

Response to Questions on Notice

Please see **below** the Women's Legal Centre ACT's ('the Centre') response to the following question on notice:

[What is the Centre's view] about whether or not [recommendations 15, 16c-19, 23, 25 and 28] should be implemented in the [proposed reforms]?

Response

Recommendation	Response
Recommendation 15: The Australian Government ratify ILO Convention 190.	The Centre supports the ratification of the ILO convention concerning the elimination of violence and harassment in the world of work. The Centre particularly supports the broad definition of 'worker' and 'workplace', the acknowledgement of gender-based violence and harassment as a systematic driver of workplace sexual harassment and the support for positive duties on employers to prevent violence and harassment in the workplace.
Recommendation 16: Amend the Sex Discrimination Act to ensure: <ul style="list-style-type: none"> c. creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited 	The Centre the supports the inclusion of this recommendation to create an obligation on employers to apply a gender-lense to their work environments and create a positive duty to prevent sexual harassment in the workplace. This will ensure workplaces must take active measures to prevent the creation and facilitation of harmful work environments, where claims can be brought to remedy issues in the work environments rather than waiting for the harm to have occurred and then be able to make a claim. This would also place less onus on an individual complainant and make employer obligations clear. We note resources should also be allocated to support small businesses to understand their obligations and implement changes.
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: <ul style="list-style-type: none"> 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. 	<p>Again, the Centre supports the inclusion of a positive duty on all employers to eliminate sex discrimination, sexual harassment, and victimisation.</p> <p>The Government's response to the Respect@Work Report states it '<i>recognises the importance of a preventative approach to stop sexual harassment before it occurs</i>'. However, the Bill's failure to introduce positive duties on employers means the work of addressing sexual harassment remains largely with individuals who have been sexually harassed, after the fact. This is despite calls from experts and advocates, including the Centre, for over a decade. In its report of 12 December 2008, the Senate Standing Committee on Legal and Constitutional Affairs recommended further consideration should be given to amending the SDA to provide for positive duties for public sector organisations, employers, educational institutions and other service providers to eliminate sex discrimination and sexual harassment and promote gender equality. The Respect@Work Report recommended employers should be</p>

	<p>required to take reasonable and proportionate measures to eliminate sexual harassment and sex discrimination at work. It is extremely disappointing that this recommendation has been ignored.</p> <p>The Government has indicated that it believes the current work health and safety protections are sufficient. Given the AHRC found sexual harassment is endemic in Australian workplaces, the WHS regime is clearly not doing enough to prevent sexual harassment. If we ever want to see a reduction in sexual harassment in Australian workplaces, we must shift the onus away from individuals who have been sexually harassed and demand more of employers.</p>
<p>Recommendation 18: 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:</p> <ol style="list-style-type: none"> 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. 	<p>The Centre supports the Commission assessing compliance and enforcing positive duties on employers. The Commission already has broad legislative functions and powers, where further inquiry functions will bolster the Commission's capacity to facilitate a process which is transparent, independent, and fair.</p>
<p>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:</p> <ol style="list-style-type: none"> the giving of information the production of documents the examination of witnesses 	<p>See above.</p>
<p>Recommendation 23: Amend the Australian Human Rights Commission Act to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.</p>	<p>The Centre supports amendments to allow unions and other representative groups to bring representative claims to court if these amendments support better access to justice outcomes for vulnerable litigants.</p>
<p>Recommendation 25: Amend the Australian Human Rights Commission Act to insert a cost protection provision consistent with section 570 of the Fair Work Act 2009 (Cth).</p>	<p>The Centre strongly supports cost protection provisions which are consistent with the FW Act.</p>

	<p>One of the biggest disappointments in this Bill is that it does not provide any costs protections for claimants under the SDA. Section 570 of the FW Act provides that a party can only be ordered to pay costs (the other side's legal fees) in very limited circumstances. These are: when the party instituted the proceedings vexatiously or without reasonable cause; when the party's unreasonable act or omission caused the other party to incur the costs; or when they unreasonably refused to participate in a matter before the Fair Work Commission about the same facts.</p> <p>There is no similar provision in the SDA, and disappointingly, this Bill does not change that. Costs risks will continue to be a significant deterrent to claimants.</p> <p>We have had clients with strong discrimination cases who have decided not to proceed due to the risk of having to pay the other side's costs. Often the other side is a large business or government department with expensive external lawyers, meaning the amount they may have to pay in costs is enormous and terrifying, and greatly shadows what they could potentially expect to receive in damages. Sexual harassment cases often involve an assessment of both side's credibility, as there is rarely direct evidence, such as video footage. Therefore, even if the conduct clearly meets the criteria for unlawful sexual harassment, claimants worry they will not be believed, and take a big risk in taking a matter further. The inconsistency in awards for damages also means that claimants face the risk of having to pay costs if they reject an offer less than what the court orders. Again, this means claimants are faced with the choice of giving up, accepting offers that potentially undervalue their loss, or continuing and gambling their financial security.</p>
<p>Recommendation 28: The Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the Sex Discrimination Act, is expressly prohibited.</p>	<p>The Centre supports this recommendation and submits consistency should be promoted between the Fair Work system and <i>Sex Discrimination Act</i> as much as possible to avoid confusion to employees and employers. The Centre submits there needs to be stronger messaging that sexual harassment is serious, illegal and won't be tolerated. The current provisions of the <i>Fair Work Act</i> do not adequately address the nature of sexual harassment, and a clear prohibition on sexual harassment will reinforce these community standards.</p>