



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

**Senate Education and Employment Legislation Committee**

**16 July 2021**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of the Law Society of New South Wales, the Queensland Law Society, The Law Institute of Victoria, The Law Society of South Australia, The Law Society of Western Australia, and its Equal Opportunity Committee, the National Human Rights Committee, and its Federal Litigation and Dispute Resolution Section's Industrial Law Committee in the development of this submission. The Law Council also thanks the Australian Women Lawyers Association who were consulted in the development of this submission.

## Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Senate Education and Employment Legislation Committee (**Committee**) in response to the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (**Bill**).
2. The Law Council notes that the Bill is part of the Government's broader response to sexual harassment in Australian workplaces, as outlined in the [\*Roadmap for Respect: Preventing and addressing sexual harassment in Australian workplaces\*](#),<sup>1</sup> being the Government's formal response to the Australian Human Rights Commission's (**AHRC**) [\*Respect@Work Report\*](#).<sup>2</sup>
3. The Law Council also notes the [\*Explanatory Memorandum\*](#) and, in particular, that the Bill aims to give effect to the Respect@Work Recommendations (**Recommendations**) 16, 20, 21, 22, 29, and 30.<sup>3</sup> While the Bill (and its Explanatory Memorandum) do not purport to do so, it is observed that the Bill does not address all the Respect@Work Recommendations relevant to federal law reform.
4. The Law Council otherwise appreciates Parliament having referred this important Bill for consideration by the Committee and broader consultation. The Law Council has considered the Bill in consultation with its Constituent Bodies, Sections and expert Advisory Committees, and is supportive of the Australian Government's efforts to drive necessary change through federal law reform. In particular, the Law Council is pleased to see and supports:
  - a. The deletion of section 13 at Item 48 of the Bill, and considers that it gives effect to Recommendation 16(e) of the Respect@Work Report.
  - b. The amendment at Item 86 and considers that it gives effect to Recommendation 20 of the Respect@Work Report.
  - c. The amendment at Item 77 of the Bill, being the insertion of the new section 47A.
  - d. The amendment at Item 59 of the Bill, which amends section 28A of the SDA so that the definition of sexual harassment applies to the SDA as a whole, rather than just Division 3.
  - e. The amendment at Item 83 of the Bill inserting new paragraph 48(1)(gc), providing the AHRC with the power to intervene in court proceedings that involve issues of discrimination involving sexual harassment or harassment on the ground of sex, with the leave of the court.

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<sup>1</sup> Australian Government, A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (April 2021) 12 (**Roadmap**) available online: <https://www.ag.gov.au/rights-and-protections/publications/roadmap-for-respect>

<sup>2</sup> Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (2020) (5 March 2020), (**Respect@Work**) available online: <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>

<sup>3</sup> [\*Explanatory memorandum\*](#), Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (**Bill**).

5. However, it is noted that some revisions are required to achieve the stated objective of fulfilling Recommendations 16, 20, 21, 22, 29, and 30.
6. To this end, the Law Council makes the following recommendations:
  - a. The Law Council recommends that the Objects at Item 31 of the Bill should be amended to either “*achieve substantive equality between women and men*” or, in the alternative, to “*achieve substantive equality for everyone, irrespective of gender or sexual orientation*”.
  - b. The words “*so as far as is practicable*” should also be deleted from proposed 3(e) in Item 31 of the Bill.
  - c. The deletion of the words “*of a seriously demeaning nature*” from the proposed section s28AA at Item 60 of the Bill.
  - d. Consideration be given to addressing *sex-based harassment* in the proposed *Fair Work Act 2009* (Cth) (**FWA**) amendments at Items 4 to 6, and 11 to 50 of the Bill.
  - e. Amending the Bill to include a general prohibition on sexual harassment or, in the alternative, a general prohibition on sexual harassment in connection with the ‘world of work’ as proposed in the Respect@Work report. Any exemptions, to the extent that they can be justified, can then be clearly and deliberately addressed (see the section on ‘workplace participants’ from page 13 below).
  - f. Extending the timeframe in section 46PH to 6 years for all forms of unlawful discrimination. In the alternative, should the 24 month timeframe be preferred, the Law Council considers that it should be extended to all forms of unlawful conduct under the anti-discrimination legislation.
  - g. That further consideration be given to:
    - Amending new section 789FD(2A) (at Item 22 of the Bill) to reflect the “in connection to work” rather than “while the worker is at work”;
    - Extending the amendments to the FWA in Items 4-5 and 11-28 to also extend to sex-based harassment and sex discrimination generally;
    - Providing the Fair Work Commission (**FWC**) with the power to enforce the new stop sexual harassment orders under the Bill, as well as the existing stop bullying orders under Part 6-4B of the FWA;
    - Clarifying that a ‘stop sexual harassment/bullying order’ does not prevent an applicant from also pursuing a sexual harassment claim under the SDA or under the relevant State or territory anti-discrimination and equal opportunity legislation; and

- Amending section 342 (being the definition of adverse action) and section 351 (other protections) of the FWA to include sexual harassment and sex-based harassment (whether perpetrated by employer or employee).
- h. The Law Council supports the amendment at Item 10 of the Bill, providing for the insertion of a note at the end of existing section 387 (criteria for considering harshness). However, it is suggested that consideration be given to:
- referring to the need to consider all relevant factors of section 387 of the FWA in its determination; and
  - referring to sex-based harassment.
- i. The Law Council supports the expansion of the compassionate leave provisions under sections 104 to 106 of the FWA to include miscarriages, addressed at Items 6, 8 and 9 of the Bill. However, it is recommended that the leave be available to the biological parent and a person who, whilst not a spouse, de facto partner or biological parent, would otherwise have had responsibility for the care of the child, noting that the amendments as drafted may exclude:
- parent, for example the father of the baby and is in a relationship with the mother, but where that relationship is not classed as a de facto relationship; or
  - intended adopted parent.
- j. That the Bill be amended to give effect to Recommendation 17 concerning 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 the alternative, that this recommendation be implemented in any future amendment Bills arising from the Respect@Work Recommendations.
- k. The commencement of those measures in the Bill which amend the anti-bullying jurisdiction in the FWA to provide for the FWC to make orders to stop sexual harassment in the workplace be deferred for a period of 2-3 months, to permit the FWC to establish adequate and effective procedures and practices.
- l. That the Committee give further consideration to the implementation of Respect@Work Recommendation 19, regarding providing the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment.

7. By way of explanation of the above, the Law Council notes the following, having regard to the stated objective of fulfilling Recommendations 16, 20, 21, 22, 29, and 30.

## Recommendation 16

8. Recommendation 16 is excerpted below for ease of reference:

### Recommendation 16:

Amend the SDA to ensure:

- a. the objects include ‘to achieve substantive equality between women and men’;
- b. sex-based harassment is expressly prohibited;
- c. creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited;
- d. the definition of ‘workplace participant’ and ‘workplace’ covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed; and
- e. the current exemption of state public servants is removed.

## Objects

9. Respect@Work Recommendation 16(a) proposes that the objects of the Sex Discrimination Act 1984 (Cth) (**SDA**) be amended to include “*achieve substantive equality between women and men*”. In response, the Bill has proposed that the following wording be included in a new subsection 3(e) of the SDA (extracted and in mark-up):<sup>4</sup>

### 3 Objects

The objects of this Act are:

...

(d) to promote recognition and acceptance within the community of the principle of the equality of men and women; and  
(e) to achieve, so far as practicable, equality of opportunity between men and women.

10. There is a distinction between ‘achieving substantive equality between women and men’ and ‘achieving equality of opportunity between men and women’ noting that the former standard is more comprehensive than the second.
11. Generally, equality of opportunity describes the concept of ‘formal’ equality which means treating people the same way.<sup>5</sup> However, treating people the same way may entrench inequality because not all people start from a level playing field. By way of example, if all people are treated the same and required to enter a building by stair, this same treatment will exclude people using a wheelchair entering the building. The same treatment excludes them.
12. Another way of looking at equality is the concept of substantive equality. Substantive equality focuses on achieving outcomes.<sup>6</sup> This may require treating people differently to achieve an equal outcome. Using the example of the stairs, the provision of a ramp may enable a person using a wheelchair to access a building or consider reconfiguring the

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<sup>4</sup> Amendment at Item 31.

<sup>5</sup> Sandra Fredman, *International Journal of Constitutional Law*, Volume 14, Issue 3, July 2016, Pages 712–738, 738, available online: <https://doi.org/10.1093/icon/mow043>

<sup>6</sup> Ibid.



entrance to enable all people to enter. Measures to promote equality also need to promote inclusion, which requires active consideration to enable all people to participate. The *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, of which Australia is a State Party, is directed towards achieving both.<sup>7</sup>

13. In line with the AHRC's recommendations, the Law Council has consistently supported the promotion of *substantive equality* as the basis of federal discrimination law reform.<sup>8</sup>
14. The Law Council also considers that this wording, "*as far as practicable*" falls short of what is proposed in Recommendation 16 and, rather, introduces a lower standard. It also observes this wording is inconsistent with the balance of several other objects contained in section 3, which are phrased in terms of "*so far as it is possible*". To this end, the Law Council notes that this wording could be read as undermining the existing objects in section 3 of the SDA.
15. One concern is that the proposed wording may give rise to the implication that rights codified in CEDAW will only be protected domestically to the extent that it is 'practicable' to do so. Under international law, every treaty to which Australia is party is binding upon it, and must be performed by it in good faith.<sup>9</sup> Where limitations on rights are permissible, they should be prescribed by law, be in pursuit of a legitimate objective, be rationally connected to their stated objective, and be a proportionate way to achieve that objective.<sup>10</sup> An approach of implementing what is simply 'so far as practicable' falls short of this aim, noting that the remainder of the SDA's provisions will be interpreted by reference to its purpose. The Committee on the Elimination of Discrimination against Women has indicated that States parties should:<sup>11</sup>

(a) Ensure that all forms of gender-based violence against women in all spheres, which amount to a violation of their physical, sexual or psychological integrity, are criminalized and introduce, without delay, or strengthen, legal sanctions commensurate with the gravity of the offence, as well as civil remedies; ...

16. The importance of setting a tone for the community through the Objects was explained in the Respect@Work report as follows:<sup>12</sup>

...a comprehensive understanding of equality should underpin the Sex Discrimination Act and that explicitly stating this as an object of the legislation can assist in clarifying its underlying purposes and foundational principles, and provide guidance to both the community and the courts.

<sup>7</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <https://www.ohchr.org/en/professionalinterest/pages/cedaw.aspx>.

<sup>8</sup> See, for example, Law Council of Australia, Response to the Australian Human Rights Commission Discussion Paper: Priorities for federal discrimination law reform (20 December 2019) (*Federal Discrimination Law paper*), 38, available online: <https://www.lawcouncil.asn.au/publicassets/ed1dce97-9048-ea11-9403-005056be13b5/3725%20-%20Priorities%20for%20federal%20discrimination%20law%20reform.pdf> and Law Council, Policy Statement on Human Rights and the Legal Profession: Key Principles and Commitments (2017), 6, available at: <https://www.lawcouncil.asn.au/resources/policies-and-guidelines>

<sup>9</sup> Vienna Convention on the Law of Treaties (acceded to by Australia 13 June 1974, entry into force for Australia and generally 27 January 1980), art 26.

<sup>10</sup> Parliamentary Joint Committee on Human Rights, Guide to human rights (June 2015) 5,7, available online: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources).

<sup>11</sup> General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, para 29(a), available online: [https://tinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1\\_Global/CEDAW\\_C\\_GC\\_35\\_8267\\_E.pdf](https://tinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf)

<sup>12</sup> Respect@Work, n2, 452

17. The Law Council recommends that the object should be either: to “*achieve substantive equality between women and men*” (as recommended by the Respect@Work report) or, in the alternative, to ‘*achieve substantive equality for everyone, irrespective of gender or sexual orientation*’.
18. The words “*so as far as is practicable*” should also be deleted from proposed 3(e). This approach would clarify the objectives of the SDA, Australia’s commitments under CEDAW, and convey a clear message to the community.

### **Sex-based harassment**

19. The Respect@Work report acknowledged a lack of awareness around harassment that is sex-based rather than sexual in nature, and that such conduct can be sex discrimination if it amounts to less favourable treatment on the basis of sex.<sup>13</sup> Respect@Work Recommendation 16(b) accordingly proposed that the SDA be amended to expressly prohibit sex-based harassment.
20. The Law Council considers that the introduction of new section 28AA at Item 60, and the related amendments from Items 61 to 76 of the Bill, is a positive step forward to realising the objectives of Recommendation 16(b). This amendment is intended to clarify existing case law, which shows that sex-based harassment can already be found unlawful under the SDA.<sup>14</sup>
21. That stated, the Law Council has some concerns about the current drafting of section 28AA.
22. With respect to the inclusion of the words “*seriously demeaning*” in subsection 28AA(1)(a), the definition of ‘harassment on the ground of sex’ at Item 60 may present difficulties. For ease of reference, new subsection 28AA (1) is as follows (excerpted, with emphasis):

#### **28AA Meaning of *harassment on the ground of sex***

(1) For the purposes of this Act, a person harasses another person (the person harassed) on the ground of sex if:

(a) by reason of:

- (i) the sex of the person harassed; or
- (ii) a characteristic that appertains generally to persons of the sex of the person harassed; or
- (iii) a characteristic that is generally imputed to persons of the sex of the person harassed;

the person engages in unwelcome conduct of a **seriously demeaning** nature in relation to the person harassed; and

(b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Note: See also section 8 (acts done for 2 or more reasons).

23. This firstly introduces a further threshold to meet, in addition to:

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<sup>13</sup> Respect@Work, n2, 457.

<sup>14</sup> For example, see *Hill v Water Resources Commission* (1985) EOC 76, 280; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91, [33]; Respect@Work, n2, 457 – 458; Explanatory Memorandum, n3, para [8].

- a. the subjective threshold of whether the conduct is *unwelcome*; and
  - b. The objective threshold of whether a *reasonable person... would be offended, humiliated or intimidated*.
24. Given that the stated purpose of the inclusion of section 28AA was to clarify that sex-based harassment should be regarded as sex discrimination under the existing terms of the Act,<sup>15</sup> it is unclear why such a clarification would introduce an additional threshold to be met. This has the effect of:
  - a. making section 28AA inconsistent with section 28A, which does not require that the relevant unwelcome conduct of a sexual nature (for example) to be 'seriously demeaning'; and
  - b. making it harder for victims of sex-based harassment to establish their claims through the introduction of an additional threshold, arguably undermining the purpose of this new section.
25. The addition of the "*seriously demeaning nature*" is, in and of itself, a high threshold that will likely be difficult to interpret and apply in practice. As one Constituent Body observed:

The requirement that unwelcome conduct be of a 'seriously demeaning nature' sets a high standard that may not be reached. In particular this drafting excludes harassment that accumulates through slight transgressions over time, as no single instance is 'seriously demeaning'.
26. Similarly, another Constituent Body noted:

... that a conservative interpretation of that term has the potential to undermine the purpose of the amendments;

...also expresses concern as to the likely difficulty of proving "seriously" and "demeaning" in this context.
27. The Explanatory Memorandum states that:

The new provision would not capture mild forms of inappropriate conduct based on a person's sex that are not of a sufficiently serious nature to meet the threshold of offensive, humiliating or intimidating, as well as seriously demeaning.<sup>16</sup>
28. However, it is submitted that the objective limb of the test that requires that the relevant unwelcome conduct has occurred in circumstances in which 'a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated', already provides an appropriate threshold to avoid conduct which is merely trivial coming within the scope of new section 28AA. It is further noted that the example provided in paragraph 157 of the Explanatory Memorandum would be effectively addressed through that threshold.<sup>17</sup>

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<sup>15</sup> Explanatory Memorandum, n3 para [8].

<sup>16</sup> Ibid [10].

<sup>17</sup> Ibid, 45:

*"For example, if a mechanic provided an overly simplistic and condescending explanation to a female client about the car repairs the mechanic had undertaken on her car, this would not meet the threshold of offensive, humiliating or intimidating simply because it was irritating for the female client. As such, it would not constitute sex-based harassment under section 28G (as amended by this Bill)."*

29. Further, subsection 28AA(2) prescribes certain non-exhaustive ‘circumstances’ to be taken into account for the purposes subsection 28AA(1). This includes:
- a. in paragraph 28AA(2)(e)- the seriousness of the conduct; and
  - b. in paragraph 28AA(2)(f)- whether the conduct has been repeated.
30. The Law Council considers that that two references to (slightly different) concepts of seriousness in both subsections 28AA(1)(a) and again in 28AA(2)(e) is potentially confusing and difficult to implement in practice, and likely to be interpreted as applying an unreasonably high threshold. Further, while consideration of whether the behaviour has been repeated is not a necessary criterion, this inclusion may have the effect of introducing a higher threshold in practice, and runs counter to section 28A (which does not require consideration of this circumstance) and case law on this matter.<sup>18</sup>
31. The Law Council also notes that, while the wording in Recommendation 16(b) is quite broad, it was arguably not envisaged that sex based harassment be dealt with separately from sexual harassment, and only the latter carried across into the amendments to FWA. Noting the stated intent of the Bill as outlined in the Explanatory Memorandum, the Law Council queries the reasoning behind this approach, or in the alternative, the reasoning behind excluding sex-based harassment from amendments to the FWA.
32. The Law Council accordingly recommends that:
- a. “*of a seriously demeaning nature*” be deleted from the proposed section s28AA; and
  - b. Consideration be given to addressing sex-based harassment in the proposed FWA amendments at Items 4 to 6, and 11 to 50 of the Bill.

#### **Creating or facilitating an intimidating, hostile, humiliating or offensive environment**

33. Respect@Work Recommendation 16(c) proposes that the SDA be amended to expressly prohibit creating or facilitating of an intimidating, hostile, humiliating or offensive environment.
34. An express prohibition of this nature has not been attempted in the Bill. As suggested by one Constituent Body:
- ... the Bill could be amended to achieve the objective of this recommendation through following the approach outlined in Respect@Work, namely by “incorporate[ing] a prohibition on creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex into either the sex discrimination or sexual harassment provisions within the Sex Discrimination Act.
35. Another Constituent Body suggested this approach would be enforced through:
- ...a civil penalty applicable for breaches of this duty.
36. However, careful consideration would need to be given as to how to frame such a prohibition appropriately in light of these corresponding civil penalties. It is noted that this issue is tied to Recommendations 20 and 17, addressed respectively below.

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<sup>18</sup> For example, see: *Johanson v Blackledge Meats* [2001] FMC 6; *Smith v Hehir and Financial Advisors Aust Pty Ltd* [2001] QADT 11 at 28; and *Hall & Ors v A. & A. Sheiban Pty Ltd & Ors* (1989) 85.

### Workplace participants

37. Respect@Work Recommendation 16(d) proposes that the SDA be amended so that the definition of 'workplace participant' and 'workplace' covers all persons 'in the world of work', including paid and unpaid workers, and those who are self-employed.
38. The Bill responds to this recommendation through a range of measures that pertinently include:
  - a. Inserting a definition of '*worker*' in subsection 4(1) SDA<sup>19</sup> that refers to the broader definition in the [Work Health and Safety Act 2011](#)(Cth) (**WHSA**) that includes, for example, volunteers;<sup>20</sup>
  - b. Inserting a definition of '*person conducting a business or undertaking*'<sup>21</sup> in subsection 4(1)<sup>22</sup> by reference to the broader definition in the WHSA;<sup>23</sup>
  - c. Adding and/or expanding upon definitions in subsection 4(1) to explicitly extend the coverage of the SDA to cover members of the House of Parliament, persons employed or engaged under the *Members of Parliament (Staff) Act 1984*, to a person who holds a Commonwealth judicial office; state parliamentarians and employees and state judicial officers;<sup>24</sup> and
  - d. removing the current exemption of state public servants (see from paragraph 50 below).
39. The Law Council has advocated for an expansion of coverage under the SDA for many years,<sup>25</sup> on the basis that it is not comprehensive and may not extend to sexual harassment by people who are self-employed, nor all partners, who are not expressly covered by the legislation, including barristers and certain statutory office holders or appointees.<sup>26</sup>

<sup>19</sup> At Item 40 of the Bill:

**"worker** has the same meaning as in the Work Health and Safety Act 2011."

<sup>20</sup> [Section 7](#) WHSA, which includes in subsection 7(1): an employee, a contractor or subcontractor, an employee an employee of a labour hire company who has been assigned to work in the person's business or undertaking, an outworker, an apprentice or trainee, a student gaining work experience, a volunteer, a person of a prescribed class. Subsections 7(2) to (2H) address specific employment contexts (such as members of the Defence force in subsection 7(2A)). Subsection 7(3) also extends the definition of a 'worker' to self-employed persons (overlapping with Subsection 5(1)- see footnote 23 below):

The person conducting the business or undertaking is also a **worker** if the person is an individual who carries out work in that business or undertaking.

<sup>21</sup> Referred to as PCBU in the Explanatory Memorandum.

<sup>22</sup> Item 40 of the Bill:

**"person conducting a business or undertaking** has the same meaning as in the Work Health and Safety Act 2011."

<sup>23</sup> [Section 5](#) WHSA, which at subsection 7(1) includes the self-employed (see except below), but does not extend to volunteer associations (see subsections 7(7)-(8)):

7(1) For the purposes of this Act, a person conducts a business or undertaking :

(a) whether the person conducts the business or undertaking **alone or with others**; and  
(b) whether or not the business or undertaking is conducted for profit or gain...

<sup>24</sup> See Item 40 of the Bill.

<sup>25</sup> See: Law Council of Australia, National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession (23 December 2020), 23 (**National Action Plan**), 17 available online:

[https://www.lawcouncil.asn.au/files/media-releases/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession\\_FINAL.pdf](https://www.lawcouncil.asn.au/files/media-releases/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession_FINAL.pdf) ..

<sup>26</sup> As submitted in the Law Council's response to NISHAW: Law Council of Australia, 'National Inquiry into Sexual Harassment in Australian Workplaces' (26 February 2019) (**NISHAW Submission**), 23, available

40. Further, there has been a lack of clarity around whether the SDA covers federal statutory appointees, who may not be considered 'employees' of the Commonwealth, and around whether statutory appointees, judge or member of parliament who engage in discriminatory or sexually harassing conduct can be held *personally* liable (named directly in a claim) under the SDA as they may not be an 'employer'.<sup>27</sup>
41. The Law Council accordingly supports in principle the expansion of the SDA's coverage to cover a broader range of workers, Commonwealth and State Parliamentarians and employees, and notes that the proposed amendments do significantly improve coverage under the SDA. However, the Law Council considers that the amendments still fall short of giving effect to Recommendation 16(d), which calls for the coverage of *all persons in the world of work*.<sup>28</sup>
42. The Law Council also reiterates its longstanding position that piecemeal coverage:<sup>29</sup>
  - a. can never contemplate all the scenarios in which sexual harassment ought to be specifically prohibited;
  - b. is complicated and difficult to apply in practice; and
  - c. accordingly, is not in practice accessible to, nor can it effectively guide, the community.<sup>30</sup>
43. Moreover, the Bill, in its reliance on definitions in the WHSA, risks amendments to the latter undermining the coverage and effectiveness in the SDA. It also requires the community to remain cognisant of that additional layer of complexity when seeking guidance from the SDA.
44. The proposed wording in the Bill relies on the interaction between:
  - a. The definitions of 'sexual harassment' in section 28A and/or 'harassment on the ground of sex' in section 28AA, including:
    - i. The relevant thresholds in those definitions (which, as currently drafted, differ);<sup>31</sup>
  - b. the relevant definitions pertaining to the type of employee or employment- for example, 'worker' and 'conducting a business or undertaking'; and

online: <https://www.lawcouncil.asn.au/docs/5491c43c-d63e-e911-93fc-005056be13b5/3587%20-%20AHRC%20NISHAW%20Submission.pdf> .

<sup>27</sup> See: The National Action Plan, n 25,17. Please also see (noting that this issue was not addressed following the 2008 inquiry and accordingly still relevant): Australian Human Rights Commission, Inquiry into the effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality (1 September 2008), at para 340, available online: <https://www.lawcouncil.asn.au/docs/5491c43c-d63e-e911-93fc-005056be13b5/3587%20-%20AHRC%20NISHAW%20Submission.pdf> ). During the same inquiry, the Law Council argued that the SDA did not provide comprehensive protection against sexual harassment for those in the legal profession as it may not apply to sexual harassment that occurs between witnesses and lawyers; lawyers and judicial officers or court staff; solicitors and barristers; or between barristers: Law Council of Australia, Submission to Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality (15 August 2008) .

<sup>28</sup> See paragraph 46, for example.

<sup>29</sup> Please also see, for example, the Law Council's extensive submissions on this subject in our NISHAW submission- n 26, 20-24.

<sup>30</sup> Noting the objectives outlined in the [Explanatory memorandum](#)- n3, for example at paras [1] – [3], [5].

<sup>31</sup> See pages 10-12.

- c. Sections 28B – 28L of the SDA, outlining the particular relationships where sexual harassment is prohibited, including the new subsections 28B(3) to (8).

45. In practice, this is a complicated endeavour. Using the example of a barrister sexually harassed by an opposing barrister, this would include the following considerations:

- a. Was the barrister 'sexually harassed' having regard to the thresholds in s28A – was it unwelcome, would a reasonable person, having regard to all the circumstances, have anticipated the possibility that the person harassed would be offended, humiliated or intimidated?

This is subject to the circumstances of the case and involves the consideration of the relevant case law.

- b. Is a barrister a 'worker' or 'conducting a business or undertaking' within the meanings proposed in subsection 4(1) (that is, per sections 7 or 5 respectively of the WHSA)?

Through the reference in subsection 4(1) SDA to the WHSA, subsection 7(3) of the WHSA extends the coverage of the SDA to include self-employed workers, including barristers.<sup>32</sup> However, barristers will also have coverage under subsection 5(1)(b) of the WHSA, which provides that conducting a business or undertaking *whether the person conducts the business or undertaking alone or with others*.<sup>33</sup>

- c. Is the relationship covered- that is, is it covered by s28B-L?

The relationship between the opposing counsel is, in this case, covered by new subsection 28B(6).<sup>34</sup> However, it is noted that analysis at this stage also requires consideration of '*in connection with*' through reference to case law.<sup>35</sup>

46. Using a different example of a volunteer firefighter for a local rural fire service (**RFS**):

- a. Was the firefighter 'sexually harassed' having regard to the thresholds in section 28A – was it unwelcome, would a reasonable person, having regard to all the circumstances, have anticipated the possibility that the person harassed would be offended, humiliated or intimidated?

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<sup>32</sup> As also noted in the Explanatory Memorandum, n3, paragraph 97.

<sup>33</sup> Section 5 WHSA (excerpted):

5 *Meaning of person conducting a business or undertaking*

(1) For the purposes of this Act, a *person conducts a business or undertaking*:

- (a) whether the person conducts the business or **undertaking alone or with others**; and
- (b) whether or not the business or undertaking is conducted for profit or gain.

<sup>34</sup> (6) It is unlawful for a person to sexually harass, or harass on the ground of sex, a person (the second person) who is:

- (a) a worker; or
- (b) a person conducting a business or undertaking;

if the harassment occurs in connection with the second person being:

- (c) a worker; or
- (d) a person conducting a business or undertaking.

<sup>35</sup> In the Respect@Work report it was noted (See Respect@Work, n2, 486):

"The courts have interpreted the phrase 'in connection with' expansively, including covering sexual harassment of an employee by another employee while off-duty in staff accommodation quarters,<sup>206</sup> at accommodation attended by employees while attending a work-related conference,<sup>207</sup> and sexual assault that occurred in a home, after a work event".



As noted above, this is subject to the circumstances of the case, but involves the consideration of the relevant case law.

- b. Is a firefighter a 'worker' within the meaning of subsection 4(1) (that is, per section 7 of the WHSA)?

In this case it depends on the relevant facts - while 'volunteers' are covered in section 7 of the WHSA, subsection 7(1) also specifies "business or undertaking" (excerpted below and with emphasis):

Meaning of *worker*

- (1) A person is a *worker* if the person carries out work in any capacity **for a person conducting a business or undertaking**, including work as...

However, "volunteer associations" are excluded in the definition of "business or undertaking" if they are wholly volunteer based- per subsections 5 (7)-(8) WHSA):<sup>36</sup>

Section 5 WHSA (excerpted):

(7) **A volunteer association does not conduct a business or undertaking for the purposes of this Act.**

(8) In this section, volunteer association means a group of volunteers working together for 1 or more community purposes **where none of the volunteers**, whether alone or jointly with any other volunteers, **employs any person to carry out work for the volunteer association.**

Accordingly, subject to the thresholds in s28A and s28B:

- A person working for a RFS where all firefighters are volunteers **will not be covered**; however
- A person working for a RFS that employs a part-time administrative assistant **will be covered**.

47. The Law Council considers that, by basing amendments on the original complex model of the SDA, the Bill proposes another overly complex model which requires victims to work out whether they are protected from sexual harassment by reference to employment status. Rather than expand the existing patchwork of protections, with the attendant complexities and ambiguities, the Law Council considers that this issue ought to be considered from the opposite direction- a general prohibition (if only in the 'world of work' as proposed in the Respect@Work report)<sup>37</sup> with any exemptions (to the extent that they can be justified) carved out. This avoids:

- a. the complicated exercise demonstrated above; and

<sup>36</sup> Section 5 WHSA (excerpted):

(7) **A volunteer association does not conduct a business or undertaking for the purposes of this Act.**

(8) In this section, volunteer association means a group of volunteers working together for 1 or more community purposes **where none of the volunteers**, whether alone or jointly with any other volunteers, **employs any person to carry out work for the volunteer association.**

<sup>37</sup> See paragraph 49 below regarding the Law Council's policy positions on this issue.



- b. the unwitting exclusion of classes of workers from both remedy and accountability.

48. The Law Council has for this reason previously advocated for federal legislation including the SDA to be amended to protect any person performing work,<sup>38</sup> not just those who meet the proscribed employment relationships,<sup>39</sup> the proscribed meanings of workplace participant in a workplace (or equivalent),<sup>40</sup> or who are incidentally providing goods, services or facilities, educational institutions, or other specific functions.<sup>41</sup> This would also be more consistent with Australia's obligations under CEDAW,<sup>42</sup> and provide an important normative statement on how sexual harassment is viewed.<sup>43</sup> The Law Council has also previously advocated for the Australian Government to consider these issues in any plan to consolidate federal, state and territory anti-discrimination legislation.<sup>44</sup>
49. It is further noted that the Law Council's December 2020 [National Action Plan](#), which was not restricted to considerations of Australian workplaces, recommended the even broader approach that the SDA be amended to include a general prohibition of sexual harassment,<sup>45</sup> noting that such general prohibitions have been operating effectively in Tasmania and Queensland<sup>46</sup> for some 23 to 30 years respectively.<sup>47</sup>

### **Exemption for state public servants**

50. Respect@Work Recommendation 16(e) proposed that the SDA be amended to remove the current exemption of state public servants. Law Council Directors relevantly endorsed in the National Action Plan support for the deletion of subsection 13(2) of the SDA, being the current exception of state public servants.<sup>48</sup>
51. The Law Council supports the deletion of section 13 at Item 48 of the Bill, and considers that it gives effect to Recommendation 16(e) of the Respect@Work Report.

### **Recommendations**

- The Law Council recommends that the Objects should be amended to either to "*achieve substantive equality between women and men*" or, in the

<sup>38</sup> See, NISHAW Submission, n 26, at 24, 49, 51. This issue was considered in two separate Senate inquiries in 2008 and 2013 respectively. The former inquiry recommended that at the SDA be amended to include a general prohibition against sex discrimination and sexual harassment 'on the basis of all protected attributes' in any area of public life. See: Senate Standing Committee on Legal and Constitutional Affairs, above Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality (Commonwealth of Australia, December 2008), xiv. The 2013 inquiry recommended that the SDA be amended to include a general prohibition against sex discrimination and sexual harassment 'on the basis of all protected attributes' in any area of public life.

<sup>39</sup> Such as current *Sex Discrimination Act 1984* (Cth) subs 28B(1)-(5).

<sup>40</sup> Such as current *Sex Discrimination Act 1984* (Cth) subs 28B(6)-(7).

<sup>41</sup> Such as current *Sex Discrimination Act 1984* (Cth) 28C-28K.

<sup>42</sup> See paragraph 15.

<sup>43</sup> NISHAW submission, n26, 24.

<sup>44</sup> Ibid.

<sup>45</sup> National Action Plan, n25, 20. It is noted that The Law Institute of Victoria does not agree with this broader approach: see [https://liv.asn.au/getattachment/Staying-Informed/Submissions/submissions/April-2021/LIV-Submission-on-Proposed-Amendments-to-the-Sex-D/20210413\\_SteggallIMP\\_SDABill\\_FIN.pdf.aspx](https://liv.asn.au/getattachment/Staying-Informed/Submissions/submissions/April-2021/LIV-Submission-on-Proposed-Amendments-to-the-Sex-D/20210413_SteggallIMP_SDABill_FIN.pdf.aspx)

<sup>46</sup> For example, section 118 of the *Anti-Discrimination Act 1991* (QLD) states, "(a) person must not sexually harass another person."

<sup>47</sup> See s118 *Anti-Discrimination Act 1991* (Qld) and s17 *Anti-Discrimination Act 1998* (Tas).

<sup>48</sup> For more information, see Respect@Work Report, n2, 268.

alternative, to “*achieve substantive equality for everyone, irrespective of gender or sexual orientation*”.

- The words: “*so as far as is practicable*” should also be deleted from proposed 3(e).
- The deletion of the words “*of a seriously demeaning nature*” from the proposed section s28AA.
- Consideration be given to addressing sex-based harassment in the proposed FWA amendments at Items 4 to 6, and 11 to 50 of the Bill.
- The Bill be amended to include a general protection general prohibition on sexual harassment or, in the alternative, a general prohibition on sexual harassment in connection with the ‘world of work’ as proposed in the Respect@Work report. Any exemptions, to the extent that they can be justified, can then be clearly and deliberately addressed.

## Recommendation 20

52. Recommendation 20 of the Respect@Work Report proposes that section 105 of the SDA be amended to ensure that it applies to sexual harassment. Section 105 relates to ‘aiding and abetting’ and presently does not apply to Division 3 of the Act (addressing Sexual Harassment).
53. The Bill proposes the following amendment at Item 86:

### **105 Liability of persons involved in unlawful acts**

A person who causes, instructs, induces, aids or permits another person to do an act that is unlawful under Division 1 ~~or 2~~ 2 or 3 of Part II shall, for the purposes of this Act, be taken also to have done the act.

54. The Law Council supports this amendment and considers that it gives effect to Recommendation 20 of the Respect@Work Report.

## Recommendation 21

55. Recommendation 21 of the Respect@Work report proposes that the *Australian Human Rights Commission Act 1986* (Cth) (**AHRCA**) be amended to make explicit that any conduct that is an offence under section 94 of the SDA (regarding victimisation) can form the basis of a civil action for unlawful discrimination.
56. In general, victimisation is when retaliatory actions (or threats of) are taken against an employee because that employee either made, or supported someone making, a sexual harassment complaint.<sup>49</sup> The SDA presently prohibits victimisation in [Section 94](#), and protects persons who make complaints made to the Commission and also under workplace complaints processes.<sup>50</sup>
57. However, uncertainty has arisen in respect of the victimisation provisions in certain federal discrimination laws, including the SDA, as they are set out as criminal offences.<sup>51</sup> This

<sup>49</sup> Respect@Work, n2, 489.

<sup>50</sup> See 94(2), as extracted in Respect@Work Report, n2, 489.

<sup>51</sup> See: *Walker v Cormack* (2011) 196 FCR 574; *Walker v State of Victoria* [2012] FCAFC 38; *Chen v Monash University* [2016] FCAFC 66; Respect@Work Report, n2, 490

means that when a complaint is terminated by the AHRC, such that the complainant can make an application to the Federal Court or Federal Circuit Court pursuant to [s46PO](#) of the AHRCA,<sup>52</sup> it is not clear whether those courts have jurisdiction to hear civil (as opposed to criminal) matters involving allegations of victimisation. This matter has not to date been resolved in case law.<sup>53</sup>

58. The AHRC proposed in the Respect@Work Report that a legislative amendment should be made to address this uncertainty, and to clarify that the Federal Court and the Federal Circuit Court have jurisdiction with respect to SDA civil victimisation claims.<sup>54</sup>
59. This was unanimously supported in the Law Council's National Action Plan. The amendment at Item 77, being the insertion of the new section 47A, deviates from the recommendation in *Respect@Work* by amending the SDA. However, the Law Council considers that this is an acceptable means of achieving the outcome of making explicit that any conduct that is an offence under section 94 of the SDA can form the basis of a civil action for unlawful discrimination.

## Recommendation 22

60. Respect@Work Recommendation 22 proposed that the AHRCA "*be amended so that the President's discretion to terminate a complaint under the SDA on the grounds of time does not arise until it has been 24 months since the alleged unlawful discrimination took place.*"
61. The Bill addresses this recommendation at Item 3 (demonstrated below in mark-up):

### 46PH Termination of complaint

#### *Discretionary termination of complaint*

- (1) The President may terminate a complaint on any of the following grounds:
- (a) the President is satisfied that the alleged acts, omissions or practices are not unlawful discrimination;
  - (b) ~~the complaint was lodged more than 6 months after the alleged acts, omissions or practices took place;~~
  - (b) the complaint was lodged:
    - (i) in a case where the complaint relates to the *Sex Discrimination Act 1984*—more than 24 months after the alleged acts, omissions or practices took place; or
    - (ii) in any other case—more than 6 months after the alleged acts, omissions or practices took place...

62. The Law Council noted in its NISHAW submission:<sup>55</sup>

The Law Council notes that the time limit was changed from 12 months to 6 months following the passage of the *Human Rights Legislation Amendment Act 2017* (Cth).

The 6-month time limit should be removed. If a time limit must be included as a ground for termination, the position of the Law Council, in consultation with its Equal Opportunity Committee and other lawyers practising in this space, is that it should not be less than 6 years.

<sup>52</sup> *Australian Human Right Commission Act 1986* (Cth).

<sup>53</sup> See: *Walkerv Cormack* (2011) 196 FCR 574; *Walkerv State of Victoria* [2012] FCAFC 38; *Chen v Monash University* [2016] FCAFC 66; Respect@Work Report, n2, 490

<sup>54</sup> Respect@Work Report, n 2, 490.

<sup>55</sup> NISHAW Submission, n 12, 30- 31.

63. This position has been confirmed in consultations on the present Bill. It was noted in these consultations that the 6-year timeframe is consistent with the time limit to pursue claims involving contraventions of civil remedy provisions under section 544 of FWA.

64. The Law Council also considers that any extension to this timeframe should apply to all forms of unlawful discrimination and other unlawful conduct under the federal anti-discrimination legislation. This maintains consistency across the federal anti-discrimination framework and reduces complexity for the AHRC and the courts in deciding which parts of a claim are justiciable, in instances where a person has experienced discrimination on the basis of multiple protected attributes. Moreover, as noted by one Constituent Body:

The procedural barriers faced by complainants under the [SDA] are most likely to apply to complainants under the [Racial Discrimination Act] and [Disability Discrimination Act]. There should be uniformity and procedural equality for all under the AHRC Act.

65. It is accordingly recommended that this timeframe be extended to 6 years for all forms of unlawful discrimination, for example as follows (in mark-up):

#### **46PH Termination of complaint**

##### *Discretionary termination of complaint*

- (1) The President may terminate a complaint on any of the following grounds:
  - (a) the President is satisfied that the alleged acts, omissions or practices are not unlawful discrimination;
  - (b) the complaint was lodged more than 6 ~~years~~ ~~months~~ after the alleged acts, omissions or practices took place...

66. In the alternative, should the 24 month timeframe be preferred, the Law Council considers that it should be extended to all forms of unlawful conduct under the anti-discrimination legislation in the same manner as proposed above. Such an approach would be consistent with Recommendation 22.

#### **Recommendations**

- It is recommended that the timeframe in section 46PH be extended to 6 years for all forms of unlawful discrimination.
- In the alternative, should the 24 month timeframe be preferred, the Law Council considers that it should be extended to all forms of unlawful conduct under the anti-discrimination legislation in the same manner as proposed above. Such an approach would be consistent with Recommendation 22.

## **Recommendation 29**

67. Respect@Work Recommendation 29 calls for the introduction of a 'stop sexual harassment order' into the FWA, equivalent to the existing 'stop bullying order' in that legislation,<sup>56</sup> in a manner designed to facilitate the order's restorative aim. While the Law Council supports the introduction of a 'stop sexual harassment order' in principle, some issues have been identified that the Law Council considers requires further consideration.

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<sup>56</sup> Section 789 FC FWA.

68. The Bill amends the existing anti-bullying jurisdiction of the FWA in Items 4-5 and 11-28 to clarify that a person who is sexually harassed may apply to the FWC for an order to stop the harassment<sup>57</sup> and to insert a new provision in Part 6-4B of the FWA, including a new subsection 789FF(1) that specifically addresses the FWC making orders to stop sexual harassment.<sup>58</sup>
69. In drawing from the SDA definition of sexual harassment in amendments in section 6 of the FWA,<sup>59</sup> the “*repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member*” threshold in subsection 789FD(1) FWA definition of “bullied at work” is avoided for orders to stop sexual harassment. This means that a worker can seek an order after a single instance of sexual harassment.
70. It is noted that access to a ‘stop sexual harassment order’ is limited through:
- a. The definition of a “worker”, as defined in the WHSA<sup>60</sup> – noting our comments in paragraph 44 above;
  - b. The exclusion of members of the Defence Force;<sup>61</sup> and
  - c. the proposal in the Bill to insert a subsection 789FD(2A),<sup>62</sup> which limits the stop sexual harassment order to constitutionally-covered businesses:
- (2A) A worker is sexually harassed at work if, while the worker is at work in a **constitutionally-covered business**, one or more individuals sexually harasses the worker.
71. A ‘constitutionally-covered business’ is defined in subsection 789FD(3) as follows:
- (3) If a person conducts a business or undertaking (within the meaning of the *Work Health and Safety Act 2011*) and either:
    - (a) the person is:
      - (i) a constitutional corporation; or
      - (ii) the Commonwealth; or
      - (iii) a Commonwealth authority; or
      - (iv) a body corporate incorporated in a Territory; or
    - (b) the business or undertaking is conducted principally in a Territory or Commonwealth place;then the business or undertaking is a **constitutionally-covered business**.
72. This excludes coverage for a number of self-employed individuals,<sup>63</sup> however it is noted that this function of the FWC is directed towards the resolution of internal workplace disputes rather than disputes with external workplaces, so this limitation is reasonable in the circumstances.
73. However, it is noted 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

<sup>57</sup> See Explanatory Memorandum, n3, paragraphs 6 and 13.

<sup>58</sup> See Item 24 of the Bill.

<sup>59</sup> Item 6 of the Bill.

<sup>60</sup> As defined in Subsection 789FC(2) FWA:

(2) For the purposes of this Part, **worker** has the same meaning as in the Work Health and Safety Act 2011, but does not include a member of the Defence Force.

<sup>61</sup> See subsection 789FC(2) FWA, as above.

<sup>62</sup> Item 21 of the Bill.

<sup>63</sup> Fair Work Commission, Definition of ‘constitutionally-covered business’ (accessed 8 July 2021) available online: <https://www.fwc.gov.au/anti-bullying-benchbook/who-covered-workplace-bullying-laws/definition-constitutionally-covered#field-content-2-heading>

a 'connection' to work.<sup>64</sup> The Law Council suggests that further consideration be given to amending new section 789FD(2A) to reflect the "in connection to" threshold. For example (as marked up):

(2A) A worker is sexually harassed at work if, ~~while~~ the worker is ~~at work in a constitutionally-covered business sexually harassed by~~, one or more individuals ~~sexually harasses the worker in connection with their at-work in a constitutionally-covered business.~~

74. Further, as noted in paragraph 31 above, the clarification in Items 4-5 and 11-28 of the Bill to explicit cover sexual harassment was not extended to 'sex-based harassment' as introduced in new Section 28AA,<sup>65</sup> nor to the sex discrimination as defined in section 5 of the SDA. While conduct meeting the definitions in new section 28AA and section 5 may also be captured by the definition of the subsection 789FD FWA definition of "bullied at work",<sup>66</sup> relief will be limited to conduct that is meets the "*repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member*" thresholds in the definition in subsection 789FD(1) FWA.
75. A broader matter relates to the need for a simpler enforcement mechanism in place for the enforcement of 'stop bullying orders', should they be contravened and expanded to include sexual harassment. Presently, applicants need to make an application in either the Federal Court or an eligible State Court to enforce such an order.<sup>67</sup> The Law Council considers that further consideration should be given to:
- Providing the FWC with the power to enforce these orders; or
  - Clarify that a 'stop sexual harassment/bullying order' does not prevent an applicant from also pursuing a sexual harassment claim under the SDA or under the relevant State or territory anti-discrimination and equal opportunity legislation.
76. It is further noted that the Bill has not addressed the following issues that were identified in the Law Council's NISHAW submission:<sup>68</sup>

"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

<sup>64</sup> In the Respect@Work report it was noted (See Respect@Work, n2, 486.):

"The courts have interpreted the phrase 'in connection with' expansively, including covering sexual harassment of an employee by another employee while off-duty in staff accommodation quarters,<sup>206</sup> at accommodation attended by employees while attending a work-related conference,<sup>207</sup> and sexual assault that occurred in a home, after a work event".

<sup>65</sup> See Item 60.

<sup>66</sup> As excerpted (noting omission of subsections (2)-(3):

789FD When is a worker *bullied at work*?

(1) A worker is *bullied at work* if:

(a) while the worker is at work in a constitutionally-covered business:

(i) an individual; or

(ii) a group of individuals;

repeatedly behaves unreasonably towards the worker, or a group of workers of which the worker is a member; and

(b) that behaviour creates a risk to health and safety.

<sup>67</sup> See section 539 FWA, which the Bill amends to refer to sexual harassment at Item 11.

<sup>68</sup> NISHAW submission, n26, 50.

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'."

77. The Law Council notes that the above amendments could also be expressly extended to sex-based harassment.
78. The Law Council accordingly recommends as follows.

### Recommendations

That further consideration be given to:

- Amending new section 789FD(2A) to reflect the "in connection to" threshold. For example (as marked up):  
  
(2A) A worker is sexually harassed at work if, ~~while~~ the worker is ~~at work in a constitutionally covered business~~ sexually harassed by, one or more individuals ~~sexually harasses the worker. in connection with their~~ at work in a constitutionally covered business.
- Extending the amendments to the FWA in Items 4-5 and 11-28 to also extend to sex-based harassment and sex discrimination generally;
- Providing the FWC with the power to enforce the new stop sexual harassment orders under the Bill, as well as the existing stop bullying orders under Part 6-4B of the FWA;
- Clarifying that a 'stop sexual harassment/bullying order' does not prevent an applicant from also pursuing a sexual harassment claim under the SDA or under the relevant State or territory anti-discrimination and equal opportunity legislation; and
- Amending section 342 (being the definition of adverse action)<sup>69</sup> and section 351 (other protections)<sup>70</sup> of the FWA to include sexual harassment and sex-based harassment (whether perpetrated by employer or employee) in the definition of 'adverse action'.

<sup>69</sup> Defined through reference to table setting out circumstances in which a person takes adverse action against another person in subsection 342(1).

<sup>70</sup> As excerpted, omitting subsections (2)-(3):

Division 5—Other protections

351 Discrimination

(1) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Note: This subsection is a civil remedy provision (see Part 4-1).



### **Recommendation 30:**

79. Respect@Work Recommendation 30 proposes the amendment of section 387 of the FWA, to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable.
80. In response to this recommendation, the Bill provides at Item 10 for the insertion of a note at the end of existing section 387 (criteria for considering harshness) as follows:
- Note:** For the purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:
- (a) the person sexually harasses another person; and
- (b) the person does so in connection with the person's employment
81. The Law Council supports this amendment. However, it suggests that consideration be given to the note:
- a. referring to the need to consider all relevant factors of section 387 of the FWA in its determination; and
- b. referring to sex-based harassment.

### **Further recommendations and comments**

82. Further to the above discussed amendments giving effect to Respect@Work Recommendations 16, 20, 21, 22, 29 and 30, the Law Council make the following additional comments.

#### **Application of Section 28A SDA**

83. The Law Council supports the amendment at Item 59 of the Bill, which amends section 28A of the SDA so that the definition of sexual harassment applies to the SDA as a whole, rather than just Division 3.

#### **Power to intervene**

84. The Law Council supports the amendments to the SDA at Item 83 of the Bill inserting new paragraph 48(1)(gc), providing the AHRC with the power to intervene in court proceedings that involve issues of discrimination involving sexual harassment or harassment on the ground of sex, with the leave of the court.

#### **Expansion of the compassionate leave provisions**

85. The Law Council also supports the expansion of the compassionate leave provisions under sections 104 to 106 of the FWA to include miscarriages, addressed at Items 6, 8 and 9 of the Bill. However, it is recommended that the leave be available to the biological parent and a person who, whilst not a spouse, de facto partner or biological parent, would otherwise have had responsibility for the care of the child, noting that the amendments as drafted may exclude:
- a. parent, for example the father, of the baby and is in a relationship with the mother, but where that relationship is not classed as a de facto relationship;  
or



- b. intended adopted parent.

### Positive duties

86. A consistent theme across the Law Council's consultations on the Bill was disappointment at the lack of introduction of positive duties on employers, per Recommendation 17 of the Respect@Work Report.

87. Recommendation 17 is excerpted for ease as reference as follows:

**Recommendation 17:**

Amend the Sex Discrimination Act to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.

In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered including, but not limited to:

- a. the size of the person's business or operations;
- b. the nature and circumstances of the person's business or operations;
- c. the person's resources;
- d. the person's business and operational priorities;
- e. the practicability and the cost of the measures; and
- f. all other relevant facts and circumstances.

88. A positive duty is a requirement for reasonable and proportionate measures to taken to eliminate discrimination, sexual harassment or victimisation as far as possible. In the *Roadmap* the Australian Government notes that under the model Work Health and Safety (WHS) laws, persons conducting a business or undertaking, such as employers, have a duty to ensure that all persons in the workplace, including workers, are not exposed to health and safety risks, so far as is reasonably practicable.<sup>71</sup> This includes the risk of being sexually harassed.<sup>72</sup>

89. It is further noted in the *Roadmap* that:

Noting the existing positive duty under WHS laws, and given the Report's findings that the current system for addressing workplace sexual harassment is complex and confusing for victims and employers to navigate, the Government will assess whether such amendments would create further complexity, uncertainty or duplication in the overarching legal framework.

90. In this respect, the Law Council refers to the AHRC's views in the Respect@Work Report that:<sup>73</sup>

Human rights frameworks and WHS frameworks have different foundations and advantages... In essence, the WHS positive duty, as it relates to sexual harassment, is focused on psychological health broadly and frames sexual harassment as a safety risk and hazard. The Sex Discrimination Act positive duty would have a more specific and targeted focus on sexual harassment, sex discrimination and victimisation, and would importantly operate within a human rights framework that takes into account the systemic and structural drivers and impacts of sexual harassment... Ultimately, with these differing but

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<sup>71</sup> Roadmap, n1, 12.

<sup>72</sup> Ibid. See also: Safe Work Australia, Workplace Sexual Harassment, available online (accessed 8 July 2021): <https://www.safeworkaustralia.gov.au/topic/workplace-sexual-harassment>. This is also consistent with CEDAW obligations and UN guiding Principles on Business and Human Rights.

<sup>73</sup> Respect@Work, n2, 480.

complementary approaches, the two positive duties would work in a mutually reinforcing way.

91. The Law Council has previously provided extensive submissions recommending that three positive duties – the duties to eliminate, respond and report- should be introduced into the SDA.<sup>74</sup> This position was reflected in the Respect@Work Report, through the recommendations in Recommendation 17 to include an additional, stand-alone duty into the SDA requiring employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. Further, in determining what would amount to ‘reasonable and proportionate’ measures, the AHRC notes that the section 15 of the *Equal Opportunity Act 2010* (Vic)<sup>75</sup> could serve as a model.<sup>76</sup>
92. This position was again endorsed by the Law Council through the National Action Plan and through consultations on this Bill. It is noted that the introduction of positive duties in the SDA would also explicitly reinforce the focus on preventing sexual harassment in the workplace, complementing the broader role played by the existing positive duty under model WHS laws. Contrary to the concerns raised in the *Roadmap*, this mutual reinforcement will likely lead to less confusion and complexity for victims and employers to navigate. Including a positive duty in the SDA would also assist in promoting a focus among employers on preventing sexual harassment in the workplace.
93. It was further noted during consultations, in support of the Respect@Work report excerpt at paragraph 90 above:
- ... There are key differences in how the regimes established by the SDA and the model WHS laws operate. Duties under the model WHS laws are not enforceable by individuals, only regulators by way of civil penalty or criminal proceedings. Under the SDA, individuals can make a complaint, which is then investigated and conciliated through the AHRC.
94. The Law Council considers that the lack of implementation of Recommendation 17 and positive duties is a missed opportunity to give 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.<sup>77</sup>
95. The Law Council accordingly recommends as follows:

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<sup>74</sup> NISHAW Submission, n26, 37-45.

<sup>75</sup> Section 15(2) requires person must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible.

<sup>76</sup> Respect@Work, above n 2, 472. It is noted that once response suggested the following wording in the alternative:

In terms of liability, as a matter of law, an employer can only be required to take “all reasonable steps” and their liability will be limited if such steps are taken. We therefore suggest that any amendment ... include reference to “a positive duty on employers to take all reasonable steps to as far as possible eliminate discrimination, sexual harassment and victimisation....”.

This was noting Review: Equal Opportunity Commission South Australia, Review of Sexual Harassment in the South Australian Legal Profession, from 109, available online: <https://www.eoc.sa.gov.au/documents/Final-Report-of-the-Review-of-Harassment-in-the-South-Australian-Legal-Profession.pdf>

<sup>77</sup> It is also noted that Recommendation 17 is followed by the complementary Recommendation 18, not consulted in the development of the National Action Plan, which proposes that:

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

### Recommendations

- That the Bill be amended to give effect to Recommendations 17 concerning 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 the alternative, that this recommendation be implemented in any future amendment Bills arising from the *Respect@Work* Recommendations.

### Transitional arrangements - deferred commencement to support the Fair Work Commission's establishment of adequate and effective procedures and practices

96. The Law Council has considered the submission of the FWC to this inquiry.<sup>78</sup> The Law Council is supportive of the FWC's recommendation that the commencement of those measures which amend the anti-bullying jurisdiction in FWA to provide for the FWC to make orders to stop sexual harassment in the workplace,<sup>79</sup> be deferred for a short period (2-3 months) to permit the FWC to establish adequate and effective procedures and practices.
97. A similar deferral was provided in the FWA when the anti-bullying jurisdiction was initially inserted in the FWA.<sup>80</sup>
98. As a result of the new measures proposed in the Bill, many vulnerable people will interact with the FWC. It is important that the FWC have the necessary time to implement new procedures and practices to properly engage with and support vulnerable parties. Critically, the suggested deferral period will provide time for the FWC to:
- a. consult with key stakeholders;
  - b. make changes to the Commission's forms and procedural rules;
  - c. ensure that systems are in place to meet the specific needs of victims of sexual harassment;
  - d. develop resources for applicants and others interacting with the FWC;
  - e. establish access to support services for applicants (such as support organisations and mental health services); and
  - f. ensure that FWC Members and staff are properly trained to deal with sexual harassment cases.
99. The Law Council accordingly recommends as follows.

### Recommendation

- The commencement of those measures in the Bill which amend the anti-bullying jurisdiction in the FWA to provide for the FWC to make orders to stop sexual

<sup>78</sup> Fair Work Commission, Submission No 1 to Senate Education and Employment Legislation Committee, Parliament of Australia, *Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (July 2021).

<sup>79</sup> The Bill, sch 1 items 1-5, 6 (definition of 'sexually harassed at work'), 11-28.

<sup>80</sup> *Fair Work Amendment Act 2013* (Cth) sch 3.

harassment in the workplace be deferred for a period of 2-3 months, to permit the FWC to establish adequate and effective procedures and practices.

### **Inquiry function of the AHRC**

100. It is also noted that the Law Council has called for powers to be given to the AHRC to investigate incidents of discrimination under federal anti-discrimination law on its own motion, rather than relying on an individual complaints-based system to take the burden.<sup>81</sup> The Law Council accordingly suggests that the Government give further consideration to the implementation of Respect@Work Recommendation 19, excerpted below for ease of reference:

**Recommendation 19:**

Amend the Australian Human Rights Commission Act to provide the Commission with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment. Unlawful discrimination includes any conduct that is unlawful under the federal discrimination laws. The Commission should be given powers to require:

- a) the giving of information
- b) the production of documents
- c) the examination of witnesses
- d) with penalties applying for non-compliance, when conducting such an inquiry.

**Recommendation**

- That the Committee give further consideration to the implementation of Respect@Work Recommendation 19, regarding providing the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment.

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<sup>81</sup> Federal Discrimination Law paper, n8, 1.