditions.

Representative actions

The MCA does not support the proposal to amend the Australian Human Rights Commission Act *(Cth)* 1986 (AHRC Act) to allow representative bodies to commence representative actions in the Federal Court in relation to anti-discrimination matters is not supported.

By their nature, sexual harassment cases are extremely personal and claimants may be in a psychologically fragile state and vulnerable to potential exploitation by third parties who have entirely different motivations (advocacy or political) than the claimant. The priority must be ensuring the claimant is not exposed to additional trauma.

Cost protections

The MCA considers it premature to consider which of the three proposed cost models is most appropriate before the research conducted by the Australian National University is completed.

About the Minerals Council of Australia

The MCA is the leading advocate for Australia's world-class minerals industry, promoting and enhancing sustainability, profitability and competitiveness. The MCA represents a sector that is dynamic, diverse, sustainable and valued by all Australians.

The purpose of the MCA is to:

- Advocate for social, economic and environmental public policy that supports a stronger, more sustainable minerals industry
- Work with industry to promote leading practice in safety, skills and training to develop the minerals workforce of the future
- Partner with communities, businesses and governments to maximise mining's contribution to Australia.

The MCA's vision is of a minerals industry comprised of nation builders and global leaders.

The MCA's mission is to secure:

- A minerals industry free of fatalities, injuries and diseases
- A skilled, diverse, productive and flexible workforce
- Policy settings conducive to economic growth and competitive access to resources
- Indigenous and community relationships built on trust and greater engagement
- Improved environmental performance throughout and beyond life of mine
- A measured transition to a zero-emissions global economy.

2. ISSUE 1: RECOMMENDATION 16(C) – HOSTILE WORK ENVIRONMENT

> *'providing that creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited'*

The MCA acknowledges that the sexual harassment provisions under the *Sex Discrimination Act 1984 (Cth)* (SDA) do not explicitly provide coverage for people who are indirectly exposed to conduct of a sexual nature.

Nevertheless, the MCA submits that when taken together, the legislative protections under the SDA, the *Fair Work Act 2009 (Cth)* (FWA), and the Work Health and Safety laws (WHS laws) and case law prohibit the creation of hostile work environments. The MCA considers that the government's priority must be on ensuring the existing legal framework is adequately enforced, supported and implemented through proper resourcing, raising awareness, and providing clear education and guidance materials to lead cultural change in Australian workplaces.

The MCA further notes that these matters are also covered by Work Health and Safety laws (WHS laws) and the FWA, with complaint mechanisms and remedies available.

As the consultation paper highlights, the duty under the model WHS laws is preventative rather than reliant on an incident actually occurring, meaning that penalties can be applied for exposing workers and others in the workplace to risks (such as sexual harassment).

In addition, the paper notes that Australian case law recognises the concept of a hostile work environment in relation to complaints of sexual harassment and sex discrimination. Australian anti-discrimination case law recognises that subjecting an employee to a hostile work environment that is sexual in nature can constitute sex discrimination and/or sexual harassment even if the conduct is not necessarily directed at a particular person.

It is therefore not clear what benefit legislative change to the SDA will bring. Further guidance material and education on the operation of the existing framework would sufficiently address this proposal.

If legislative change is to proceed, the duty should apply to all persons, consistent with WHS laws, which require workers to take reasonable care to ensure that their acts and omissions do not adversely affect the health and safety of others at the workplace.

An appropriate threshold is also required to ensure only relevant conduct would be captured and the interaction with existing frameworks.

3. ISSUE 2: RECOMMENDATION 17 – POSITIVE DUTY

> *'introducing 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'*

The MCA gave written and verbal evidence to the Senate Education and Employment Legislation Committee about its support for the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021.

The MCA supported the Bill as well as further amendments to the SDA, including a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation as far as possible, as recommended in the Respect@Work Report.

While a positive duty already exists in WHS law, it is evidently not working for sexual harassment. It has not been the focus of safety and health laws or those that regulate the laws. Further efforts are needed by WHS regulators and the Federal Government can play a role through participation in Safe Work Australia's development, training and resources for state based regulators.

Therefore, given the significance of the challenge we all face to eliminate sexual harassment, the MCA supports the inclusion of a positive duty in the SDA. This is consistent with the minerals industry focus on prevention and removing the legislative burden on those experiencing sexual harassment.

Further industry consultation on the regulatory tools to support the positive duty is required, including application of the duty, and to whom it applies, and any offences and penalties that may arise.

The MCA is of the view that all businesses should have this positive duty as they do under WHS laws, and that the duty be qualified by what is reasonably practicable.

Legislative reform only represents one component of the many actions required to achieve enduring positive societal change. Australian governments also have a role in providing national leadership and supporting workplaces through the development of education and awareness campaigns, training and guidance materials.

Industry leadership is also crucial and the Australian minerals industry has developed a National Industry Code on eliminating sexual harassment, which itself is a positive duty on industry[2].

MCA members are required (as a condition of membership) to confirm their commitment to eliminating sexual harassment and adopt the national industry code. They are also encouraged to share the commitment and code with their contractors and suppliers and place them on their websites and intranet sites.

The minerals industry believes that measuring and monitoring compliance is fundamental to achieving outcomes. MCA member companies have adopted Towards Sustainable Mining (TSM), an award winning accountability framework which helps minerals companies evaluate, manage and communicate their sustainability performance.

Adopting the independently verified system will reinforce the sector's commitment to continuous improvement in safety, environmental and social governance. TSM strengthens Enduring Value – the Australian minerals industry's sustainable development framework – by providing a consistent approach to assess and communicate site level performance in a transparent and accountable way.

TSM covers three core areas – communities and people, environmental stewardship, and climate change. There are eight protocols within the core areas including a safety and health protocol which is part of the communities and people area.

Companies will be required to evaluate their safety and health performance against TSM indicators that support implementation of the TSM Safety and Health Protocol, which will incorporate sexual harassment measures.

---

[2] Minerals Council of Australia, *Industry Code on Eliminating Sexual Harassment*, 7 July 2021

TSM will be rolled out over five years and adoption will be an expectation of MCA membership. Companies will publicly report against TSM indicators every year and results are externally verified every three years.

4. ISSUE 3: RECOMMENDATION 18 – ENFORCEMENT POWERS FOR THE AUSTRALIAN HUMAN RIGHTS COMMISSION

'providing the AHRC with the function of assessing compliance with the positive duty, and for enforcement,

The issue of who enforces the proposed positive duty in the SDA is complex. Given the significant overlap with WHS laws, an additional regulator with enforcement powers for the same risk would be disruptive and also result in inconsistent interpretations and enforcement measures.

WHS regulators are best placed to regulate the proposed positive duty as they are already empowered to regulate the broad safety and health positive duty, including a range of other psychological risks bullying, mental health, discrimination etc.

The MCA recommends the Australian Government consider conferring the enforcement powers in relation to the proposed positive duty under the SDA to the relevant WHS regulator, rather than setting up the Australian Human Rights Commission (AHRC) as a regulator. The AHRC would be better placed to continue supporting the regulator and the community through providing advice, education, guidance and dispute resolution, rather than assuming an enforcement function.

There is also merit in exploring a role for the AHRC regarding enforceable undertakings, whereby an individual can bring forward a complaint and the AHRC can investigate a suspected contravention of the positive duty that is serious in nature, relates to a class or group of persons and cannot reasonably be expected to be resolved by dispute resolution. The AHRC could then enter into an agreement (referenced with appropriate links with WHS law to enable an enforceable undertaking and consequences for failing to the complete the undertaking) with a person about action required to comply with the SDA. This has some similarities with the Victorian Equal Opportunity and Human Rights Commission's responsibilities for the positive duty under the *Equal Opportunity Act 2010* (Vic).

To enhance WHS regulators capability, MCA strongly supports the implementation of consistent regulator education and training (as per Recommendations 34-37) on the nature, drivers and impacts of sexual harassment and that this involve trauma-informed inspection and compliance training in line with the principles of *Change the Story* so as not to further harm victims.

5. ISSUE 4: RECOMMENDATION 19 – INQUIRY POWERS FOR THE AUSTRALIAN HUMAN RIGHTS COMMISSION

'providing the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination, including sexual harassment'

The MCA supports providing the AHRC with new or additional inquiry powers to inquire into systemic unlawful discrimination, limited to matters involving discrimination under the Sex Discrimination Act (e.g. discrimination on the ground of sex, sex-based harassment and sexual harassment, not discrimination regulated by other legislation), and with specific conditions.

There should be a responsibility to consult with potentially affected entities that would be the subject of an inquiry, including industry bodies in the case of a sectoral inquiry, professional bodies in the case of an occupation/profession inquiry and regional representatives in case of geographic-based inquiries.

Investigatory powers including - the giving of information, production of documents and examination of witnesses, with penalties applying for non-compliance, must be carefully defined to reduce the risk of overlap or interference with matters that may form part of current or future criminal proceedings and broader government or parliamentary inquiries, and that parties to disputes are not denied procedural fairness or natural justice.

Furthermore, AHRC-directed inquiries must not result in discrimination and reputational damage to those parties who, with valid reason, refuse to participate for fear of evidence to an inquiry being used against them under alternative laws.

Overarching the consideration of additional powers must be the importance of maintaining the independence of the AHRC, as this may be diminished where they seek to play both a conciliatory and investigatory role.

6. ISSUE 5: RECOMMENDATION 23 – REPRESENTATIVE ACTIONS

'enabling representative bodies to bring representative claims to court'

The proposal to amend the Australian Human Rights Commission Act to allow representative bodies to commence representative actions in the Federal Court in relation to anti-discrimination matters is not supported.

Representative bodies are already able to provide financial, legal and other support to individuals and groups to pursue litigation.

It is appropriate that government and independent regulators only, are empowered to bring actions before the courts.

The MCA agrees with the Australian Government that while representative groups can bring a representative complaint to the AHRC on behalf of one or more people aggrieved by conduct amounting to unlawful discrimination, this approach may be appropriate for conciliation in the AHRC. However, different considerations apply in the context of proceedings before a court.

The MCA agrees with the consultation paper, which notes that there is contention about whether representative proceedings are the appropriate mechanism for resolving workplace anti-discrimination matters, particularly sexual harassment, given the factual complexities and differences in employment relationships

Enabling representative bodies to play an increased role in representative proceedings in the anti-discrimination space could introduce biases and result in targeted or vexatious campaigns against particular individuals or employers.

By their nature, sexual harassment cases are extremely personal and claimants may be in a psychologically fragile state and vulnerable to potential exploitation by third parties who have entirely different motivations (advocacy or political) than the claimant.

This can negatively impact the preferred victim centric approach to responding and the need to be able to address these matters with regards to the specific claims.

The priority must be ensuring the claimant is not exposed to additional trauma.

7. ISSUE 6: RECOMMENDATION 25 – COST PROTECTIONS

> *'inserting a cost provision into the AHRC Act to provide that a party to proceedings may only be ordered to pay the other party's costs in limited circumstances'*

The MCA notes that that since the recommendation was made, the government engaged a team of academics from the Australian National University, led by Emerita Professor Margaret Thornton FASSA, FAAL, to undertake research and collect data on cost procedures and damages in sexual harassment matters. This data, case research and analysis will inform this consultation process and broader consideration of this recommendation.

Therefore, it is premature to consider which of the three proposed below models is most appropriate.