

Submission by the
Australian Discrimination Law
Experts Group (ADLEG)
to the
Senate Education and Employment
Legislation Committee

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

9 July 2021

Australian Discrimination Law Experts Group

We make this submission on behalf of the undersigned members of the Australian Discrimination Law Experts Group (ADLEG), a group of legal academics with significant experience and expertise in discrimination and equality law and policy. This submission focuses on the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021.

We are happy to answer any questions about the submission or other related issues, or to provide further information on any of the areas covered. Please let us know if we can be of further assistance in this inquiry, by emailing [REDACTED]

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Summary

We support the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (the Bill) and commend the Australian Government for seeking to strengthen legislative measures to prevent and address sexual harassment and harassment on the ground of sex. The Bill constitutes an important step towards aligning general workplace law, work health and safety law and anti-discrimination law protections for workers. In this submission, we note concerns and limitations of the Bill, and we propose several amendments that would strengthen the operation of the Bill and contribute to developing safe, respectful and equitable workplaces.

In *Roadmap for Respect*, the Government noted that ‘[c]lear obligations and consistent tests in as few places as possible ensures employers and employees know the applicable standards and can avoid harm’. We share the Government’s concerns about complexity, inconsistency and duplication within federal and state anti-discrimination legislation, as well as in the way it is integrated with other areas of law, most notably, federal industrial law. We urge the Government to undertake a process of harmonising and modernising anti-discrimination, equality and work-related legislation. In the very brief time available to us to review this Bill, we have been unable to provide comprehensive recommendations in relation to how that harmonisation might best be implemented in relation to sexual harassment and harassment on the ground of sex. We do note that Attorneys-General have agreed to consider possible areas of focus for the harmonisation of human rights and anti-discrimination legislation related to sexual harassment, in response to Recommendation 26 of the Respect@Work Report.¹ We would urge Attorneys-General to consider more broadly the harmonisation of anti-discrimination, human rights and equality laws. This is necessary if the legislative framework is to effectively address intersectional discrimination and harassment, which we note is not addressed by this Bill.

¹ Communiqué, Extraordinary Meeting of Attorneys-General, 9 June 2021, agreement (c)a.

Recommendations

Our recommendations are as follows (all sections refer to the proposed new sections of the *Australian Human Rights Commission Act 1986* (Cth), the *Sex Discrimination Act 1984* (Cth) and the *Fair Work Act 2009* (Cth) as identified in the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021):

Recommendation 1: Repeal section 46PH(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth). Substitute,

‘(b) the complaint was lodged more than 24 months after the alleged acts, omissions or practices took place;’

Recommendation 2: Amend section 46PO of the *Australian Human Rights Commission Act 1986* (Cth) to clarify that:

If:

(a) a complaint has been terminated by the President under section 46PE, paragraph 46PF(1)(b) or section 46PH; and

(b) the President has given a notice to any person under subsection 46PH(2) in relation to the termination;

any person who was an affected person in relation to the complaint *or a person or persons acting in a representative capacity, including a trade union*, may make an application to the Federal Court or the Federal Circuit Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.

Recommendation 3: At the end of section 3 of the *Sex Discrimination Act 1984* (Cth), add:

‘; and (e) to achieve substantive equality for all sexes.’

Recommendation 4: Remove the word ‘seriously’ from proposed section 28AA(1)(a) of the *Sex Discrimination Act 1984* (Cth).

Recommendation 5: Amend the definition of proposed section 28AA(1)(b) of the *Sex Discrimination Act 1984* (Cth) so as not to limit the scope of harassment on the grounds of sex to the emotional response of the victim, and extend to alternatives, such as:

(1) the person (engaging in the unwelcome conduct) does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the conduct would *interfere with or diminish the ability or authority of the person harassed to carry out any responsibility associated with their position*; or

(2) the person (engaging in the unwelcome conduct) does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the conduct would *create or facilitate an intimidating, hostile, humiliating, degrading or offensive environment*.

The meaning of sexual harassment in section 28A(1)(b) of the *Sex Discrimination Act 1984* (Cth) should be similarly amended.

Recommendation 6: Introduce a positive duty into the *Sex Discrimination Act 1984* (Cth) on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment, harassment on the ground of sex and victimisation, as far as possible. This should be accompanied by a commensurate expansion of the functions and resources of the Australian Human Rights Commission.

Recommendation 7: Implement Recommendation 19 of the Respect@Work Report by amending the *Australian Human Rights Commission Act 1986* (Cth) to provide the Australian Human Rights 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 federal discrimination laws. The Australian Human Rights Commission should be given powers to require:

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

Amend the *Australian Human Rights Commission Act 1986* (Cth) to confer upon the Australian Human Rights Commission the power to enforce the *Sex Discrimination Act 1984* (Cth) by pursuing claims on behalf of individuals and groups and to seek the imposition of civil penalties on non-compliant organisations (in addition to seeking remedies for individual/s).

Recommendation 8: Amend the *Australian Human Rights Commission Act 1986* (Cth) to insert a costs protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).

Recommendation 9: Amend the *Australian Human Rights Commission Act 1986* (Cth) to make conciliation optional.

Recommendation 10: Review other federal anti-discrimination Acts - *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth) and *Racial Discrimination Act 1975* (Cth) - and amend as necessary to ensure consistency with the SDA of protection for workers and coverage in respect of members of parliament, their staff and judicial officers.

Recommendation 11: Consider how to better integrate the scope and operation of the anti-bullying jurisdiction of the Fair Work Commission with the prohibition on sexual harassment in the *Sex Discrimination Act 1984* (Cth).

1. Time limits

We welcome the amendment to s 46PH(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act) that extends the time within which a complaint may be lodged under the *Sex Discrimination Act 1984* (Cth) (the SDA) from 6 months to 24 months, before the President is able to exercise a discretion to terminate the complaint. However, the exclusion of the *Age Discrimination Act 2004* (Cth) (the ADA), *Racial Discrimination Act 1975* (Cth) (the RDA) and *Disability Discrimination Act 1992* (Cth) (the DDA) from this extension of time introduces inequity and increases the complexity of federal anti-discrimination laws.

In the Respect@Work Report, the Australian Human Rights Commission (the Commission) noted that ‘the six-month timeframe associated with this discretion fails to recognise the complex reasons why a victim may delay making a sexual harassment complaint immediately following the alleged incident’.² Similar complexity exists for those considering making a complaint of discrimination related to age, race or disability. The complaints-based individual model, common to federal anti-discrimination statutes, places a considerable burden upon individual complainants, who must weigh up the personal risks associated with pursuing a complaint, which might include victimisation, job loss and damage to future employment prospects. In addition, a complainant may wish to consider the details of the protections under the various, and mutually exclusive, jurisdictions in which they could lodge a complaint in order to make an informed decision about how to proceed. This is a complex process and inevitably a time consuming one, even for experts in the field, a problem which is magnified for individuals who wish to complain they have been subject to prohibited discriminatory treatment.

There is no sound policy rationale for exempting other federal anti-discrimination statutes from these amendments. To the contrary, for as long as discrimination remedies are spread across four different statutes, the intersectional nature of many instances of discriminatory conduct make it necessary for the statutes to conform on matters such as time limits. Accordingly, we recommend extending the time limit to 24 months for all federal anti-discrimination complaints.

² Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) 29.

Recommendation 1: Repeal section 46PH(1)(b) of the *Australian Human Rights Commission Act 1986* (Cth). Substitute; ‘(b) the complaint was lodged more than 24 months after the alleged acts, omissions or practices took place;’

2. Representative Proceedings

We are of the view that the Government should implement Recommendation 23 of the Respect@Work Report and amend the AHRC Act ‘to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the AHCR Act that allow unions and other representative groups to bring a representative complaint to the Commission’.³

In *Roadmap for Respect*, the Government suggested that while the approach contained in s 46P of the AHRC Act may be appropriate for conciliation in the Commission, ‘different considerations apply in the context of proceedings before a court’.⁴ However, no indication was provided as to what those different considerations might be, and in our view there are no considerations that distinguish court proceedings for this purpose. As outlined by the Commission, there are sound policy reasons for permitting representative actions to be brought by or on behalf of multiple complainants (including by a trade union or other entity with a legitimate interest in the subject matter). Representative actions can overcome barriers associated with navigating the cost and complexity of court proceedings for complainants and they provide a vehicle by which genuine cases, cases of systemic discrimination or harassment, and cases with a public interest element, can proceed to court.⁵ In addition to providing greater consistency in relation to standing in the Commission and in the federal courts, the recommended amendment would also reduce complexity for parties by placing the standing provisions for complaints made under anti-discrimination laws in the one location under Part IIB of the AHRC Act.

Recommendation 2: Amend section 46PO of the *Australian Human Rights Commission Act 1986* (Cth) to clarify that if (a) a complaint has been terminated by the President under section 46PE, paragraph 46PF(1)(b) or section 46PH; and (b) the President has given a notice to any person under subsection 46PH(2) in relation to the termination; any person who was an affected person in relation to the complaint *or a person or persons acting in a representative capacity*,

³ Ibid 501.

⁴ Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (2021) 13.

⁵ Australian Human Rights Commission (n 2) 500.

including a trade union, may make an application to the Federal Court or the Federal Circuit Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.

3. Substantive Equality

The Bill amends the objects clause of the SDA to add a new equality object, which is welcome. However, the wording of this new object - ‘(e) to achieve, so far as practicable, equality of opportunity between men and women’ – suffers three weaknesses. Firstly, by referring to equality between ‘men and women’ it reflects an outdated binary conceptualisation of sex. It does not account for those people who identify as neither male nor female or whose sex is biologically indeterminate. The SDA itself was amended in 2013 to acknowledge diversity of sexes and genders, so this change would make the objects inconsistent with the substantive provisions of the Act. We recommend an alternative drafting that refers to ‘equality for all sexes’. This wording also better aligns with the High Court’s decision in *Norrie*, which recognised that ‘[n]ot all human beings can be classified by sex as either male or female’.⁶

Secondly, the insertion of the phrase ‘so far as practicable’ is an unnecessary qualification. This is an objects clause, not a substantive provision; it serves as guidance for interpreting the substantive provisions. In this sense, it does not need to be qualified; it is aspirational and should reflect the highest goal of achieving equality to the extent the Act can support the achievement of this goal. This concern applies equally to such a qualification in the objects of the other federal anti-discrimination Acts. The drafting currently used in subsections 3(a), (b) and (ba) of the SDA, ‘so far as possible’, has long been the subject of criticism for qualifying the purpose of the Act. Submissions to the Senate Standing Committee on Legal and Constitutional Affairs on the ‘Effectiveness of the *Sex Discrimination Act 1984* in Eliminating Discrimination and Promoting Gender Equality’ in 2008 criticised the use of ‘so far as is possible’ as being inconsistent with Australia’s obligations under international law and confirming ‘the impression that the SDA is ambivalent about its aims’.⁷ The current drafting of the proposed new object - ‘so far as practicable’ - is equally equivocal about the commitment of the SDA to achieving equality, and inconsistent with the other objects.

⁶ *NSW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11, [1].

⁷ The Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) 18–19.

Finally, we support the commitment to ‘substantive equality’ in Recommendation 16(a) of the Respect@Work Report,⁸ rather than the phrase ‘equality of opportunity’ in the Bill. While these terms are sometimes used interchangeably as a means of differentiating them from ‘formal equality’ or ‘equal treatment’, they are not the same. Simone Cusack and Lisa Pusey have outlined the meaning of ‘equality’ contained within the Convention on the Elimination of Discrimination against Women (CEDAW), by reference to CEDAW and the CEDAW Committee’s General Recommendations. They write,

‘In addition to formal equality, CEDAW requires states parties to take all appropriate measures to ensure substantive (de facto) equality between women and men. Articles 3 and 24, for example, require steps to be taken to ensure the full development and advancement of women and the full realisation of the rights in CEDAW, respectively. The Committee has explained that states parties must ensure that women are ‘given an equal start’ (equality of opportunity) and are ‘empowered by an enabling environment to achieve equality of results’ (equality of results). This means that it is not enough for states parties to guarantee women treatment that is identical to that of men; they must also take biological, socially and culturally constructed differences between women and men into account, which may require non-identical treatment to address those differences. Significantly, the principle of substantive equality embodied in CEDAW and embraced by the Committee *further requires states parties to address the underlying causes and structures of gender inequality* (‘equality as transformation’ or ‘transformative equality’). The Committee has tended to view transformative equality as part of substantive equality rather than as a distinct model of equality...’⁹

Cusack and Pusey go on to outline the ‘transformative equality’ obligation that CEDAW imposes upon state parties,

‘The principle of transformative equality underpins several of CEDAW’s provisions. Examples include arts 2(f) and 5, which together require states parties to address prevailing gender relations and the persistence of gender-based stereotypes. The Committee’s approach to transformative equality has centred on two distinct but related categories of obligations. The first category

⁸ Australian Human Rights Commission (n 2) 452.

⁹ Simone Cusack and Lisa Pusey, ‘CEDAW and the Rights to Non-Discrimination and Equality’ (2013) 14(1) *Melbourne Journal of International Law* 54, 64.

concerns the transformation of institutions, systems and structures that cause or perpetuate discrimination and inequality. According to the Committee, states parties should implement an effective strategy that aims to redistribute power and resources amongst women and men and adopt measures ‘towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns’. The second category of obligations concerns the modification or transformation of harmful norms, prejudices and stereotypes. The Committee has explained that states parties should address the norms, prejudices and stereotypes that violate women’s rights and create the conditions necessary for women to exercise their autonomy and agency and ‘develop their personal abilities, pursue their professional careers and make choices without the limitations set by stereotypes, rigid gender roles and prejudices’.¹⁰

This outline by Cusack and Pusey makes clear that while equality of opportunity is an important element of substantive equality, it does not capture the obligations upon state parties to engage in the work of transforming institutions, systems and structures, as well as norms, prejudices and stereotypes that perpetuate discrimination and inequality. Amending the objects clause to specifically reference ‘substantive equality’ would demonstrate that the SDA is underpinned by a commitment to addressing the drivers of inequality and sex-based discrimination.

Recommendation 3: At the end of section 3 of the Sex Discrimination Act 1984 (Cth), add: ‘; and (e) to achieve substantive equality for all sexes’.

4. ‘Seriously’ demeaning conduct

We support the expanded protection of the SDA to harassment on the ground of sex. The excessive attention accorded overtly sexualised instances of sexual harassment, particularly on the part of prominent men such as Harvey Weinstein, has served to divert attention away from the panoply of harassing acts that might be described as sexed as well as sexualised.¹¹

However, while the inclusion of harassment on the ground of sex is a welcome reform, the drafting of s 28AA will limit the scope and effect of this important reform. The requirement that the unwelcome conduct be ‘seriously’ demeaning imposes too high a bar for complainants

¹⁰ Ibid 64–65.

¹¹ See Margaret Thornton, ‘Sexual Harassment Losing Sight of Sex Discrimination’ (2002) 26(2) *Melbourne University Law Review* 422.

and will undermine the usefulness of the provision. It suggests that sex-based harassment which is not *seriously* demeaning is acceptable even if it is offensive, humiliating or intimidating. Discrimination and harassment often work through repeated small actions rather than a single dramatic discriminatory action. In order for the reform to adequately address demeaning, belittling and misogynistic conduct, we recommend that the word ‘seriously’ be removed. In interpreting existing sexual harassment laws, courts have shown that they are capable of assessing the harmfulness of conduct without the need for such a qualification.

Recommendation 4: Remove the word ‘seriously’ from proposed section 28AA(1)(a) of the *Sex Discrimination Act 1984* (Cth).

5. The impact of harassment on the ground of sex

As noted above, while we welcome proposed s 28AA as an important reform, it unfortunately mirrors some of the problematic aspects of the current meaning of sexual harassment contained in s 28A of the SDA. In particular, it requires that the person engaging in the unwelcome conduct ‘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’ (s 28AA(1)(b)). Alternative provisions should be included to account for other ways in which harassment is unacceptable. While some victims might feel offended, humiliated or intimidated; harassment is also unacceptable when it interferes with a person’s ability to do their job, access education, accommodation, or goods and services, for example. The emotional response (or potential response) of a victim subjected to harassment should not be the only determinant of whether harassment is wrong under the law; other possible impacts should be recognised. The drafting of this needs to be thought through so that the definition of s28A and 28AA is appropriate for all the prohibitions in ss 28B-28L. One suggestion that is focused on this concern in respect of work is to provide two alternatives:

- that the person (engaging in the unwelcome conduct) does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the conduct *would interfere with or diminish the ability or authority of the person harassed to carry out any responsibility associated with their position*, or
- that the person (engaging in the unwelcome conduct) does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the conduct *would create or facilitate an intimidating, hostile, humiliating, degrading or offensive environment*.

The words ‘offended, humiliated or intimidated’ unnecessarily constrain the test contained in s 28A of the SDA and in the proposed s 28AA by delimiting the kind of reaction the claimant is expected to have. To address the range of sexual and sex-based harassment that persists, the legislation needs to move on from a view of this harassment that implies women find sexual or sex-based behaviour merely offensive or humiliating. There will be times when women may find either sexual or sex-based harassment unacceptable at work because those behaviours prevent them carrying out their work tasks or demean them at work. In such a case, the person may not be offended, humiliated or intimidated, but have still experienced significant negative effects.

Offended, humiliated, intimidated

An example of how the existing definition fails to protect claimants of sexual harassment arose in the case of *TN v BF & Anor*.¹² In this case a young woman, TN, reported multiple acts of workplace sexual harassment, including masturbation, by AB, the elderly founder of the company where she was employed. During one incident, TN videoed AB on her phone, while he masturbated for four and a half minutes. In her affidavit TN said: ‘I was disgusted though did not want to leave as I did not want to lose my job. I was waiting for him to ejaculate so that I could leave the room’. However, the fact that TN videoed the act of masturbation was used as evidence that she was not offended, humiliated or intimidated by her employer masturbating. A better definition would encompass workplace behaviours that are sexual, or sex-based, and create a hostile environment for another person to work in, or interfere with their capacity or authority to carry out their work. We recommend that these additional definitions sit alongside the current one.

Interfere with a person’s ability to carry out their work

Since sex-based harassment has been inadequately protected by the SDA to date, federal case law does not provide many examples of such behaviour. However, an example of a situation where a person may be negatively impacted by sex-based harassment, but not offended, humiliated or intimidated arose in the State case of *Gould v Director-General, NSW*¹³. In this case the complainant argued, amongst other things, that male colleagues at the ambulance service tightened taps on equipment so tightly that she could not use it and that junior male colleagues overrode her authority, along with male colleagues ignoring her at work. Where harassing behaviour on the ground of sex impedes and undermines someone’s ability to do their job, this should be prohibited. The requirement that the behaviour offend, humiliate or

¹² *TN v BF & Anor* [2015] FCCA 1497.

¹³ [2011] NSWADT 35

intimidate does not necessarily capture this type of harassment, and in fact can become an impediment to protection.

While the focus of the Respect@Work Report and this submission is on work, we recommend the Government consider how to ensure that the concerns we have articulated above are addressed in relation to all protected areas, such as education, the provision of goods and services and the provision of accommodation.

Hostile environment

Early State-based sex discrimination found that the cumulative effects of an endless succession of petty acts, not necessarily ‘sexual’ in nature, such as nuisance calls and upsetting jokes could contribute to a hostile workplace.¹⁴ However, following these early cases, Mason and Chapman write that ‘the term [hostile environment] has not been unequivocally embraced as being within legislative definitions of sexual harassment’ under the SDA.¹⁵ It has been referred to in some cases, but in obiter,¹⁶ and in others, rejected.¹⁷

An explicit recognition that the creation of a hostile environment can be a form of sexual or sex-based harassment would help to protect against some of the patterns of harassment that otherwise might go unprotected. These would include: non-sexual behaviours; behaviours that do not offend, intimidate or offend, as noted above; and behaviours that on their own may not meet a threshold for sexual harassment, but cumulatively create a particular ‘environment’ of hostility.

An example of such a law is the *Equality Act 2019* (UK), which includes the following definition of harassment in s 26:

- (1) A person (A) harasses another (B) if—
 - (a) A engages in unwanted conduct related to a relevant protected characteristic, and
 - (b) the conduct has the purpose or effect of— ...

¹⁴ *Hill v Water Resources Commission* [1985] EOC 92—127. See also, *Bennett v Everitt* [1988] EOC 92—244; *Bebbington v Dove* [1993] EOC 92—543; *Freestone v Kozma* [1989] EOC 92—249; *Hall v Sheiban* [1989] EOC 92—250.

¹⁵ Gail Mason and Anna Chapman, ‘Defining Sexual Harassment: A History of the Commonwealth Legislation and Its Critiques’ (2003) 31(1) *Federal Law Review* 195, 216.

¹⁶ *Freestone v Kozma* (n 14) 77, 377; *G v R and Department of Health Housing and Community Services* (Unreported, HREOC, 17 September 1993).

¹⁷ *A v B* [1991] EOC 92—367.

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Recommendation 5: Amend the definition of proposed section 28AA(1)(b) of the *Sex Discrimination Act 1984* (Cth): so as not to limit the scope of harassment on the grounds of sex to the emotional response of the victim, and extend to alternatives, such as: (1) the person (engaging in the unwelcome conduct) does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the conduct would *interfere with or diminish the ability or authority of the person harassed to carry out any responsibility associated with their position*; or (2) the person (engaging in the unwelcome conduct) does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the conduct would *create or facilitate an intimidating, hostile, humiliating, degrading or offensive environment*. The meaning of sexual harassment in section 28A(1)(b) of the *Sex Discrimination Act 1984* (Cth) should be similarly amended.

6. Positive duty on employers

Recommendation 17 of the Respect@Work Report was to amend the SDA 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. The Commission noted that in determining whether a measure is reasonable and proportionate, the SDA 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
- f) all other relevant facts and circumstances.¹⁸

In *Roadmap for Respect*, the Government noted that 'under the model 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

¹⁸ Australian Human Rights Commission (n 2) 481.

reasonably practicable. This includes the risk of being sexually harassed'.¹⁹ The Government has indicated that it will assess whether an amendment to the SDA introducing a positive duty as recommended in the Respect@Work Report 'would create further complexity, uncertainty or duplication in the overarching legal framework'.²⁰

We have previously recommended such a positive duty and endorse the Commission's Recommendation 17.²¹ The Bill should introduce a positive duty upon employers to prevent, rather than merely respond to, discrimination, victimisation and harassment. Current federal anti-discrimination laws prohibit harassment, but do not require or effectively enable organisations to change. They do not impose a positive duty on organisations to audit or self-regulate. They impose no obligations to inform, consult or engage stakeholders in identifying risks of harassment or designing solutions. While the Commission has important powers to provide education and guidance, these can only be offered, not wielded in any strategic pyramid of enforcement.²²

The purpose of positive duties is to place obligations onto duty-holders to prevent, rather than merely respond to discrimination and sexual harassment.²³ Such a duty requires duty-bearers to acknowledge and take reasonable steps to dismantle systemic work practices which allow for sexual harassment to occur. In many jurisdictions there has been the growing utilisation of responsive and reflexive regulatory theory. A proactive model aimed at institutional change moves away from the fault-based model of traditional anti-discrimination measures and instead focuses on the capacity of institutions to share the load in addressing issues of systemic inequality.²⁴ The United Kingdom, among other jurisdictions, has taken this step. The United Kingdom's public sector equality duty, which came into force in April 2011, is an example of this kind of second-generation reflexive law, designed to complement and enhance the individual claims-based system of anti-discrimination laws to achieve greater cultural

¹⁹ Australian Government (n 4) 12.

²⁰ Ibid 12 and 14.

²¹ See Recommendation 15, Australian Discrimination Law Experts Group, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (2019). Positive duties were also recommended in The Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia (n 7) Recommendations 14 and 40.

²² Belinda Smith, 'A Regulatory Analysis of the "Sex Discrimination Act 1984 (Cth)": Can It Effect Equality or Only Redress Harm?' in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 105, 105, 109, 111–112.

²³ Belinda Smith, 'Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to Address Work-Family Conflict' (2006) 28(4) *Sydney Law Review* 689, 713.

²⁴ Sandra Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369, 373; Belinda Smith and Dominique Allen, 'Whose Fault Is It? Asking the Right Question to Address Discrimination' (2012) 37(1) *Alternative Law Journal* 31.

change.²⁵ Though the duty appears to be very modest, research shows it has already had some effect in changing practices and norms as this theory predicts.²⁶ There are also examples of the introduction of positive duties here in Australia, for example in the Victorian *Gender Equality Act 2020*. While it is too early to evaluate the impact of that Act, it is a local example of legislation creating positive duties which has received positive endorsement from affected communities, suggesting there may be appetite for such reform in Australia.

It is acknowledged that a positive duty exists in WHS laws to proactively identify and address risks of harm in the workplace and to consult stakeholders. These laws also empower government agencies to enable and enforce compliance. In contrast to anti-discrimination laws, WHS laws more closely reflect the theory of reflexive regulation and allow for responsive regulation.²⁷ There can be no doubt that WHS laws are intended to address the types of psychological and physical harms that often result from harassment (and discrimination). The object of the Model WHS Act²⁸ is ‘to secure the health and safety of workers and workplaces’,²⁹ including by eliminating or minimising risks arising from work to protect ‘workers and other persons against harm to their health, safety and welfare’.³⁰ ‘Health’ is defined to include ‘psychological health.’³¹

The primary duty of care imposed by the Model WHS Act is on a person conducting a business or undertaking (PCBU) *to ensure, so far as is reasonably practicable, the health and safety of workers and other workplace participants* (e.g. volunteers, contractors, suppliers) under their effective control.³² PCBUs must also ensure that a workplace that they manage or control, or anything arising from that workplace, does not put at risk the health and safety of any person,

²⁵ Sandra Fredman and Sarah Spencer, ‘Beyond Discrimination: It’s Time for Enforceable Duties on Public Bodies to Promote Equality Outcomes’ (2006) 6 *European Human Rights Law Review* 598; Fredman (n 24); Sandra Fredman, ‘Breaking the Mold: Equality as a Proactive Duty’ (2012) 60(1) *American Journal of Comparative Law* 265; Christopher McCrudden, ‘Equality Legislation and Reflexive Regulation: A Response to the Discrimination Law Review’s Consultative Paper’ (2007) 36(3) *Industrial Law Journal* 255.

²⁶ Simonetta Manfredi, Lucy Vickers and Kate Clayton-Hathway, ‘Public Sector Equality Duty: Enforcing Equality Rights through Second-Generation Regulation’ (2018) 47(3) *Industrial Law Journal* 365; Sue Arthur et al, *Views and Experiences of the Public Sector Equality Duty (PSED): Qualitative Research to Inform the Review* (NatCen Social Research, 2013).

²⁷ Belinda Smith, Melanie Schleiger and Liam Elphick, ‘Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws’ (2019) 32(3) *Australian Journal of Labour Law* 219, 235–243.

²⁸ There are nine sets of WHS statutes across Australia, but seven of these reflect the Model Act developed through a national harmonisation process (2008-2011), with Victoria and Western Australia legislating independently.

²⁹ E.g., *Work, Health and Safety Act 2011* (Cth) s 3(1).

³⁰ *Work, Health and Safety Act 2011* (Cth) s 3(1)(a).

³¹ *Work, Health and Safety Act 2011* (Cth) (s 4 and Schedule 5).

³² *Work, Health and Safety Act 2011* (Cth) s 19(1).

including proactive measures to prevent and manage the risks of harmful workplace behaviours.³³

The focus is not on individuals and isolated incidents of misbehaviour; the focus is on systems and cultures. The obligation requires the PCBU to provide and maintain safe ‘systems of work’³⁴ and a ‘work environment’ that is safe and without risk to health.³⁵ In addition, PCBU’s must so far as is reasonably practicable, *consult* with workers and any health and safety representatives about work health and safety matters that directly affect them;³⁶ and provide ‘any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking.’³⁷

However, there is a fundamental problem: despite the growing evidence of the seriousness and pervasiveness of sexual harassment and the harm that it causes, Australian WHS agencies have been slow and reluctant to acknowledge harassment as a workplace hazard that warrants their attention.³⁸ There has been some welcome progress on this front recently.³⁹ But unless and until all WHS agencies explicitly acknowledge that harassment causes harm and develop expertise and guidance to prevent harassment, this system that is designed to protect workers from harm will continue to fail to protect workers from harassment.

There is growing recognition across Australia that sexual harassment is part of a wider problem of gender inequality and gender violence,⁴⁰ and that a range of measures is needed to promote more respectful, equitable and safe workplaces. A positive duty in the SDA would complement the existing duty in WHS laws. In this way we agree with the finding in the Respect@Work Report

³³ *Work, Health and Safety Act 2011* (Cth), s 20.

³⁴ *Work, Health and Safety Act 2011* (Cth) s 19(3)(c).

³⁵ *Work, Health and Safety Act 2011* (Cth) s 19(3)(a).

³⁶ *Work Health and Safety Act 2011* (Cth) s47(1).

³⁷ *Work, Health and Safety Act 2011* (Cth) s 19(3)(f).

³⁸ Smith, Schleiger and Elphick (n 27) 244-46.

³⁹ Eg Safe Work Australia, *Preventing workplace sexual harassment: National Guidance material*, January 2021; WorkSafe Victoria, *Work-related Gendered Violence including Sexual Harassment: A guide for employers*, March 2020.

⁴⁰ See for example, Victorian Trades Hall Council, *Stop Gendered Violence at Work* (2017); Unions NSW, *Reforms to Sexual Harassment Laws: Discussion Paper* (2018); NT Working Women’s Centre, *NT Working Women’s Centre Submission to NT Workplace Health and Safety Review* (2018); NT Working Women’s Centre, *NT Working Women’s Centre Submission to The Northern Territory Gender Equity Framework* (2019).

‘that human rights frameworks and WHS frameworks have different foundations and advantages... 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’.⁴¹

Further, a positive duty in the SDA would help to address one of the most prevalent forms of sexual harassment, which is harassment of workers by customers and clients. The Fourth National Survey on Sexual Harassment in Australian Workplaces found that 18 percent of respondents reported having been sexually harassed by a customer or client (22% of women and 11% of men). This was the second most common type of harassment when categorised by the relationship of a single perpetrator to a victim, after a co-worker at the same level. Harassment by a client or customer was more common than harassment by a more senior co-worker or supervisor. This type of harassment was also more common in retail trade, accommodation and food services, where 30 percent of those who experienced workplace sexual harassment reported that the perpetrator was a customer or client. This type of harassment is particularly problematic in circumstances where employers prioritise clients and customers for fear of alienating them or losing their business. A positive duty on employers should require that they take reasonable steps to protect workers from sexual and sex-based harassment, not only by other workers but also by third parties.

Functions and resources of the Australian Human Rights Commission

Recommendation 18 of the Respect@Work Report was 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:

- a. 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
- b. enter into agreements/ enforceable undertakings with the organisation
- c. apply to the Court for an order requiring compliance with the duty’.

The Government has deferred consideration of this recommendation until it determines whether to implement Recommendation 17 (positive duty). For any positive duty to have the

⁴¹ Australian Human Rights Commission (n 2) 480.

desired outcome, the regulator (such as the AHRC) must have a range of powers available to them to support such a duty.⁴² This can involve supporting self-regulation through persuasion, advice, the provision of guidance on best practice and evidence of the practices of comparable organisations.⁴³ However, to be effective, there needs to be sufficient sanctions in case of non-compliance through powers of enforcement involving a range of systemic corrective orders and even penalties.⁴⁴

Recommendation 6: Introduce a positive duty into the *Sex Discrimination Act 1984* on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment, harassment on the grounds of sex and victimisation, as far as possible. This should be accompanied by a commensurate expansion of the functions and resources of the Australian Human Rights Commission.

7. Australian Human Rights Commission inquiry and enforcement functions

We agree that the Bill should confer a broad inquiry function upon the Commission, as recommended in Recommendation 19 of the Respect@Work Report. Sexual harassment laws rely on the individual complainant for enforcement. There is currently no scope for the Australian Human Rights Commission or another statutory agency to take action on behalf of an individual complainant or the community. Nor can the Australian Human Rights Commission assist the individual financially or otherwise if they take their claim to court. The individual complaints system is complex and costly, and after four decades, it has not adequately addressed sexual harassment in the workplace.

In addition to the broad inquiry function recommended in the Respect@Work Report, we also recommend that the Commission be given the power to enforce the SDA, and other federal discrimination laws, by initiating complaints on behalf of individuals and groups. It is not anticipated that the Commission would fund all actions that were pursued to the federal courts, but it would be expected to take a strategic approach to its litigation work and support cases that would clarify and develop the law, address systemic issues, and have an impact on a group of women. We further recommend that the Commission be given the power to seek the imposition of preventative or corrective orders and civil penalties on non-compliant

⁴² Smith (n 23) 723.

⁴³ Ibid 727.

⁴⁴ Ibid 705–706.

organisations (in addition to seeking remedies for the individual/s). The Commission should be empowered to work with respondents to resolve matters using enforceable undertakings.

This model has already been used successfully by the Fair Work Ombudsman to address many forms of unlawful conduct in the workplace and could be replicated to address sexual harassment, and other breaches (particularly systemic) of discrimination laws. Finally, we recommend that the Commission receive additional resources so that it can perform this new, important function effectively.

Recommendation 7: Implement Recommendation 19 of the Respect@Work Report by amending the *Australian Human Rights Commission Act 1986* (Cth) 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 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 with penalties applying for non-compliance, when conducting such an inquiry.

Amend the *Australian Human Rights Commission Act 1986* (Cth) to confer upon the Commission the power to enforce the *Sex Discrimination Act 1984* (Cth) by pursuing claims on behalf of individuals and groups and to seek the imposition of civil penalties on non-compliant organisations (in addition to seeking remedies for individual/s).

8. Costs

In the Respect@Work Report the Commission recommended amending the AHRC Act to insert a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth) (the FWA) (Recommendation 25). The Government has indicated it will review costs procedures in sexual harassment matters to ensure they are fit for purpose, noting that the determination of costs orders is already at the discretion of the court.⁴⁵

We support the introduction in this Bill of a costs protection provision as recommended by the Commission. Among serious barriers to the ability to bring a sexual harassment claim to protect rights are the general civil procedure litigation rules that apply to federal civil litigation, which

⁴⁵ Australian Government (n 4) 13.

interact with the assessment of damages in sexual harassment matters. These rules apply with particular harshness in sexual harassment claims because of the structure in which an individual must bring a claim against their employer or ex-employer, which is likely to be an organisation with much larger resources and a less personal stake in the matter. The best example is *Richardson v Oracle*,⁴⁶ in which a sexual harassment claimant succeeded in her claim in the Federal Court, but was awarded only \$18,000 damages, a remarkably low amount given the harm she suffered, and the costs and risks involved in litigating her claim. Because of the operation of the Federal Court Rules (which are very similar to the costs rules in other Australian courts) and because she had refused to settle for an offer of \$55,000 before the hearing occurred, instead of having her costs paid as she had succeeded, she was ordered to pay the costs of the respondent from the date of the offer on an indemnity basis (i.e. the full costs incurred).⁴⁷ This was financially disastrous and her legal success became a Pyrrhic victory. In effect, a claimant is put in the position of having to gamble on weighing the amount of damages a court would award her if she succeeded against the risk of paying the other side's indemnity costs. This cannot be regarded as a satisfactory process in proceedings to resolve an individual work dispute that concerns protection of a human right: it operates not as a general incentive to negotiate a settlement but as an almost insuperable barrier to enforcing the law, given the usually low damages awarded in sexual harassment cases. *Richardson* had little alternative but to appeal the decision on damages to the Full Federal Court, which upheld her appeal. The Court decided that the category of damages for pain and suffering (i.e. not proved economic loss) for sexual harassment had been evaluated well below the level of compensation set in comparable cases, such as common law personal injuries claims for psychological injuries resulting from workplace bullying and harassment. The Court decided that her damages for pain and suffering should be increased to \$100,000, and she should be awarded \$30,000 for economic loss for a period after she left Oracle when her salary in her new job was lower. As a result, she was no longer liable to pay the respondent's costs, and instead they were required to pay hers. Because the amount awarded exceeded the amount of a counter-offer to settle made on her behalf, her costs were to be paid on an indemnity basis by the respondent from that date.⁴⁸

The impact of these costs rules exacerbates the risks of litigating a sexual harassment claim and emphasises the inappropriateness of requiring individuals to bring claims against their

⁴⁶ *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82.

⁴⁷ *Ibid* 234–237.

⁴⁸ *Richardson v Oracle Corporation Australia Pty Ltd (No 2)* [2014] FCAFC 139. For detailed analysis, see Madeleine Castles, Tom Hvala and Kieran Pender, 'Rethinking Richardson: Sexual Harassment Damages in the #MeToo Era' (2021) 49(2) *Federal Law Review* 231.

employers in the civil courts on the same basis as other civil litigation. Enforcing a claim under the FWA does not involve such risks, as costs are not generally awarded unless circumstances are exceptional. Australia’s anti-discrimination laws limit the vindication of human rights claims to the individual affected with no assistance from a public agency, and then impose punitive civil litigation and costs rules on the litigant.

Recommendation 8: Amend the *Australian Human Rights Commission Act 1986* (Cth) to insert a costs protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth).

9. Compulsory Conciliation

In order to access the federal court system for a legal determination, complainants must first go to the Commission for conciliation. While there are significant benefits to conciliation, it is sometimes inappropriate or undesirable for a complainant to go through the conciliation process. For example, where sexual harassment is one aspect of a more complex matter that is otherwise being litigated, compulsory conciliation creates a separate process for one part of a claim, meaning that it may be dropped. While we acknowledge the Commission’s view that such a provision might risk increasing the court’s workload,⁴⁹ where a complainant does not want to conciliate, they should be able to waive conciliation and receive a termination notice to access the court system. This would enable them to avoid the delay that is often associated with accessing conciliation. This model has been successfully utilised in Victoria, where complainants under the *Equal Opportunity Act 2010* (Vic) can elect to go directly to the tribunal, bypassing alternative dispute resolution processes when appropriate.

Recommendation 9: Amend the *Australian Human Rights Commission Act 1986* (Cth) to make conciliation optional.

10. Expansion of federal anti-discrimination law

We support the extension in the SDA of the protection against sexual and sex-based harassment to ‘workers’ consistent with the *Work Health and Safety Act 2011* (s 7), which includes not only direct employees and contractors, but their subcontractors and employees, labour hire workers, outworkers, trainees, unpaid work experience students and volunteers. This is an important amendment, which extends protection to a number of vulnerable groups. While we welcome this amendment in respect of sexual and sex-based harassment, we recommend that

⁴⁹ Australian Human Rights Commission (n 2) 498–499.

all federal anti-discrimination laws should be consistent in their coverage in protecting all workers against harassment and discrimination of all kinds.

We also support the clarification provided by amendments to s 4 (Interpretation) of the SDA, extending the scope of coverage of the SDA to members of parliament, their staff and judicial officers. While we welcome this amendment to the SDA, we recommend review and appropriate amendments to ensure the other three federal anti-discrimination Acts also extend to members of parliament, their staff and judicial officers.

In *Roadmap for Respect*, the Government acknowledged that ‘duplication, conflicting definitions and concepts and unclear pathways for resolution’ create challenges for dealing with matters of sexual harassment.⁵⁰ The same can be said for discrimination matters and other types of harassment. The Government’s response is to seek ‘clear paths to maximise Australians’ access to justice’.⁵¹ They note that ‘clear obligations and consistent tests in as few places as possible ensures employers and employees know the applicable standards and can avoid harm’.⁵² If this is the stated intention of the Government in legislating this Bill, then care should be taken to avoid creating additional complexities and inconsistencies between the SDA and other federal anti-discrimination statutes.

Recommendation 10: Review other federal anti-discrimination Acts - *Disability Discrimination Act 1992* (Cth), *Age Discrimination Act 2004* (Cth) and *Racial Discrimination Act 1975* (Cth) - and amend as necessary to ensure consistency with the SDA of protection for workers and coverage in respect of members of parliament, their staff and judicial officers.

11. Sexual harassment within anti-bullying jurisdiction

We support amendments to the FWA that clarify that sexual harassment can amount to bullying, and in particular the amendments to s 789FF that enable a worker to apply to the Fair Work Commission following a single instance of sexual harassment for an order to stop the harassment. However, the limitation contained in proposed s 789FD(2A) that the worker must be sexually harassed ‘at work’ will limit the capacity of these orders to address sexual harassment for workers. This is so because social media used outside working hours is a major avenue for bullying and harassment. Sexual harassment is also likely to occur at informal functions attended with work colleagues. As noted in the Explanatory Memorandum to the

⁵⁰ Australian Government (n 4) 2.

⁵¹ Ibid.

⁵² Ibid.

Bill,⁵³ the decision of the Full Bench of the Fair Work Commission in *Bowker; Coombe; and Zwarts*⁵⁴ interpreted the concept of being ‘at work’ as encompassing both ‘the performance of work (at any time or location) and when the worker is engaged in some other activity which is authorised or permitted by their employer, or in the case of a contractor their principal (such as being on a meal break or accessing social media while performing work)’.⁵⁵ However, it was acknowledged by the Full Bench in that same case that ‘the use of social media to engage in bullying creates particular challenges’.⁵⁶

The Full Bench accepted that if the bullying behaviour consisted of a series of Facebook posts it would amount to bullying at work within the meaning of s 789FD if the worker was at work at the time the comments were posted, or if the worker accessed the comments later while at work.⁵⁷ However, the Full Bench also acknowledged that their interpretation of s 789FD ‘may give rise to some arbitrary results’ including that if a worker accessed comments on social media which constituted unreasonable behaviour at a time when they were not at work, the behaviour would not fall within the scope of Part 6-4B.⁵⁸ This inconsistency is problematic, particularly as it pertains to sexual harassment. If a worker engages in unwelcome conduct of a sexual nature by posting or sending materials to a co-worker but outside of work hours, and they are received by the co-worker when they are not at work or performing work, this would not satisfy the ‘at work’ requirement. Similarly, if the worker is sexually harassed by a co-worker at an informal function (one that is not authorised or permitted by the employer), this would not satisfy the at-work requirement of s 789FD. The Full Bench reasoned that the ‘application of the meaning of ‘at work’ in a particular case will depend on all the circumstances and it is appropriate that the jurisprudence develop on a case-by-case basis.’⁵⁹

We commend the Government for providing access to the anti-bullying jurisdiction (‘a fast, low cost, informal mechanism to deal with complaints’⁶⁰), but arbitrary distinctions between sexual harassment at work and sexual harassment outside of work by an employer or co-worker, limit the utility of the provisions. We acknowledge that to expand or change the

⁵³ Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, 22-23.

⁵⁴ *Bowker; Coombe; and Zwarts v DP World Melbourne Ltd; Maritime Union of Australia, Victorian Branch and Others* [2014] FWCFB 9227.

⁵⁵ *Ibid* [51].

⁵⁶ *Ibid* [54].

⁵⁷ *Ibid* [55].

⁵⁸ *Ibid* [56].

⁵⁹ *Ibid* 58.

⁶⁰ Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, 9.

meaning of ‘at work’ for the sexual harassment provisions will create inconsistencies with the ‘bullying at work’ provisions, and yet not to change them would create inconsistencies with the types of sexual harassment that are prohibited under the SDA. This again highlights the need for a system-wide rethink of the integration of federal anti-discrimination and industrial laws. A worker who experiences sexual harassment (irrespective of whether it is at work, or in connection with their work) should be able to access both the injunctive relief provided by the anti-bullying jurisdiction as well as the compensatory relief provided under the SDA.

Recommendation 11: Consider how to better integrate the scope and operation of the anti-bullying jurisdiction of the Fair Work Commission with the prohibition on sexual harassment in the *Sex Discrimination Act 1984* (Cth).