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# **Submission to the Review of the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021**

Senate Education and Employment Legislation Committee

Submission by the Attorney-General's Department

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## Abbreviations

|                     |   |
|---------------------|---|
| AHRC                | Australian Human Rights Commission  |
| AHRC Act            | <i>Australian Human Rights Commission Act 1986</i>  |
| Department          | Attorney-General's Department   |
| Bill                | Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021  |
| FC                  | Federal Court   |
| FCC                 | Federal Circuit Court<br><br><i>Note: Following the commencement of the <i>Federal Circuit and Family Court of Australia Act 2021</i> and the <i>Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021</i>, the Federal Circuit Court will continue in existence, and be known as the Federal Circuit and Family Court of Australia (Division 2).</i> |
| FW Act              | <i>Fair Work Act 2009</i>   |
| FW Regulations      | <i>Fair Work Regulations 2009</i>   |
| FWC                 | Fair Work Commission  |
| PCBU                | A person conducting a business or undertaking   |
| Respect@Work Report | Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020) Report  |
| Roadmap             | A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021)  |
| SD Act              | <i>Sex Discrimination Act 1984</i>  |
| SRC Act             | <i>Safety, Rehabilitation and Compensation Act 1988</i>   |
| SWA                 | Safe Work Australia   |
| WHS Act             | <i>Work Health and Safety Act 2011</i>  |
| WHS Regulations     | <i>Work Health and Safety Regulations 2011</i>  |

## Introduction

1. The Attorney-General's Department (the department) welcomes the Senate Education and Employment Legislation Committee's review of the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (the Bill).
2. In 2018, the Government funded the Australian Human Rights Commission (AHRC) to undertake the National Inquiry into Sexual Harassment in Australian Workplaces. The Terms of Reference for the inquiry were focussed on identifying and making recommendations in relation to the prevalence, drivers and impacts of sexual harassment in the workplace, and the current legal framework with respect to sexual harassment. At the federal level, this legal framework is made up of Australia's anti-discrimination laws, particularly the *Sex Discrimination Act 1984* (SD Act) and *Australian Human Rights Commission Act 1986* (AHRC Act); as well as the *Fair Work Act 2009* (FW Act) and the *Work Health and Safety Act 2011* (WHS Act).
3. While the Respect@Work Report notes that the terms 'sexual harassment', 'sexual abuse' and 'sexual assault' are sometimes used interchangeably within the community,<sup>1</sup> the legal and regulatory recommendations outlined in the Report propose improvements to the framework for sexual harassment, and not the criminal law which deals with sexual assault.
4. The product of this inquiry – the Respect@Work: National Inquiry into Sexual Harassment in the Workplace Report (Respect@Work Report) – sets out 55 recommendations directed to the Government, states and territories, employers, and industry groups to support cultural change and ensure safe workplaces in Australia. The recommendations are informed by significant consultation with a broad range of stakeholders, with the AHRC receiving 460 submissions, and conducting numerous meeting with stakeholders including 60 consultations across Australia with more than 600 participants and three roundtables.<sup>2</sup>
5. The Government set out its response to the Respect@Work Report in the 'Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces' (the Roadmap). Through the Roadmap, the Government agreed (in full, in part or in principle) or noted all recommendations across the five key areas of focus: data and research, primary prevention, the legal and regulatory framework, workplace prevention and response, and support, advice and advocacy. More than \$22 million has been committed by the Government through the 2020-21 and 2021-22 Budgets to progress implementation of the Roadmap.
6. The Bill implements the Government's commitments in response to recommendations 16, 20, 21, 22, 29 and 30 of the Respect@Work Report to strengthen the national anti-discrimination and industrial relations laws. The Bill would amend the AHRC Act, the FW Act and the SD Act to simplify and enhance protections, and reduce procedural barriers for complainants, with respect to sex-based discrimination and sexual harassment in the workplace. In addition to better preventing and addressing this conduct, the measures contained in the Bill would also

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<sup>1</sup> Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020) Report, page 653.

<sup>2</sup> Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020) Report, page 14.

make it easier for people to understand their obligations and rights in the workplace. Strengthening the national framework that deals with sexual harassment will also send a strong signal for cultural change. While no changes are being made to the criminal law, better preventing sexual harassment may also reduce the incidence of sexual assault.<sup>3</sup>

7. The Bill also amends the FW Act to enable an employee to take compassionate leave if they, or their spouse or de facto partner, has a miscarriage. This amendment will promote women's workforce participation and, more broadly, women's economic security.
8. The Bill was drafted in consultation with key stakeholders, including from industry, workplace regulators, employer and employee representative groups, state and territory governments, the Respect@Work Council and the Sex Discrimination Commissioner, Kate Jenkins, who authored the Respect@Work Report.
9. The Bill represents a significant step in preventing and addressing workplace sexual harassment in Australia, and is complemented by other work underway, including to improve work health and safety frameworks (recommendation 35) and clarify in the *Fair Work Regulations 2009* (FW Regulations) that sexual harassment can amount to serious misconduct warranting immediate dismissal from the workplace (recommendation 31).
10. Following passage of this legislation, the Government will continue to progress remaining recommendations in line with its commitments in the Roadmap.

### Overarching federal legal frameworks

11. At a national level, the anti-discrimination laws, FW Act and WHS laws operate in unison to ensure safe workplaces, free from discrimination and harassment. If a person experiences sex-based discrimination or harassment in the workplace, they may seek to address the conduct using mechanisms available under those laws (see **Appendixes A – D**).
12. Internal workplace complaint mechanisms should also be used to resolve disputes. Further, some conduct may be more appropriately dealt with by the police, especially if it constitutes a criminal offence.

### Federal anti-discrimination law framework

13. The SD Act makes it unlawful to discriminate against a person in specified areas of public life because of their sex, gender identity, intersex status, sexual orientation, marital or relationship status, family responsibilities, because they are pregnant or might become pregnant or because they are breastfeeding.
14. Sections 28B through to 28L of the SD Act prohibit sexual harassment in the context of employment (including partnerships), education, the provision or receipt of goods, services and facilities, the provision of accommodation, dealing with land, by clubs and in the

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<sup>3</sup> The Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020) Report provides examples of incidences of sexual assault which may have culminated in circumstances where sexual harassment was not adequately addressed and the harassment became increasingly violent (see page 126 for example).

administration of Commonwealth laws and programs. These areas of public life are broadly consistent across the other federal anti-discrimination Acts. Sexual harassment may simultaneously be prohibited by one or more of these provisions, such as through employment (section 28B) and the provision of goods and services (section 28G).

15. Sexual harassment is defined in section 28A of the SD Act to mean an unwelcome sexual advance, request for sexual favours or other unwelcome conduct of a sexual nature, where a reasonable person having regard to all the circumstances would have anticipated the possibility that the person being harassed would be offended, humiliated or intimidated.
16. The SD Act sits alongside Australia's other federal anti-discrimination laws: the *Racial Discrimination Act 1975*, *Disability Discrimination Act* and the *Age Discrimination Act 2004*. The AHRC Act establishes the AHRC as an independent statutory agency responsible for administering this federal anti-discrimination framework.
17. In the first instance, all complaints of discrimination under a federal anti-discrimination law must be made to the AHRC. Where a complaint is made, the President can bring together the different parties to try to resolve the complaint through conciliation. This mechanism is designed to encourage complainants to attempt conciliation before proceeding to civil litigation. Importantly, the AHRC is not a court and so cannot determine whether particular conduct has occurred.<sup>4</sup>
18. If a complaint is not resolved through conciliation, or the complaint is discontinued for another reason (such as circumstances where there is no reasonable prospect of the matter being settled by conciliation), a complainant can initiate civil proceedings in the Federal Court of Australia (FC) or the Federal Circuit Court of Australia (FCC).<sup>5</sup>

#### Federal industrial relations framework

19. Australia's national industrial relations framework for 'national system' employers and employees is provided by the FW Act.<sup>6</sup> The FW Act contains a number of protections from workplace discrimination, harassment and victimisation, which complement the anti-discrimination laws.
20. The general protections provisions<sup>7</sup> include protections for employees from 'adverse action' by their employer for certain discriminatory reasons or because of their exercise of a workplace right, such as making a complaint about sexual harassment under the SD Act.

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<sup>4</sup> Further information on the complaints process is available on the AHRC's website at: <https://humanrights.gov.au/complaints/complaint-guides/complaint-process-0>.

<sup>5</sup> Further information about bringing civil proceedings in the FC or FCC for human rights matters is available at: <https://www.fedcourt.gov.au/law-and-practice/guides/human-rights> and <http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/gfl/human-rights/>.

<sup>6</sup> Some state public service and local government employees remain under state systems. Further information on the coverage of the FW Act is available on the Fair Work Ombudsman's website at: <https://www.fairwork.gov.au/about-us/legislation/the-fair-work-system#who-is-covered>.

<sup>7</sup> Further information on the general protections provisions is available on the FWC's website at: <https://www.fwc.gov.au/resources/benchbooks/general-protections-benchbook>.

Adverse action can include dismissing the employee, or actions that result in a loss of pay, reduction in rank, or any deterioration of the advantages enjoyed by the employee.

21. The FW Act also contains multiple actions provisions, which prevent a person from making an application or complaint under a Commonwealth, state or territory anti-discrimination law and under the general protections provisions in the FW Act in relation to the same conduct.
22. The unfair dismissal provisions<sup>8</sup> are also a relevant consideration for employers in their management of workplace sexual harassment complaints. The provisions confer a discretion on the Fair Work Commission (FWC) to assess whether an eligible employee's dismissal was harsh, unjust or unreasonable, taking into account a range of factors set out at section 387. These factors include whether there was a 'valid reason' for the dismissal. If the FWC is satisfied that a person has been unfairly dismissed, it may order the person's reinstatement or compensation.
23. The anti-bullying provisions<sup>9</sup> enable a worker who has been bullied at work to apply to the FWC for a 'stop bullying order'. This remedial measure is currently available where sexual harassment constitutes bullying, that is, repeated unreasonable behaviour that creates a risk to health and safety. The anti-bullying provisions are intended to protect workers from future harm rather than to punish bad behaviours, and so cannot include a requirement to pay compensation.

#### Model Work Health and Safety laws

24. The model WHS laws establish a statutory framework to promote and provide safe workplaces that are free from sexual harassment (among other hazards). Each jurisdiction is responsible for implementing, regulating and enforcing WHS laws within its own jurisdiction and a person who is subjected to sexual harassment can request the assistance of a jurisdictional WHS regulator who can investigate alleged breaches of WHS laws.
25. The model WHS laws were developed by Safe Work Australia (SWA) and are the central plank of Australia's harmonised legislative WHS framework, with all jurisdictions, except Victoria and Western Australia, having implemented laws based on the model legislation. Victoria has similar laws in place and Western Australia recently passed a new WHS Bill based on the model WHS Act, which is expected to commence in 2022. Each jurisdiction is responsible for implementing, regulating and enforcing WHS laws within its own jurisdiction. Comcare is the WHS regulator in the Commonwealth jurisdiction.
26. Under the model WHS laws, 'persons who conduct a business or undertaking' (PCBU), such as employers, are required to eliminate or otherwise minimise health and safety risks so far as is reasonably practicable. The model WHS laws define 'health' to include both physical and psychological health. Sexual harassment in the workplace is recognised as a hazard and risk to

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<sup>8</sup> Further information on the unfair dismissal provisions is available on the FWC's website at: <https://www.fwc.gov.au/resources/benchbooks/unfair-dismissals-benchbook>.

<sup>9</sup> Further information on the anti-bullying provisions is available on the FWC's website at: <https://www.fwc.gov.au/resources/benchbooks/anti-bullying-benchbook>.

health and safety which can be physical and/or psychological. Workers and other persons at a workplace also have a duty to ensure their acts and omissions do not adversely affect the health and safety of other persons while at work. This includes not subjecting others to sexual harassment.

27. The WHS framework is predicated on a risk management approach and contains mechanisms for preventing and responding to sexual harassment in the workplace. Under the model WHS laws, PCBU's (such as employers), have a positive duty to ensure that all persons in the workplace are not exposed to health and safety risks. This includes psychosocial risks such as sexual harassment and requires the risks to be eliminated or minimised so far as is reasonably practicable.
28. Importantly, there is currently a specific and unqualified obligation under WHS laws to provide a safe work environment (subject only to the reasonably practicable limitation). Intimidating, hostile, humiliating or offensive environments would be considered a risk under WHS laws on any basis, including where the environment results from sexual harassment.
29. The model WHS framework adopts a three-tiered approach which includes broad, overarching general duties in the model WHS Act, and more detailed provisions in the model WHS Regulations and model Codes of Practice. On 20 May 2021, WHS Ministers agreed to amend the model WHS regulations to deal with how to identify psychosocial risks, including sexual harassment, associated with psychological injury. When the amendments to the regulations are implemented, the WHS framework for preventing sexual harassment will consist of three important tiers:
  - a broad primary duty of care in the WHS Act, which includes a positive duty to prevent sexual harassment
  - specific psychosocial regulations which provide detail about how the general duty must be met, and
  - a code of practice which provides even greater detail about what is known about the hazard and risks and how to best manage them.
30. WHS laws provide for compliance, enforcement and inquiry functions to be exercised by jurisdictional WHS regulators. WHS regulators undertake proactive activities such as education and awareness raising to ensure PCBU's are informed of their duties. Compliance activities may include inspections, audits and other verification activities. Failure of duty holders to meet obligations under WHS laws can result in prosecution and severe penalties for individuals, PCBU's and body corporates.
31. In practice, this WHS framework requires a proactive approach to eliminating or minimising risks to health and safety. While recognising that each workplace is different, the WHS laws require PCBU's to undertake a range of measures to meet their obligations, for example to:
  - assess the level of risk at the particular workplace and the effectiveness of existing measures



- provide a safe physical environment for workers
  - address unwanted or offensive behaviour early
  - encourage workers to report sexual harassment and manage reports sensitively
  - take action where appropriate, for example disciplinary action against perpetrators, and
  - use information, instruction, training and supervision to support the overall prevention strategy.
32. Both SWA and Comcare have published guidance on workplace sexual harassment. SWA has published national guidance material on preventing workplace sexual harassment under the model WHS laws.<sup>10</sup> Comcare has published guidance for employers, managers, supervisors and workers on meeting WHS responsibilities in relation to sexual harassment in the Commonwealth jurisdiction.<sup>11</sup>

### Workers' Compensation

33. Workers' compensation in Australia is a shared responsibility, with the Commonwealth, states and territories each establishing their own workers' compensation schemes. Workers' compensation schemes generally cover employees and provide compensation for work-related injuries and diseases, including those resulting from sexual harassment.
34. The *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) establishes the Commonwealth workers' compensation scheme. Compensation under the SRC Act may include medical expenses, incapacity payments, household services and attendant care services. Compensation for reasonable medical treatment is payable for as long as such treatment is reasonably required.

### Overview of the measures included in the Bill

35. The measures in the Bill to implement the Government's commitments in the Roadmap would strengthen, clarify and streamline the legal framework with respect to workplace sexual harassment by ensuring all workers are protected from sex-based discrimination and sexual harassment, making it easier for PCBUs and workers to understand and navigate the system, and reducing procedural barriers.

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<sup>10</sup> Safe Work Australia, 'Preventing workplace sexual harassment: National guidance material' (January 2021); available online at: <https://www.safeworkaustralia.gov.au/doc/preventing-workplace-sexual-harassment-guide>.

<sup>11</sup> Guidance materials are available on Comcare's website: <https://www.comcare.gov.au/safe-healthy-work/prevent-harm/workplace-sexual-harassment>.

36. The Bill would **ensure all workers are protected** from sex-based discrimination and sexual harassment by:
- guiding decision-makers to consider the goal of achieving equality of opportunity, so far as practicable, between men and women when considering a complaint
  - ensuring all workers are protected from sex-based discrimination and harassment, and
  - ensuring that a person who assists another person to sexually harass someone can also be found to have engaged in the conduct (ancillary liability).
37. The Bill would make it **easier to understand and navigate the framework**, by:
- clarifying that the FWC may make orders to stop sexual harassment in the workplace
  - clarifying the operation of the existing prohibition against workplace sexual harassment
  - clarifying that sex-based harassment is prohibited and can form the basis of a complaint, and
  - clarifying that sexual harassment can be a valid reason for dismissal under the FW Act.
38. The Bill would **reduce procedural barriers** by:
- clarifying that a person can make a civil or criminal complaint of victimisation, and
  - extending the timeframe for which a complaint of sex-based discrimination or sexual harassment can be made to the AHRC.
39. See **Appendixes A – D** for an overview of how these measures would strengthen the protections for workers under the existing federal framework.
40. The Bill would also amend the FW Act to enable an employee to take compassionate leave if they, or their current spouse or de facto partner, has a miscarriage.
41. Detailed information on the background and drafting of these amendments, together with examples, can be found in the Explanatory Memorandum.

#### Clarify that sex-based harassment is prohibited

42. The Bill would clarify that ‘sex-based harassment’ – which is already recognised as a prohibited form of discrimination in case law – is expressly prohibited in the SD Act.<sup>12</sup> Sex-based harassment refers to circumstances where a person experiences harassing conduct on the basis of their sex, but that is not sexual in nature. This amendment would give effect to

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<sup>12</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 60.

the Government's commitments under the Roadmap in relation to recommendation 16(b) of the Respect@Work Report.<sup>13</sup>

43. The practical effect of this amendment is to put beyond doubt that sex-based harassment is prohibited and ensure that a person who experiences such conduct has a clear, streamlined pathway for addressing that conduct (see **Appendix B**).
44. Under the Bill, sex-based harassment is defined as unwelcome conduct of a seriously demeaning nature that is engaged in by reason of the person's sex in circumstances in which, in line with the existing test for sexual harassment, a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated. The term 'unwelcome conduct' and the reasonable person test are based on existing concepts in the SD Act,<sup>14</sup> which are regarded by the case law as setting an appropriate threshold for the type of conduct that should be unlawful. The concept of 'seriously demeaning' was developed to reflect the type of conduct that has been found to constitute sex-based harassment in the case law.
45. Specific examples are outlined in the Explanatory Memorandum. Depending on the circumstances, conduct that might constitute sex-based harassment includes:
  - Asking intrusive personal questions based on a person's sex.
  - Making inappropriate comments and jokes to a person based on their sex.
  - Displaying images or materials that are sexist, misogynistic or misandrist.
  - Making sexist, misogynistic or misandrist remarks about a specific person.
  - Requesting a person to engage in degrading conduct based on their sex.
46. This amendment would strengthen the anti-discrimination law framework by clarifying on the face of the SD Act that this type of conduct – harassment on the basis of sex – is unlawful. A person who experiences sex-based harassment will have a clear, streamlined pathway for addressing that conduct, rather than relying on existing sexual harassment (to the extent the conduct involved can be classified as sexual in nature) or sex discrimination provisions. In addition, the amendments would highlight to employers and the broader community that this type of conduct is not acceptable.

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<sup>13</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), pages 12-13.

<sup>14</sup> See for example, *Sex Discrimination Act 1984*, subsection 28A(1).

## Protecting all workers from sex-based discrimination and harassment

47. The Bill would ensure all workers are protected from sexual harassment under the SD Act by:
- clarifying that members of parliament, judges and staff of parliamentarians at all levels of government are covered by the Act<sup>15</sup>
  - removing the exemption of state and territory public servants in section 13,<sup>16</sup> and
  - extending coverage of the existing protection from workplace sexual harassment in section 28B to cover all workers and workplaces.<sup>17</sup>
48. These amendments would give effect to the Government's commitments under the Roadmap in relation to recommendations 16(d) and (e) of the Respect@Work Report.<sup>18</sup>
49. To clarify that members of parliament, judges and staff of parliamentarians at all levels of government are covered by the SD Act, the Bill would expressly mention a member of parliament, a person employed under the *Members of Parliament (Staff) Act 1984* and a person who holds a Commonwealth judicial office under the definition of 'Commonwealth employee'.<sup>19</sup> The Bill would also introduce an equivalent definition of 'state employee'.<sup>20</sup> This amendment goes beyond the recommendations of the Respect@Work Report and complements other work underway in response to reports of serious incidents that occur during parliamentary employment, including the Review of the Parliamentary Workplace: Responding to Serious Incidents.<sup>21</sup>
50. Significantly, these amendments would strengthen the anti-discrimination law frameworks by removing existing gaps in coverage and providing employers and the broader community with greater clarity about the application of the SD Act.
51. To ensure state and territory public servants are covered by the SD Act in the same way as all other workers, the Bill would remove the existing exemption of state and territory public servants from protections for workplace discrimination and sexual harassment in section 13.<sup>22</sup> This would bring the SD Act in line with other federal anti-discrimination laws, which do not provide exemptions for state public servants.<sup>23</sup> Consequential amendments are made by the

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<sup>15</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, items 33 to 37, and 40.

<sup>16</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 48.

<sup>17</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, items 40 (definitions of worker and person conducting a business or undertaking), 60 (meaning of worker in a business or undertaking) and 63 (amendments to the sexual harassment prohibition).

<sup>18</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), pages 12 and 13.

<sup>19</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 35.

<sup>20</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, items 37 and 40.

<sup>21</sup> Review of the Parliamentary Workplace: Responding to Serious Incidents (2021).

<sup>22</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 48.

<sup>23</sup> Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020) Report, page 468.

Bill,<sup>24</sup> particularly to ensure a state or territory public servant could make a complaint about their employer.<sup>25</sup>

52. To ensure all workers are protected from sexual harassment, the Bill would amend the existing protection from workplace sexual harassment in section 28B to more closely align with the protection in the model WHS law.<sup>26</sup> By adopting the concepts of ‘worker’ and ‘PCBU’ used in the model WHS laws, volunteers, interns and self-employed persons would be brought under the SD Act protection in addition to employees, commission agents and contractors who are already covered.<sup>27</sup> As a result some workers, such as self-employed persons, may be protected in more than one way under the SD Act, for example if they are harassed in connection with their work (section 28B) and also when providing a good or service (section 28G).
53. Collapsing the concepts of commission agents and contractors in section 28B under the concept of worker also provides an opportunity to make the existing operation of section 28B clearer. In response to feedback that the existing operation of the section is confusing and unclear, the Bill would simplify the drafting to make it clear that a person is protected from sexual harassment that occurs in connection with their work or the harasser’s work. Using the broader concepts of worker and PCBU also futureproofs the protection by making the coverage more flexible to the different types of workers that may emerge in the evolving world of work.
54. Simplifying section 28B and making its existing operation clearer gives effect to the Government’s commitment in the Roadmap to make the system for addressing sexual harassment in the workplace easier for employers and workers to understand and navigate.<sup>28</sup>

### Prohibiting a person from assisting another person to engage in sexual harassment or sex-based harassment

55. The Bill would ensure that a person who causes, instructs, induces, aids or permits someone else to engage in sex-based harassment or sexual harassment can also be found to have engaged in the unlawful conduct, by expanding the ancillary liability provision (section 105) in the SD Act.<sup>29</sup>
56. This amendment would give effect to the Government’s commitments under the Roadmap in relation to recommendation 20 of the Respect@Work Report.<sup>30</sup>

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<sup>24</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 87.

<sup>25</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 47.

<sup>26</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, items 40 (definitions of worker and person conducting a business or undertaking), 60 (meaning of worker in a business or undertaking) and 63 (amendments to the sexual harassment prohibition).

<sup>27</sup> Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020) Report, page 466.

<sup>28</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), pages 12 and 13.

<sup>29</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 86.

<sup>30</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), pages 12 and 15.

57. A person can already be found to have ancillary liability for causing, instructing, inducing, aiding or permitting someone else to engage in sex-based discrimination. This amendment would therefore address a gap in coverage by ensuring a person can also be found to have ancillary liability in the same circumstances for sex-based harassment and sexual harassment.

#### Clarifying that victimisation can be addressed as a civil and criminal matter

58. Victimising conduct occurs when a person threatens or subjects another person to some form of detriment because they are taking action to address discrimination or harassment, such as making a complaint, cooperating with an investigation or attending conciliation.
59. The Bill would clarify that victimising conduct can form the basis of a civil action for unlawful discrimination under the SD Act, by inserting a new civil provision prohibiting victimising conduct (section 47A) that would operate separately from existing subsection 94(1), which remains a criminal offence.<sup>31</sup> A consequential amendment would also be made to the definition of ‘unlawful discrimination’ in the AHRC Act.<sup>32</sup> The practical effect of this measure is to make it easier for a person to resolve their complaint by making it clear they can initiate civil proceedings in the FC or FCC if a complaint of victimisation cannot be resolved at conciliation, is otherwise terminated by the AHRC or does not warrant criminal action (see **Appendix D**).
60. These amendments would give effect to the Government’s commitment under the Roadmap in relation to recommendation 21 of the Respect@Work Report.<sup>33</sup>
61. This measure addresses judicial uncertainty that has arisen in relation to the prohibition of victimising conduct under the SD Act. Prior to 2011, the case law held that the victimisation provision in subsection 94(1) of the SD Act could give rise to both civil and/or criminal proceedings. This was because the definition of ‘unlawful discrimination’ in section 46PO of the AHRC Act specifically captured this provision, meaning someone could make a complaint of unlawful discrimination in relation to victimising conduct to the AHRC. However, there have been three cases since 2011 that questioned whether the FCC or the FC has jurisdiction to hear a civil application of ‘unlawful discrimination’ under the AHRC Act that relates to victimisation.<sup>34</sup> This legal uncertainty has primarily arisen because subsection 94(1) of the SD Act is set out as a criminal offence.
62. In short, this amendment reduces ambiguity and uncertainty in the existing anti-discrimination law framework by making it explicit that victimisation under the SD Act can be addressed through civil or criminal processes. This ensures that workers who experience victimisation will have clear and distinct avenues to address the conduct and seek appropriate remedies (see **Appendix D**).

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<sup>31</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 77.

<sup>32</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, items 2 to 3.

<sup>33</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), pages 13 and 15.

<sup>34</sup> Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report (2020), page 490.

63. As outlined in the Explanatory Memorandum, this amendment is not intended to create ambiguity in relation to the other Commonwealth anti-discrimination Acts, which contain similar victimisation provisions.<sup>35</sup>

#### Extending the time period to make a complaint under the AHRC Act

64. The Bill would provide more time for a person to make a complaint to the AHRC under the SD Act without facing the possibility that the President of the AHRC may terminate the complaint due to a delay in lodging it with the AHRC. Currently, the President has the discretion to terminate a complaint if it is not made within six months of the conduct occurring.<sup>36</sup> Under the Bill, the six month timeframe would be extended to 24 months,<sup>37</sup> so that potential complainants have sufficient time to come to terms with the conduct before initiating a complaint. This measure would implement the Government's commitment under the Roadmap in relation to recommendation 22 of the Respect@Work Report.<sup>38</sup>
65. The Respect@Work Report highlighted the complex reasons that could cause a delay in making a sexual harassment complaint and recommended extending this timeframe from six months to 24 months to reduce procedural barriers for complainants.<sup>39</sup>
66. This amendment would reduce procedural barriers in the anti-discrimination framework for people who have experienced sexual harassment (see **Appendix A**). It would also reduce the confusion for applicants about when a complaint must be made and reassure them that delays in making a complaint will not result in their complaint being dismissed.

#### Making the object of the SD Act clearer

67. The Bill would amend the object clause at section 3 of 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.<sup>40</sup>
68. The Respect@Work Report found that gender inequality is a key driver of workplace sexual harassment.<sup>41</sup> In its response to recommendation 16(a), the Government expressed its support for equality of opportunity between men and women.<sup>42</sup>
69. This amendment would ensure that the concept of equality of opportunity between men and women, in addition to the elimination of discrimination, underpins the operation of the SD Act. Equality of opportunity between men and women is based on the principle of free and equal participation in areas of public life. Discrimination, sexual harassment and harassment

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<sup>35</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 Explanatory Memorandum, para 197.

<sup>36</sup> *Australian Human Rights Commission Act 1986*, paragraph 46PH(1)(b).

<sup>37</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 3.

<sup>38</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), pages 13 and 15.

<sup>39</sup> Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces (2020) Report, page 495.

<sup>40</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 31.

<sup>41</sup> Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report (2020), see for example pages 18, 92, and 138 to 152.

<sup>42</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), pages 12 to 13.

on the ground of sex contribute to gender inequality and constitute barriers to free and equal participation in areas of public life for both men and women.

70. Substantive equality, by comparison to equality of opportunity, requires equality of outcome. The SD Act is focused on removing barriers to free and equal participation in areas of public life. In order to achieve substantive equality, more affirmative actions are required by workplaces so it would not be appropriate to imply that a decision-maker would need to achieve substantive equality in considering a complaint under the SD Act.

### Stop bullying orders – expansion to expressly include sexual harassment

71. The Bill would amend the existing anti-bullying jurisdiction of the FWC to clarify it can make an order to stop sexual harassment in the workplace, including by specifically providing that one instance of sexual harassment at work is sufficient to establish eligibility for an order.<sup>43</sup> The FWC offers an independent, expeditious and low cost avenue for handling workplace sexual harassment claims.
72. This amendment would implement the Government's commitment in response to recommendation 29 of the Respect@Work Report.<sup>44</sup>
73. The Respect@Work Report highlighted that while the existing anti-bullying jurisdiction provides a quick and effective intervention tool to address bullying at work, sexual harassment may not constitute bullying in all circumstances, for example where the behaviour is not repeated, and can differ substantially in its nature and experience.<sup>45</sup>
74. The Bill would define when a person is sexually harassed at work for the purposes of an order, adopting the definition from the SD Act, and would not require the worker to establish that this behaviour creates a risk to health and safety. This is because, by its very nature, sexual harassment is a risk to a person's health and safety.
75. Making an application for an order to stop sexual harassment would also be the exercise of a workplace right under the FW Act. This means employees are protected from adverse action, which could include dismissal or demotion, because they have made an application for an order.

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<sup>43</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 24.<sup>44</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), page 16.

<sup>44</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), page 16.

<sup>45</sup> Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces (2020) Report, pages 523 to 525.



## Unfair dismissal – clarifying that sexual harassment can be a ‘valid reason’ for dismissal under the FW Act

76. The Bill would clarify on the face of the legislation that sexual harassment can be conduct amounting to a valid reason for dismissal for the purposes of section 387 of the FW Act where it occurs in connection with a person’s employment.<sup>46</sup>
77. This amendment would implement the Government’s commitment in response to recommendation 30 of the Respect@Work Report.<sup>47</sup> The Respect@Work Report found that employers were over-cautious or confused about their ability to terminate an employee’s employment in response to sexual harassment.<sup>48</sup>
78. The amendment is consistent with FWC decisions that have found sexual harassment can be a valid reason for dismissal under section 387. This is intended to provide greater certainty to employers that taking disciplinary action in response to workplace sexual harassment can include termination of employment. It also clearly communicates to perpetrators of sexual harassment that this type of behaviour can be sufficiently serious to justify the termination of their employment.
79. The amendment does not limit the FWC’s discretion in determining whether there is a valid reason for dismissal in cases involving sexual harassment or inappropriate forms of conduct more broadly.

## Enabling compassionate leave for couples who experience miscarriage

80. The Bill would amend the existing entitlement to compassionate leave in the FW Act to enable an employee to take up to two days of paid compassionate leave (unpaid for casuals) if the employee, or the employee’s current spouse or de facto partner, has a miscarriage.
81. This amendment was not put forward in the Respect@Work Report, however it has been identified as an important measure to provide improved support to employees if they or their current spouse or de facto partner has a miscarriage. In particular, this amendment would promote women’s workforce participation.
82. Miscarriage is defined as the spontaneous loss of the embryo or fetus before 20 weeks’ gestation. This is based on the standard medical meaning of the term.
83. The definition of miscarriage would include the spontaneous loss of an embryo or fetus, for example, where a non-viable embryo stops developing. It would also include a spontaneous loss of an embryo or fetus where a subsequent medical procedure is needed to remove tissue associated with the miscarriage (such as a ‘dilation and curettage’ procedure).
84. Currently, the FW Act provides two days’ paid compassionate leave (unpaid for casuals) when a member of the employee’s immediate family or household contracts or develops a personal

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<sup>46</sup> Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, Schedule 1, Part 1, item 10.

<sup>47</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), pages 15 to 16.

<sup>48</sup> Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020) Report, page 530.

illness, or sustains a personal injury, that poses a serious threat to their life, or dies. Compassionate leave is also available where a child is stillborn, if the child would have been a member of the employee's immediate family, or a member of the employee's household, if the child had been born alive.

85. The effect of this amendment would be to expand the minimum leave entitlement to ensure that a miscarriage constitutes grounds for compassionate leave. This would ensure that when an employee, or an employee's current spouse or de facto partner, has a miscarriage, the employee would be entitled to two days' paid compassionate leave (unpaid for casuals) in recognition of their bereavement.

## Next steps

86. The Government has prioritised legislative amendments to implement Government commitments in response to recommendations 16, 20-22 and 29-30 of the Respect@Work Report. Following passage of this legislation, the Government will consider next steps for remaining legal and regulatory recommendations in line with its commitments in the Roadmap.
87. The department notes that a number of the further recommendations of the Respect@Work Report are based on preventing sex-based discrimination and harassment before it occurs (for example recommendations 16(c), 17, 18 and 19).
88. As identified in the Roadmap, the WHS framework already requires duty holders to ensure that all persons in the workplace are not exposed to health and safety risks, as far as reasonably practicable.<sup>49</sup>
89. Many of the concerns outlined in the Respect@Work Report were in relation to the implementation of the WHS framework, rather than the effectiveness of the framework itself.<sup>50</sup> Since the Respect@Work Report was released, there has been a focus by the Government and its agencies on further improving the WHS framework and its implementation. Key measures to date include:
- WHS Ministers have agreed to progress amendments to the model WHS regulations to deal with how to identify psychosocial risks, including sexual harassment, associated with psychological injury.
  - A model code of practice is also being developed by SWA to cover psychosocial health, including sexual harassment.
90. As part of the 2021-22 Budget, Comcare will deliver National Forums for Commonwealth, state and territory WHS Inspectors on sexual harassment, and training for employers and managers covered by Commonwealth WHS laws to better understand and meet their obligations in relation to sexual harassment under the laws. The department believes this

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<sup>49</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), page 12.

<sup>50</sup> Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020) Report, page 545.

training would be beneficial to address the finding of the Respect@Work Report that WHS regulators do not have an adequate understanding of the dynamics and drivers of sexual harassment.

91. The department will continue to work with regulators through the Heads of Workplace Safety Authorities and through engagement with state and territory WHS Ministers at the next WHS meeting of ministers in 2021 to explore options for strengthening the implementation of the WHS framework in relation to sexual harassment.
92. The Respect@Work Report also recommended that the Fair Work System be reviewed to clarify that sexual harassment, using the definition in the SD Act, is expressly prohibited (recommendation 28). In the Roadmap, the Government agreed to review the Fair Work System once any amendments proposed under recommendation 16 have been implemented and their impact can be assessed.<sup>51</sup> The review will also be informed by the results of the next National Sexual Harassment Survey to be undertaken by the AHRC in 2022, which will enable an evidence-based approach to be taken to the review.
93. The Bill is complemented by an amendment to the FW Regulations to clarify that sexual harassment can amount to serious misconduct warranting immediate dismissal from the workplace (recommendation 31). This amendment will commence on 10 July 2021.
94. The Respect@Work Report also recommended that the AHRC Act be amended to insert a cost protection provision consistent with section 570 of the FW Act (Recommendation 25). In the Roadmap, the Government noted that the courts already have a broad discretion to award costs under their own legislation.<sup>52</sup> Consistent with this commitment, the Government will consider the adequacy of this broad discretion in light of the issues raised in the Respect@Work Report.
95. Importantly, legislative reform is only one aspect of work underway to support cultural change and ensure safe workplaces in Australia, with the states and territories and private sector also progressing change. This includes work with respect to data collection (recommendation 3), research (recommendations 4 and 24), development of guidelines and resources (recommendations 34, 36, 37, 48 and 50-52), alignment of the state and territory legal and regulatory frameworks with the national framework (recommendation 26), protecting vulnerable witnesses (recommendation 39) and ensuring community services are sufficient (recommendations 49 and 53).
96. The Government has established the Respect@Work Council to oversee the implementation of key recommendations in the Roadmap and to bring together leaders from relevant bodies and sectors to provide leadership on promoting safer workplaces.<sup>53</sup>

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<sup>51</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), pages 13 and 15.

<sup>52</sup> A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021), pages 13 and 15.

<sup>53</sup> See <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/respect-at-work/council> for further information, including the Respect@Work Council's terms of reference.

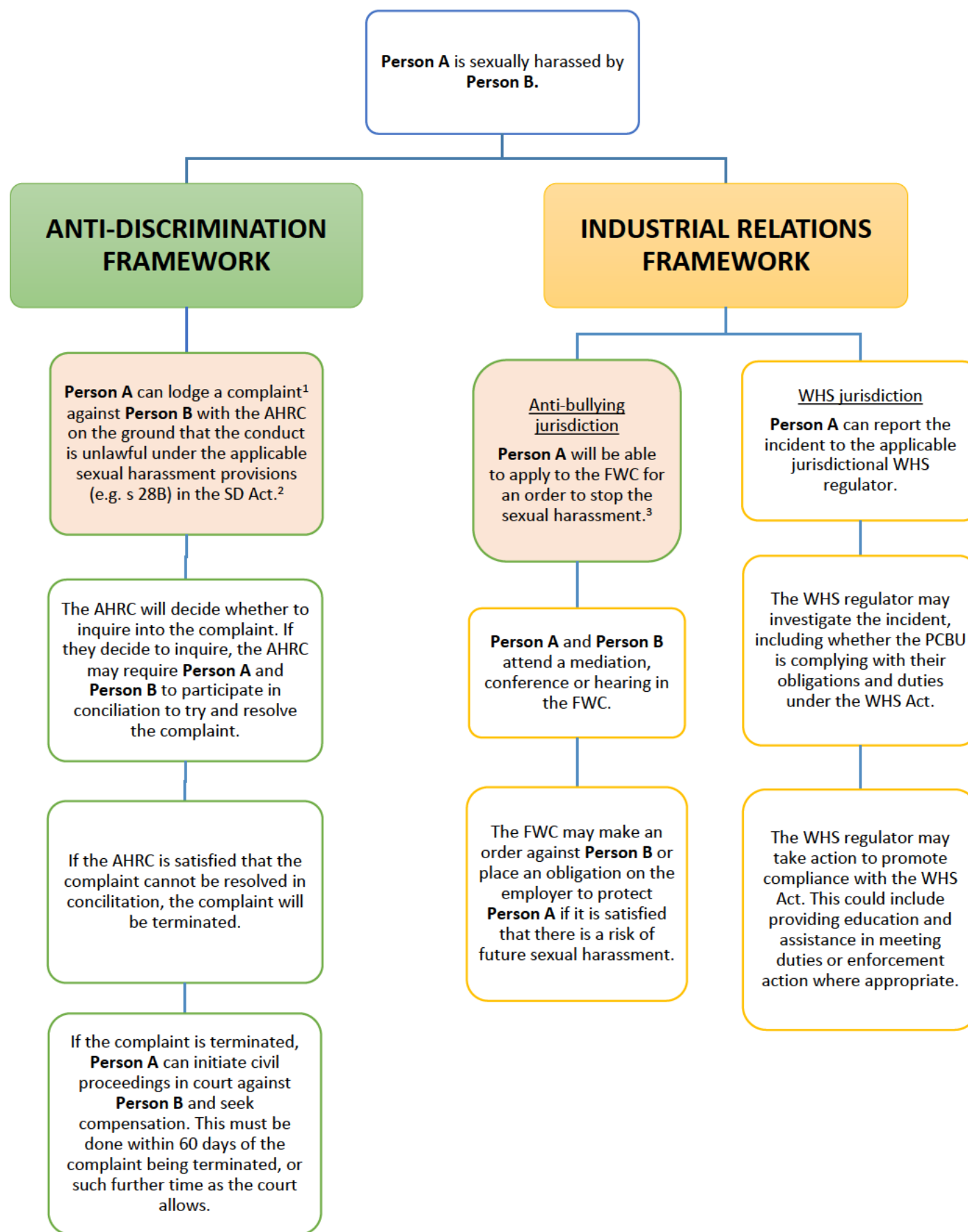
97. The department is supporting the Respect@Work Council, as well as other bodies such as the Meeting of Attorneys-General and WHS Ministers' Meeting, to drive implementation.

## Conclusion

98. The department welcomes the Committee's inquiry into the Bill, and hopes that this submission assists the Committee in understanding the purpose and intent of the proposed measures in the Bill.

## Appendix A – Workplace sexual harassment

Appendix A shows the different pathways under federal law available to an individual that experiences sexual harassment at work.<sup>54</sup>



<sup>1</sup> The Bill would provide Person A with 24 months to lodge a complaint before the President's discretion to terminate the complaint is enlivened (rather than six months).

<sup>2</sup> The Bill would expand the scope of sexual harassment protections under the SD Act – it would remove the exemption for state public servants, clarify that the SD Act applies to judges, members of parliament, and their staff, and amend s 28B in particular to expand its application to all 'workers' and simplify the provisions. These amendments would ensure Person A is protected against sexual harassment regardless of what type of worker they are, and make it easier for them to navigate and understand the framework.

<sup>3</sup> The Bill would clarify and expressly provide for the availability of 'stop orders' in relation to sexual harassment within the FW Act.

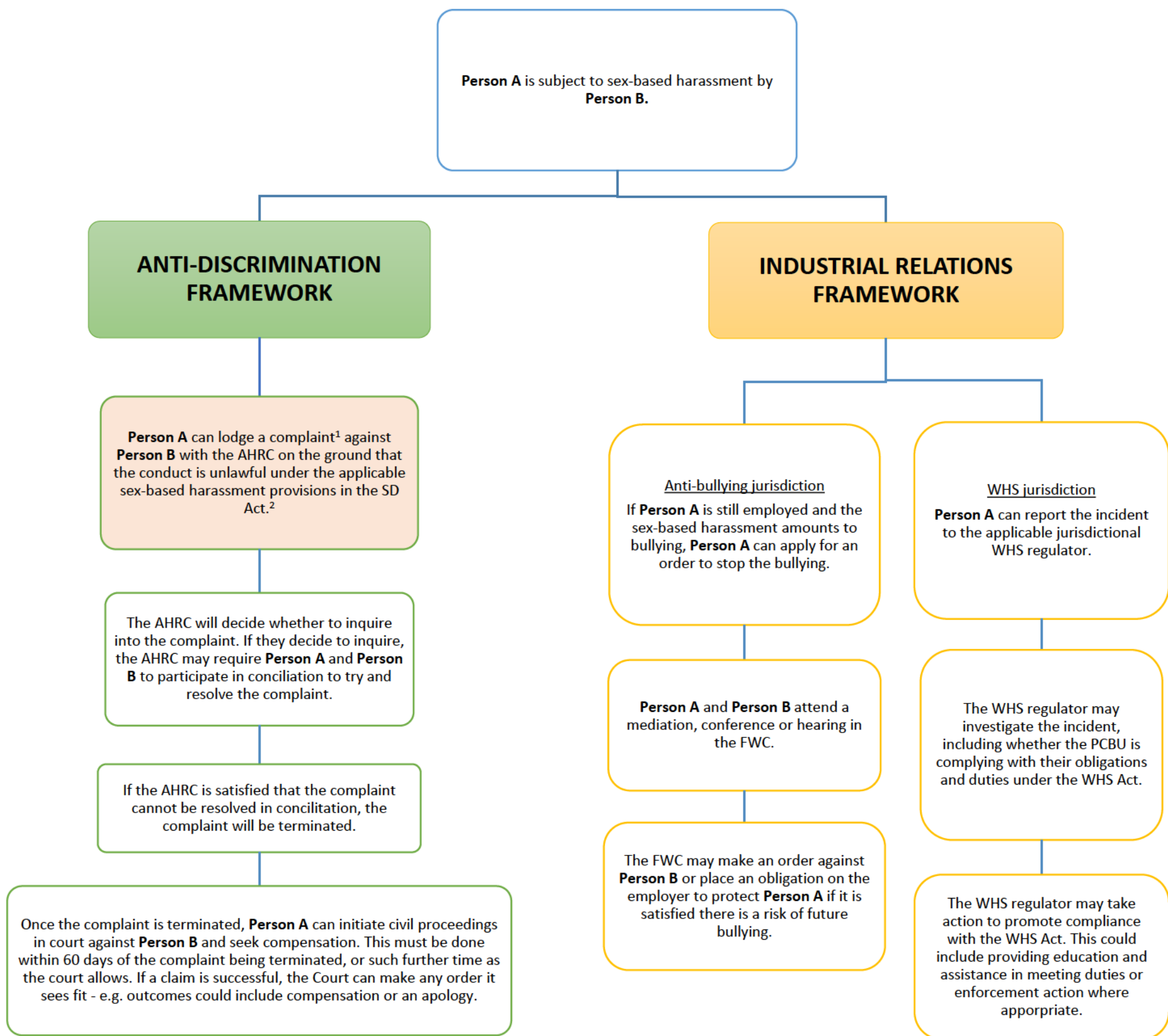
### Key:

- Anti-discrimination framework
- Industrial relations framework
- Includes changes that would be made by the Bill

<sup>54</sup> Note: this flowchart provides a high-level overview only. Further criteria or restrictions may apply. A complaint of sexual harassment that also amounts to sexual assault can be progressed through the criminal justice process.

## Appendix B – Workplace sex-based harassment

Appendix B shows the different pathways under federal law available to an individual that experiences sex-based harassment at work.<sup>55</sup>



<sup>1</sup> The Bill would provide Person A with 24 months to lodge a complaint before the President's discretion to terminate the complaint is enlivened (rather than six months).

<sup>2</sup> The Bill would clarify and expressly provide for a prohibition against sex-based harassment under the SD Act. The expanded scope of the sexual harassment provisions would also apply to sex-based harassment – i.e. Person A would be protected against sexual harassment regardless of what type of worker they are.

Key:

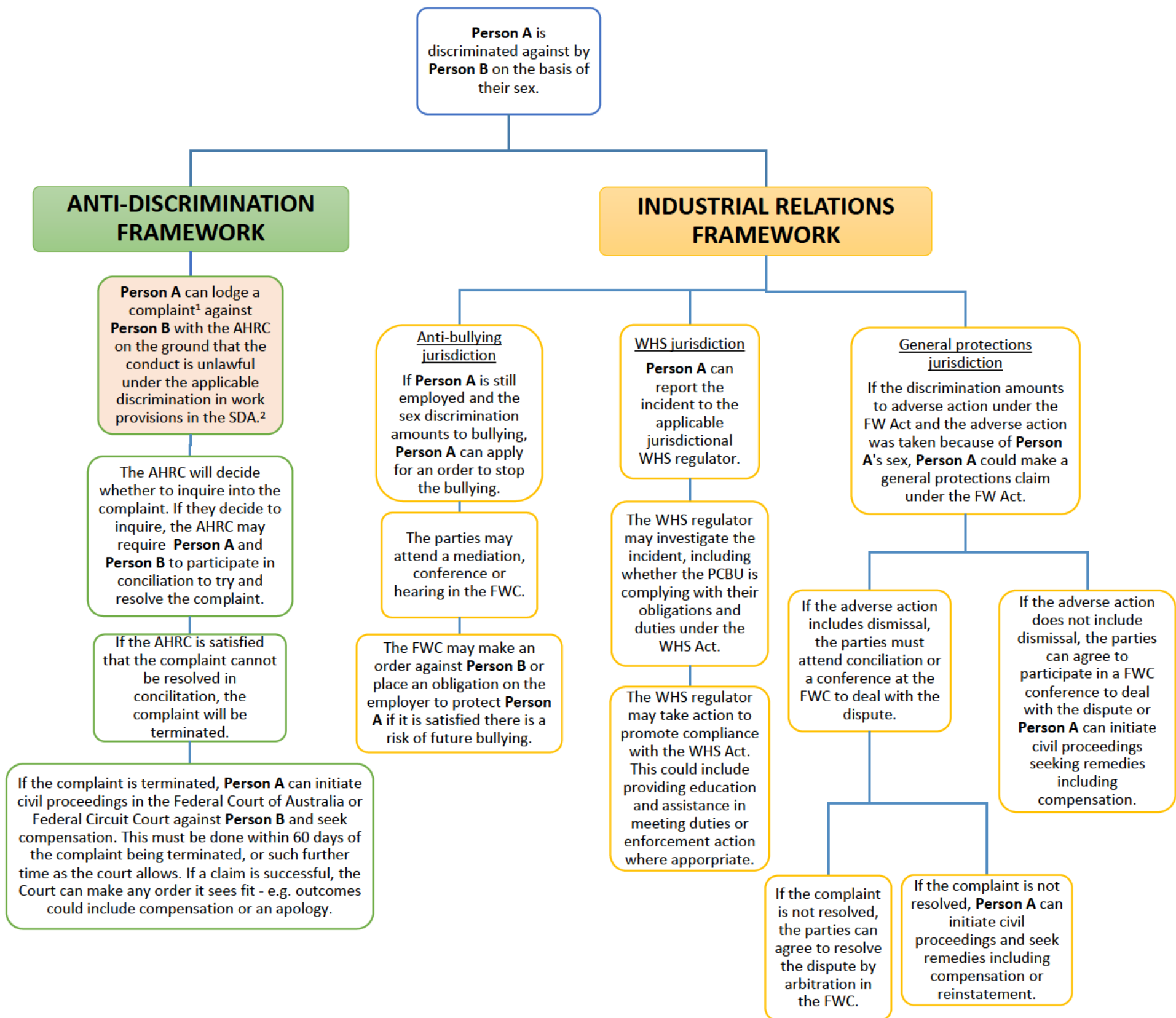
- Anti-discrimination framework
- Industrial relations framework
- Includes changes that would be made by the Bill

<sup>55</sup> Note: this flowchart provides a high-level overview only. Further criteria or restrictions may apply.



## Appendix C – Workplace sex discrimination

Appendix C shows the different pathways under federal law to an individual that experiences sex discrimination in the workplace.<sup>56</sup>



<sup>1</sup> The Bill would provide **Person A** with 24 months to lodge a complaint before the President's discretion to terminate the complaint is enlivened (rather than six months).  
<sup>2</sup> The Bill would expand the scope of sex discrimination protections under the SD Act – it would remove the exemption for state public servants, and clarify that the SD Act applies to judges, members of parliament, and their staff.

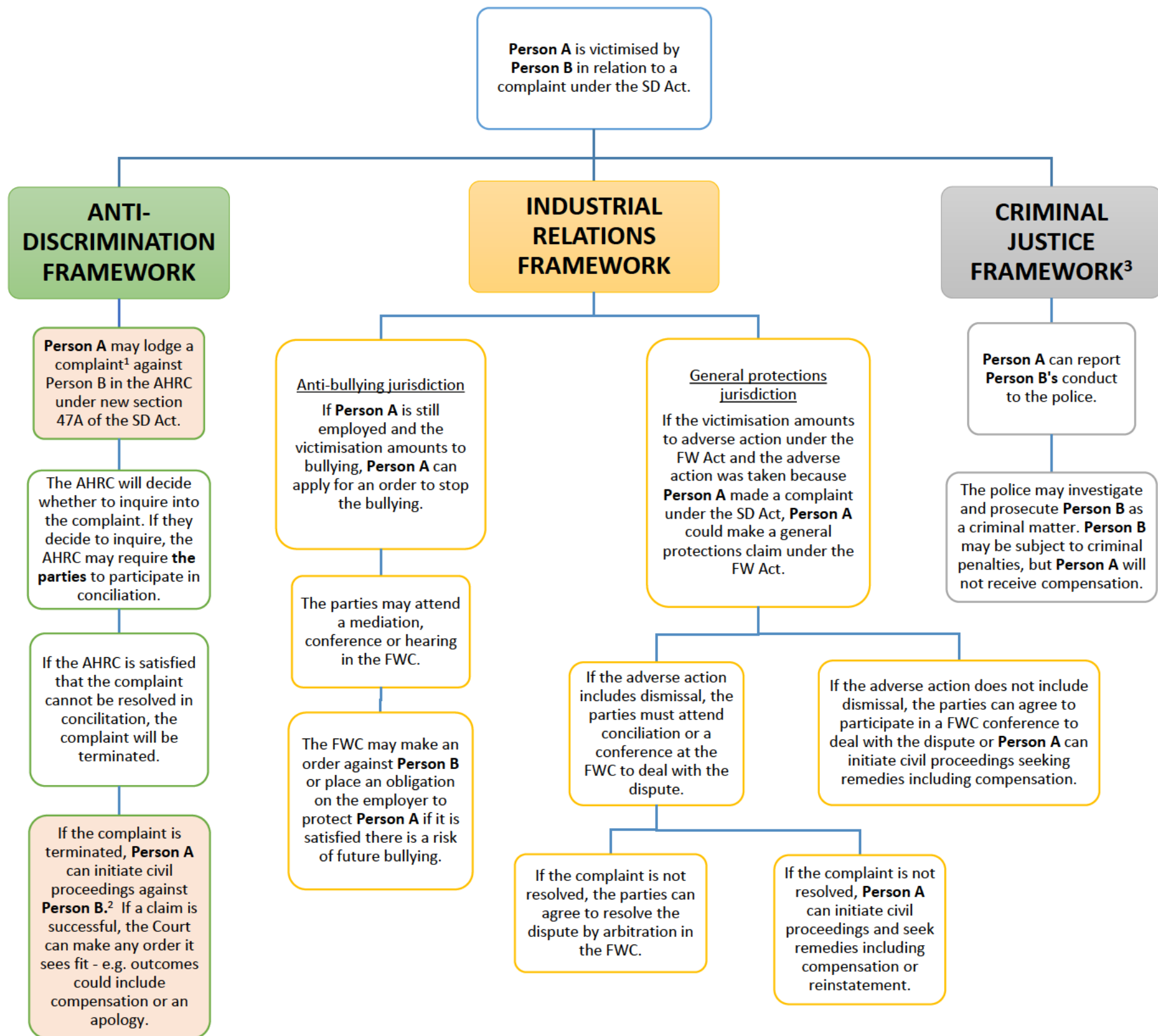
### Key:

- Anti-discrimination framework
- Includes changes that would be made by the Bill
- Industrial relations framework

<sup>56</sup> Note: this flowchart provides a high-level overview only. Further criteria or restrictions may apply. For example, under the FW Act, a person would be prevented from bringing an application/complaint under both the anti-discrimination framework and the general protections jurisdiction of the industrial relations framework in relation to the same conduct. If one of those avenues are chosen, actions under the anti-bullying and WHS jurisdictions of the industrial relations frameworks would remain available.

## Appendix D – Victimisation

Appendix D shows the different pathways under federal law available to an individual that experiences victimising conduct at work.<sup>57</sup>



<sup>1</sup> The Bill would provide Person A with 24 months to lodge a complaint before the President's discretion to terminate the complaint is enlivened (rather than six months).

<sup>2</sup> The Bill would clarify that Person A can initiate civil proceedings against Person B if their complaint is not resolved in the AHRC.

<sup>3</sup> This shows the pathway for pursuing criminal victimising conduct under the SD Act – there may be other general criminal law pathways (including at the state/territory level) available for this kind of conduct.

### Key:

- Anti-discrimination framework
- Criminal justice framework
- Industrial relations framework
- Includes changes that would be made by the Bill

<sup>57</sup> Note: this flowchart provides a high-level overview only. Further criteria or restrictions may apply. For example, under the FW Act, a person would be prevented from bringing an application/complaint under both the anti-discrimination framework and the general protections jurisdiction of the industrial relations framework in relation to the same conduct. If one of those avenues are chosen, actions under the anti-bullying and WHS jurisdictions of the industrial relations frameworks, and the criminal justice framework, would remain available.