AUSTRALIAN DISCRIMINATION LAW EXPERTS GROUP

Submission of the Australian Discrimination Law Experts Group

in response to the

Senate Standing Committees on Legal and Constitutional Affairs inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

11 October 2022

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Glossary

ADA	*Age Discrimination Act 2004* (Cth)
ADLEG	Australian Discrimination Law Experts Group
AHRC	Australian Human Rights Commission
AHRCA	*Australian Human Rights Commission Act 1986* (Cth)
DDA	*Disability Discrimination Act 1992* (Cth)
EOAV	*Equal Opportunity Act 2010* (Vic)
FWA	*Fair Work Act 2009* (Cth)
SDA	*Sex Discrimination Act 1984* (Cth)
RDA	*Racial Discrimination Act 1975* (Cth)
Respect@Work Report	Australian Human Rights Commission, *Respect@Work: Sexual harassment national inquiry report* (2020, Australian Human Rights Commission) <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

Australian Discrimination Law Experts Group

This submission is made 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 is in response to the Senate Standing Committees on Legal and Constitutional Affairs inquiry ('the Inquiry') into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 ('the Bill') tabled in the federal parliament on 27 September 2022.

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 contacting Belinda Smith on or Robin Banks on

This submission may be published.

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Summary

This submission is made in response to the Senate Standing Committees on Legal and Constitutional Affairs inquiry ('the Inquiry') into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 ('the Bill') tabled in the federal parliament on 27 September 2022.

As set out in further detail below, our recommendations are as follows:

1. ADLEG recommends that aspects of the Bill be delayed to ensure that they can be fully considered to avoid unintended and complicating outcomes.

2. ADLEG recommends clause 2 of schedule 8 be amended to refer to 'substantive gender equality' rather than simply 'substantive equality'.[6]

3. ADLEG recommends that similar amendments be made to ensure the other three federal discrimination laws—the *Racial Discrimination Act 1975* (Cth) (RDA), the *Disability Discrimination Act 1992* (Cth) (DDA), and the *Age Discrimination Act 2004* (Cth) (ADA)—have as one of their objects the achievement of substantive equality on the basis of race, disability and age.[8]

4. ADLEG commends the amendment that removes the qualifier 'seriously' from section 28AA of the SDA and recommends it be supported.[9]

5. ADLEG recommends that section 28AA(1)(a) be amended by removing 'of a seriously demeaning nature in relation to the person harassed'.[10]

6. ADLEG recommends that section 28AA(1)(b) be amended to include 'offended, humiliated, intimidated or unable to participate in the workplace on an equal basis with others'.[11]

7. ADLEG recommends that this proposed new paragraph 3(ca) of the SDA be amended to read:[13]

   (ca) to eliminate, as far as possible, discrimination involving subjecting persons to workplace environments that are hostile on the grounds of sex, **sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, potential pregnancy, breastfeeding and/or family responsibilities**.

8. ADLEG commends the recognition in new section 8A of the SDA (schedule 1 clause 4) that harassment occurs on combinations of protected characteristics (intersectionality).[15]

9. ADLEG recommends that consideration be given to adopting a general recognition of intersectionality (combined or overlapping protected characteristics) across the Act as a whole.[15]

10. ADLEG recommends proposed section 28M(2)(a) and (b) of the SDA be removed from the Bill.[17]

11. ADLEG recommends the circumstances for sex-based and hostile work environments in section 28AA and proposed section 28M(3) of the SDA be made consistent.[19]

12. ADLEG recommends that the proposed circumstances to be taken into account in section 28M(3) of the SDA be changed to assist in determining the contribution the first person made to the hostile environment and include existing SDA section 28AA(2)(a)–(g).[21]

13. ADLEG recommends the following revised wording for proposed sections 28M(2)(a) and (b) of the SDA to replace the current proposed sections 28M(2)(a) and (b):[22]

28M Hostile work environment

(1) It is unlawful for a person to **substantially contribute to the creation or maintenance of** ~~subject another person to~~ a workplace environment that is hostile on the ground of sex.

(2) A person (the first person) substantially contributes to the creation of a workplace environment that is hostile, offensive, humiliating or intimidating to another person (the second person) if:

(a) a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the contribution would have resulted in the workplace environment being hostile, offensive, humiliating or intimidating to the second person 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

14. ADLEG recommends the Outline in proposed section 47B of the SDA be amended to refer also to harassment.[25]

47B Simplified outline of this Part

> An employer or a person conducting a business or undertaking must take all reasonable ~~and proportionate~~ measures to eliminate, as far as possible, certain discriminatory conduct **and harassment**.
>
> Division 4A of Part II of the *Australian Human Rights Commission Act 1986* confers functions on the President in relation to this duty, including inquiring into compliance, giving compliance notices and accepting undertakings.

15. ADLEG recommends that the positive duty be to take 'all reasonable steps,' consistent with section 106 of the Act.[28]

16. ADLEG recommends that the positive duty explicitly include an obligation to consult and engage as a factor to be considered under proposed section 47C(6) of the SDA.[30]

17. ADLEG recommends that the positive duty include a disclosure obligation, at least in respect of workers and other stakeholders.[31]

18. ADLEG recommends that section 47C(6) of the SDA include AHRC guidance materials as a 'relevant matter' to be taken into account in determining whether duty holders comply with the positive duty.[32(d)]

19. ADLEG recommends that the proposed section 35A of the AHRCA be corrected or clarified to ensure that the new AHRC functions for promoting awareness and compliance with the positive duty not be limited to 'sex discrimination' but extend to the full coverage of the positive duty, including harassment.[33]

20. ADLEG recommends in respect of the positive duty provisions that it would be preferable and in the interests of consistency to use the term 'duty holder' throughout.[34]

21. ADLEG recommends that the proposed section 35B be amended to remove the requirement the AHRC to form a 'reasonable suspicion'.[37]

22. ADLEG recommends that proposed section 35B of the AHRCA be amended to remove subsection (2) and (3) and to refer in subsection (4) to procedural fairness rather than natural justice.[38]

23. ADLEG commends the amendments set out in schedule 3 and recommends they be supported.[39]

24. ADLEG recommends that proposed paragraph 46PO(2A)(c) of the AHRCA be amended to give standing to make a representative application to any entity that initiated the complaint to the Australian Human Rights Commission under section 46P, or a similar entity.[40]

25. ADLEG recommends that the Bill not include the proposed section 46POA of the AHRCA.[42]

26. ADLEG recommends the AHRCA be amended to ensure remedial orders beyond compensation can be made to address the group-based nature of a representative application.[43]

27. ADLEG recommends that the provisions to amend the arrangements for representative applications be supported with the amendments set out in recommendations 24, 25 and 26.[44]

28. ADLEG therefore reiterates its recommendation for an asymmetric system of costs allocation, as suggested in its submission on the Exposure Draft, the basic features of which are that the applicant would be entitled to costs recovery if successful but would not pay the respondent's costs if unsuccessful (unless vexatious).[48]

29. ADLEG recommends that schedule 6 be supported.[51]

30. ADLEG recommends that the Government consider expanding the reporting obligations to require public reporting by the Commonwealth public sector in respect of all protected attributes and intersectionality.[52]

31. ADLEG recommends that incidence of formal complaints of sexual harassment, sex-based harassment and hostile work environment harassment be added to the gender equality indicators in the Act.[52]

32. ADLEG recommends that section 94 of the SDA and equivalent provisions in the other federal discrimination laws be amended similarly to section 104(2) of the *Equal Opportunity Act 2010* (Vic) to provide:[56]

> (2) It is sufficient for subsection (1)(g) [which requires an allegation of a breach of the Act] that the allegation states the act or omission that would constitute the contravention without actually stating that this Act, or a provision of this Act, has been contravened.

33. ADLEG recommends that section 27(2) of the RDA be amended to reflect section 94 of the SDA and proposed section 18AA of the RDA be amended to reflect section 47A of the SDA.[58]

34. ADLEG recommends that section 51 of the ADA be amended to reflect section 94 of the SDA and proposed section 47A of the ADA be amended to reflect section 47A of the SDA.[59]

35. ADLEG recommends that the proposed victimisation provisions in the Bill be supported with the amendments set out in recommendations 32, 33 and 34.[61]

36. ADLEG recommends that schedule 8 clause 1 be supported.[64]

37. ADLEG recommends that the Bill be amended to include a provision in the form proposed in paragraph 65 below to streamline references to attributes and characteristics related to attributes. This could be further streamlined by adding the intersectionality provision (any combination of 2 or more of the characteristics).[66]

Fundamental concerns

1. ADLEG recognises that these reforms reflect the most significant and far-reaching recommendations of the *Respect@Work* Report.[1] Properly drafted and implemented, we believe they would have a significant impact on achieving substantive gender equality in Australia. We commend the initiative to implement the reforms but are deeply concerned that as currently drafted, the flaws and omissions in the Bill will undermine the effectiveness of the legislative changes and we ask that proper time and consideration be given to the points set out below.

2. We identify below those aspects of the Bill that we believe should proceed immediately on the basis that they implement important and relatively straight forward reforms. We also identify those which require further consideration to ensure they achieve the intended outcomes.

3. A key theme of the *Respect@Work* Report is that the laws seeking to address sex discrimination and harassment are too complex and difficult to navigate (as noted in the Explanatory Memorandum[2]). Some of the proposed changes exacerbate this problem.

4. Further, these reforms are an opportunity to build structural connections and to streamline the regulatory system governing workplace gender equality. Recommendation 14 of the *Respect@Work* Report was that the Respect@Work Council be empowered to 'improve coordination, consistency and clarity across the key legal and regulatory frameworks, to improve prevention and response to sexual harassment'. These legislative changes should be directed at a simpler, more effective system of regulation but they do not build the necessary connections between the federal discrimination, fair work, workplace health and safety and workplace gender equality jurisdictions that would provide that clarity and consistency.

5. We understand and support the urgent need for concrete action on sexual harassment and gender equality. However, good law reform requires adequate time for consultation and good drafting. Aspects of this Bill are being rushed without adequate time for considering the most effective ways to remedy the fundamental problems we have identified below.

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1 Australian Human Rights Commission, *Respect@Work: Sexual harassment national inquiry report* (2020, Australian Human Rights Commission) <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

2 Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [30].

Substantive equality: Schedule 8

6. We **commend** schedule 8 clause 2 to the Committee and urge that it be recommended for passage with one amendment. This clause amends the objects of the *Sex Discrimination Act 1984* (Cth) (SDA) to refer to 'substantive equality'. **ADLEG recommends amending clause 2 of schedule 8 be amended to refer to 'substantive gender equality' rather than simply 'substantive equality'.**

7. However as amended the object in section 3(d) of the SDA would still refer to 'substantive equality between men and women.' ADLEG recommends that the clause be amended to reflect the fact that the SDA deals with equality between many groups affected by forms of sex and sex-related discrimination. This could be done by replacing 'between men and women' with 'between people with characteristics protected by this Act and other people' or 'for people with characteristics protected by this Act.'

8. ADLEG recommends that similar amendments be made to ensure the other three federal discrimination laws—the *Racial* Discrimination *Act 1975* (Cth) (RDA), the *Disability Discrimination Act 1992* (Cth) (DDA), and the *Age Discrimination Act 2004* (Cth) (ADA)—have as one of their objects the achievement of substantive equality on the basis of race, disability and age.

Sex-based harassment – Schedule 8

9. Schedule 8 clause 3 amends section 28AA of the SDA to remove the qualifier, 'seriously', in reference to conduct that must be demeaning in nature to constitute sex-based harassment. **ADLEG commends the amendment that removes the qualifier 'seriously' from section 28AA of the SDA and recommends it be supported.**

10. We believe that the 2021 reform that included the word 'demeaning' as a requirement to prove sex-based harassment in section 28AA(1) was a misstep that should now be remedied. There is no reason, in evidence, practice or common sense, for a person to need to be 'demeaned' to prove sex-based harassment. It is enough to show that a person was exposed to conduct because of their sex/characteristics, that would meet the standard reasonable observer test. **ADLEG recommends that section 28AA(1)(a) be amended by removing 'of a seriously demeaning nature in relation to the person harassed'.** This would result in the provision reading as follows:

> (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

11. For the reasons set out below at [19], the requirement that the person harassed be 'offended, humiliated or intimidated' is a test that should be amended. The Act should provide a remedy for situations where a person, due to the harassment, is unable to participate in the workplace on an equal basis with others. The current test, developed for unwelcome sexual behaviour, is particularly unsuited to sex-based harassment and does not capture the impact of de-authorising, disrespectful or obstructive behaviours that prevent the harassed person participating equally in the workplace. **ADLEG recommends that section 28AA(1)(b) be amended to include 'offended, humiliated, intimidated or unable to participate in the workplace on an equal basis with others':**

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

(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 **or unable to participate in the workplace on an equal basis with others**.

Hostile work environment – Schedule 1

12. While in principle ADLEG strongly endorses the inclusion of hostile work environment provisions as an additional protection under the Act, the way that the provisions are worded renders them ineffective.[3] This is because, rather than making a person responsible for the creation or maintenance of a (general) hostile environment that impacts others, these provisions create an additional individual-on-individual action, while adding further 'relevant circumstances', eg. of seriousness and repetition, that are not part of Australian sexual harassment jurisprudence and would likely operate as additional hurdles to victims. It is difficult to see any situation where these provisions would be applicable. It is possible that these sections were influenced by the US jurisprudence on hostile environment cases, which is unsuited to the Australian legislative framework. These provisions must be delayed to ensure the underlying principles and objects will be achieved through appropriately drafted amendments.

Objects

13. We commend schedule 1 clause 2 to the Committee and recommend that it be supported with amendment. This clause adds a new paragraph (ca) to the objects provision of the SDA: section 3. It provides, as a new object of the Act, being 'to eliminate, as far as is possible, discrimination involving subjecting persons to workplace environments that are hostile on the ground of sex'. Given the SDA seeks to protect against discrimination on a number of grounds, not limited to sex, ADLEG recommends this new clause be extended to recognise that hostile workplace environments include those that are hostile in relation to all of those grounds, including a combination of them. As such, **ADLEG recommends that this proposed new paragraph 3(ca) of the SDA be amended to read:**

> (ca) to eliminate, as far as possible, discrimination involving subjecting persons to workplace environments that are hostile on the grounds of sex, **sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy, potential pregnancy, breastfeeding and/or family responsibilities.**

Scope of protection

14. ADLEG **urges** the current government and the federal Parliament to consider amending the other three substantive federal discrimination laws—the RDA, the DDA, and the ADA—to include workplace environments that are hostile on any ground (or combination of grounds) protected under federal discrimination legislation.

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3 For a recent article examining the possibilities of using Australian hostile environment law to more effectively address the effects of discriminatory harms alongside a positive duty, see Isabel Karpin and Karen O'Connell 'The Challenge of Bioinequality: Addressing the Health Impact of Unequal Treatment through Law' (Forthcoming, 2022) *Medical Law Review* (UK).

15. Further, ADLEG commends the recognition in new section 8A of the SDA (schedule 1, clause 4) that harassment occurs on combinations of protected characteristics (intersectionality). However, we can see no reason for confining this recognition to only hostile work environment harassment, or only to harassment generally, rather than to all the conduct the Act makes unlawful. ADLEG recommends that consideration be given to adopting a general recognition of intersectionality (combined or overlapping protected characteristics) across the Act as a whole. A simple approach to this would be to adopt a provision that identifies the attributes protected by the Act, and further recognises that any 2 or more of those characteristics is also protected.

Need to focus on environment and contribution to environment

16. The requirement in proposed section 28M(2) (schedule 1 clause 5) that an individual (the first person) subjects another individual (the second person) directly to harmful conduct replicates ordinary unlawful harassment. In this form, the provisions will fail to achieve the benefit of adding a hostile environment action, which is to cover a situation where a person's unlawful behaviour lies in contributing to the creation of a hostile environment. Another person who is harmed by that environment can then bring an action against the persons who created the environment. This is a crucial distinction. It avoids the common situation where individuals' acts are difficult to connect directly to a specific individual, but they create a hostile environment, and another person is impacted by that environment. To give an example, a person who institutes a workplace competition rating women on attractiveness may be responsible to women impacted by that system even if they have never personally rated them.

17. The requirement in proposed section 28M(2)(a) and (b) that the persons must be in the same physical workplace is an unnecessary additional hurdle and retrograde, given common knowledge and wide acceptance of the use of online harassment to create hostile environments for women and other vulnerable groups, and the expansion of online work in recent years. Many workers are likely to interact primarily or substantially in a virtual workplace which may nevertheless be hostile. **ADLEG recommends proposed section 28M(2)(a) and (b) of the SDA be removed from the Bill.**

18. The test that the environment be 'offensive, intimidating, humiliating' in section 28M(2)(c) imports wording scholars have long critiqued.[4] It unnecessarily creates a requirement that the person impacted be able to evidence particular feelings. These replicate gendered stereotypes by requiring that the person subjected to harm feel offended or frightened or humiliated by unwanted behaviour or hostile environments. This test is particularly unsuited to sex-based and hostile work environment claims. It

[4] See Margaret Thornton 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26(2) *Melbourne University Law Review* 422 .

needs, at a minimum, to be broadened to include *hostile* effects, to capture conduct that may not offend or frighten, but prevents the person affected from doing their job or enjoying the workplace environment on an equal basis with others. That, surely, is the appropriate test for sex-based harassment or hostile environments.

19. This Bill, in its current form, would result in there being three different sets of 'circumstances' to be considered for the three types of harassment (sexual, sex-based and hostile environment). This is unnecessary and confusing. The relevant circumstances to be considered should be as consistent as possible to avoid confusion for duty-bearers, provide certainty for complainants and prevent unnecessary litigation. **ADLEG recommends the circumstances for sex-based and hostile work environments in section 28AA and proposed section 28M(3) of the SDA be made consistent**.

20. It is of particular concern that the 'circumstances' to be considered in section 28M(3)—seriousness, repetition and status—appear to be directed at narrowing the scope of the section. Along with the problems in the current wording of the section (set out above) this further reduces the effectiveness of this section in remedying hostile work environments. The 'circumstances' also seem to be related to the conduct of the first person directed towards the second person, when logically they should focus on the contribution the first person made to the hostile environment itself.

21. It is also of particular concern that the list of relevant circumstances in section 28M(3) does not include (as it does in section 28A and section 28AA) the age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, disability of the person affected or the relationship of the people involved. It is simply wrong, given the clear evidence of intersectional harassment (that is, the disproportionate impact harassment has on specific groups), that these factors are not included as relevant in hostile environments, when they are highly relevant. These circumstances allow consideration of the increased risks of harassment and discrimination for specific groups, in particular those who have intersectional attributes, and it would assist clarity if the Act identified the purpose of considering these circumstances: for example, as relevant to interpreting behaviours in the workplace in view of power disparities. **ADLEG recommends that the proposed circumstances to be taken into account in section 28M(3) of the SDA be changed to assist in determining the contribution the first person made to the hostile environment and include existing SDA section 28AA(2)(a)–(g).**

22. ADLEG recommends the following revised wording for proposed sections 28M(2)(a) and (b) of the SDA to replace the current proposed sections 28M(2)(a) and (b):

28M Hostile work environment

(1) It is unlawful for a person to **substantially contribute to the creation or maintenance of** ~~subject another person to~~ a workplace environment that is hostile on the ground of sex.

(2) A person (the first person) substantially contributes to the creation of a workplace environment that is hostile, offensive, humiliating or intimidating to another person (the second person) if:

(a) a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the contribution would have resulted in the workplace environment being hostile, offensive, humiliating or intimidating to the second person 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

Positive duty – Schedule 2

23. Schedule 2 of the Bill sets out amendments to the SDA to introduce a positive duty. Clause 8 adds a new Part IIA, most importantly a new section 47C, to establish a duty on identified entities to 'prevent unlawful sex discrimination etc'. This is done in response to recommendation 17 of the *Respect@Work* Report. This is to be enforced by the Australian Human Rights Commission (AHRC), primarily through powers afforded to it as a result of schedule 2 part 2 creating a new Division 4A in Part II of the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA), in response to recommendation 18.

24. ADLEG welcomes the creation of this duty but is concerned that the provisions appear to be unduly complex. Any employer or person conducting a business should not have to obtain legal advice to help them make sense of what is required. Such complexity does not augur well for the success of the initiative. It might be noted that members of ADLEG, all senior lawyers with expertise in equality and discrimination law, found it difficult to agree on the interpretation of some sections.

25. Further, it is unclear why the simplified outline in the proposed section 47B (schedule 2 clause 8) refers only to 'discriminatory conduct' when the duty applies also to harassment. The outline should accurately reflect the content of the part. **ADLEG recommends the Outline in proposed section 47B of the SDA be amended to refer also to harassment.**

47B Simplified outline of this Part

> An employer or a person conducting a business or undertaking must take **all** reasonable ~~and proportionate~~ measures to eliminate, as far as possible, certain discriminatory conduct **and harassment**.
>
> Division 4A of Part II of the *Australian Human Rights Commission Act 1986* confers functions on the President in relation to this duty, including inquiring into compliance, giving compliance notices and accepting undertakings.

26. We are concerned that the proposed section 47C of the SDA (schedule 2 clause 8) is unnecessarily complicated and limited, thereby undermining the potential of the duty to effectively address the range of harassment identified in the *Respect@Work* Report. We have a number of concerns that are set out below.

27. Firstly, it is unclear why the duty requires 'reasonable and proportionate steps'. Currently the SDA imposes vicarious liability on various duty bearers under section 106 unless they take 'all reasonable steps' to prevent the wrongful conduct. Rather than replicating and reinforcing this obligation to take all reasonable steps, this proposed section 47C introduces a new term which we believe will simply create confusion and litigation. **ADLEG recommends that the positive duty be to take 'all reasonable steps,' consistent with section 106 of the Act.**

28. The duty in section 47C is drafted to apply to 'employers' and persons conducting a business or undertaking (PCBUs). It is not clear why both terms are needed when all employers would fall within the definition of PCBUs. Presumably employers are specifically mentioned to align with the negative duties to not discriminate in section 14, but the current drafting seems to be an unnecessarily complicated and inelegant solution. This double reference to employers and PCBUs is then replicated and the complexity compounded throughout the section. We recognise that the term PCBU was introduced recently and creates more consistency with work health and safety laws, but its singular use in the harassment provisions of the SDA creates inconsistencies within the SDA and between discrimination laws, and adds to the complexity of this legislation.

29. As currently drafted, the duty in section 47C is complex and very difficult to understand. It appears to impose a duty on employers and PCBUs to take reasonable steps to prevent their own workers and agents from perpetrating harassment (under section 28B) against each other or other persons (such as clients, customers, patients, students, visitors or even passers-by) (subsections (1), (2) and (3)) and to take steps to prevent harassment of their employees/workers by such *other persons* (subsections (1), (4) and (5)). This is appropriate because it seeks to ensure that the positive duty is aligned with the scope of the underlying protections in section 28B. It is clear that businesses should bear some responsibility for taking steps to prevent harassment *by* their workers and harassment *of* their workers by such other persons. Businesses would obviously have less control over the conduct of such other persons, so this means the steps considered 'reasonable' would be adapted to those circumstances. There is increasing recognition of the prevalence and harm of workers being harassed by customers and others (see *Respect@Work* Report, and the recent Victorian Equal Opportunity and Human Rights Commission inquiry into non-compliance with the Victorian positive duty by Bakers Delight Holdings[5]). Examples of this include workers being harassed by customers, care workers by patients, professional sportspersons by spectators, and journalists being trolled by listeners/readers. Work health and safety laws require PCBUs to take steps to prevent (physical and psychological) harm to their workers from such other persons, and so it is appropriate that this SDA positive duty similarly require duty holders to take steps to prevent their workers from being subjected to discrimination and harassment.[6] However, as noted above, the introduction into the SDA of the term PCBU (and extension of protection to other persons) in such a limited way, has created inconsistency within the Act and between federal discrimination laws. It has also created complexity, and this is being compounded as seen in this proposed section 47C. Complexity undermines credibility of the Act and compliance.

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5 < https://www.humanrights.vic.gov.au/news/retail-investigation/>.

6 Belinda Smith, Melanie Schleiger and Liam Elphick, 'Preventing Sexual Harassment in Work: Exploring the Promise of Work Health and Safety Laws' (2019) 32 *AJLL* 219

30. The positive duty as currently drafted contains no explicit obligation to consult workers or other stakeholders in order to comply. The 'reasonable and proportionate steps' obligation might be interpreted to require consultation, but **ADLEG recommends that the positive duty explicitly include an obligation to consult and engage as a factor to be considered under proposed section 47C(6) of the SDA.** This is consistent with the approach under the *Gender Equality Act 2020* (Vic) and positive equality duties in Scotland, Wales and Northern Ireland.

31. The positive duty as currently drafted contains no reporting obligations at all and this will limit its efficacy and compliance. Without any obligation to report, there is no mechanism to ensure that workers, other stakeholders or the AHRC are to be informed of steps and engaged in promoting compliance by duty holders. This is of particular significance for AHRC enforcement, as noted below at [34]–[38]. **ADLEG recommends that the positive duty include a disclosure obligation, at least in respect of workers and other stakeholders**. One suggestion is outlined below:

    a. Imposing a disclosure obligation on larger businesses and entities, such as those businesses and tertiary sector employers that are already required to report under the *Workplace Gender Equality Act 2012* (Cth) (WGEA). Under WGEA, once duty holders report to the WGE Agency, they also must provide a copy of their report to their workers and stakeholders (section 16 WGEA) and inform the workers/stakeholders that they have a right to provide information to the WGE Agency about the report (sections 16A, 16B WGEA). This transparency obligation is designed to harness the interests and resources of workers and other stakeholders to promote accurate reporting and ultimately compliance.

    b. A similar obligation could be imposed in respect of section 47C to require larger entities (such as WGEA duty holders) to make transparent to their workers and other stakeholders (or publicly) the steps they have taken to fulfil the positive duty. This could involve:

        i. An annual requirement to provide at least an outline of the steps the entity has taken to comply and a sign off by the chief executive officer (however described) that the entity has taken 'all reasonable steps' to prevent the conduct covered by section 47C.

        ii. This notice should also inform stakeholders that they can provide comments on the notice to the entity or directly to the AHRC if they have relevant information or concerns about the adequacy of the steps of their business, as the WGEA duty holders must do in respect of WGEA reporting.[7]

[7] This form of transparency has proven essential in supporting the UK Equality and Human Rights Commission in enforcing positive equality duties in Scotland. See Alysia Blackham, 'Positive Equality

32. Relevant factors under section 47C(6):

    a. We **commend** the inclusion of a list of factors to be taken into account in determining whether 'reasonable and proportionate steps' have been taken to prevent harassment and discrimination. What is reasonable is contextual.

    b. ADLEG recommends that consultation be included as a relevant factor, as noted above at [30].

    c. We are concerned that the factors listed in the provision are directed solely to the circumstances of the duty holder's business and do not include consideration of the impact on persons intended to be protected by the duty. These are counterbalancing considerations that may justify taking further steps. Without some consideration of the benefits of any steps to be taken, the scales will be unduly weighted towards the interests of the duty holder. We recommend that the factors include the seriousness of any discrimination that is to be countered, the impact on affected groups and individuals, and the benefits to be gained by taking the steps.

    d. It is also imperative that employers and other PCBUs be directed to the guidance materials produced by the AHRC in respect of the duty, and an obvious way to do this is to include reference to them expressly as a relevant factor under section 47C(6). If laws require a standard of behaviour, as this positive duty is going to do, to be fair and effective the law also needs mechanisms to ensure that duty holders know of and understand the requirements and are enabled to comply with the standard. The AHRC is to be given functions relating to the positive duty (under section 35A AHRCA), including functions to prepare and publish 'guidelines for complying with the positive duty'. Such guidelines can be considered as a 'relevant matter' to be taken into account in determining whether a duty holder complies with the positive duty, so duty holders should be put on notice of this and directed to these enabling materials. **ADLEG recommends that section 47C(6) of the SDA include AHRC guidance materials as a 'relevant matter' to be taken into account in determining whether duty holders comply with the positive duty**. (AHRC guidance materials should also be referenced explicitly in determining all reasonable steps under the vicarious liability provisions in section 106 of the SDA.)

33. The AHRC is to be given functions (under section 35A AHRCA), including functions to prepare and publish 'guidelines for complying with the positive duty', to promote understanding and undertake research and educational programs. We commend this power but question why this is limited to 'sex discrimination'. **ADLEG recommends**

Duties: The Future of Equality and Transparency?' (2021) 37(2) Law in Context 98–118 https://journals.latrobe.edu.au/index.php/law-in-context/article/view/150; Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (2022, Oxford Monographs on Labour Law, Oxford University Press) chapter 7.

that the proposed section 35A of the AHRCA be corrected or clarified to ensure that the new AHRC functions for promoting awareness and compliance with the positive duty not be limited to 'sex discrimination' but extend to the full coverage of the positive duty, including harassment.

Positive duty enforcement – Schedule 2 Part 2

34. While a detailed process is set in place for the Commission to inquire into a person's compliance regarding a positive duty (section 35B(1), the trigger for action on the part of the Commission is a reasonable suspicion of non-compliance. (The reference here is to 'a person's compliance', but the identity of the 'person' is somewhat unclear when section 47C refers to a 'duty holder'. **ADLEG recommends in respect of the positive duty provisions that it would be preferable and in the interests of consistency to use the term 'duty holder' throughout**.

35. The question that ADLEG poses in relation to section 35B is what is the nature of the evidence that needs to be adduced to support a 'reasonable suspicion' on the part of the Commission? The lodgement of a complaint of discrimination with a commission or agency would appear to constitute compelling evidence on its face, but confidentiality is the central characteristic of the conciliation process in all jurisdictions, which prohibits the release of any information pertaining to a complaint. AHRCA section 46PKA prohibits Commission staff themselves from disclosing details of conciliation complaints and they face a criminal penalty if they do so, which presumably would also apply in the case of a purpose such as providing evidence of a breach of a positive duty. Deeds of settlement and non-disclosure agreements (NDAs) prevent the parties themselves from revealing details of a complaint and may involve significant penalties; the *Privacy Act also* prohibits the communication of such information.

36. How else might a reasonable suspicion be formed? If it were to depend on an informal communication from an employee, that person would be vulnerable to being dismissed or being subjected to some other retaliatory action; defamation suits are not unfamiliar in the case of those alleged to have engage in sexual harassment. In view of these serious constraints, surely it would make sense to place the onus on the duty holder in the first instance to present periodic reports about an organisation, such as occurs with the Workplace Gender Equality Agency and other similarly situated organisations.

37. ADLEG recommends that the proposed section 35B be amended to remove the requirement the AHRC to form a 'reasonable suspicion'.

38. The provision that would guide the Commission's inquiry function in relation to the positive duty, proposed section 35B of the AHRCA (schedule 2 part 2), sets out a confusing list of directions about natural justice and fair actions by the Commission. It is clear that the Commission would be obliged to act with procedural fairness in relation to any action involving an individual or organisation in any event, so the reference in subsection (4) to the 'rules of natural justice' is unnecessary. It is not clear what is being achieved by subsections (2) and (3), or what their aim is, as fair procedures would be required by the rules of procedural fairness. If the aim is to make these underlying legal

principles clear in this context, this would be best and most clearly done by omitting (2) and (3) and referring in (4) to procedural fairness rather than natural justice. **ADLEG recommends that proposed section 35B of the AHRCA be amended to remove subsection (2) and (3) and to refer in subsection (4) to procedural fairness rather than natural justice.**

Inquiries into systemic unlawful discrimination – Schedule 3

39. ADLEG commends the amendments set out in schedule 3 and recommends they be supported.

Representative applications – Schedule 4

40. We welcome the introduction of provisions to overcome the existing barriers to complaints made by representatives proceeding in the federal court system: schedule 4 of the Bill. We understand this is achieved by providing a definition in section 3(1) of the AHRCA of 'representative application' that distinguishes it from 'an application that commences a representative proceeding in accordance with Part IVA of the *Federal Court of Australia Act 1976*'. The amendment to section 46PO in the form of the new subsection 46PO(2A) provides that a complaint may be made on behalf of an 'affected person' (definition unchanged) by the listed individuals or entities. These are welcome changes. While it may be intended to be understood that 'person' includes bodies corporate, the retention of the distinction between 'a person or trade union' in paragraph 46PO(2A)(c) may be interpreted as an intention that only individual persons or trade unions can lodge under this paragraph. This would be an unfortunate outcome and would prevent organisations with a clear and long-standing role in advocating for members of disadvantaged groups from being the applicant on behalf of members of the groups they support and for whom they advocate. **ADLEG recommends that proposed paragraph 46PO(2A)(c) of the AHRCA be amended to give standing to make a representative application to any entity that initiated the complaint to the Australian Human Rights Commission under section 46P, or a similar entity**.

41. The proposed new section 46POA will be an insurmountable barrier to many complaints proceeding as representative applications and therefore will preclude individuals affected by the systemic discrimination from benefitting from this important access to justice amendment. Requiring, for example, every individual affected by discriminatory wages in supported employment settings to consent (in writing) to a representative action against the employer would prevent many individuals from getting any benefit from such an action proceeding, particularly individuals with significant cognitive impairments.

42. Further, this provision is at odds with the proposed new section 46POB which provides that an individual on whose behalf a representative application has been made cannot make a separate application unless they opt out of that action. This type of opt-out provision is found in situations when a class is described in the proceeding and individuals are not required to consent (opt in) to be part of the application and individuals who fall within the defined class can then opt out of the class, thereby preserving their right to bring an individual action. We recommend that these provisions be amended to not require consent of class members for the application to proceed, but to retain the opt-out provision. That is, **ADLEG recommends that the Bill not include the proposed section 46POA of the AHRCA.**

43. We also note the Court's remedial power is still limited to a focus on individual compensation. It should be accompanied by some amendments to the remedy provision

in the AHRCA, namely sections 46PO(4) and (5). The need for a group action suggests that the discrimination is systemic at least to some degree in affecting a wide group of people, and the remedies should enable this to be addressed, and not be limited only to compensating each individual group member. This could be addressed by adding a provision to section 46PO(4) that where a representative claim succeeds the court should consider whether a remedy that addresses the group based nature of the claim should be made in addition to individual compensation. **ADLEG recommends the AHRCA be amended to ensure remedial orders beyond compensation can be made to address the group-based nature of a representative application.**

44. ADLEG recommends that the provisions to amend the arrangements for representative applications be supported with the amendments set out above.

Costs – Schedule 5

45. Costs remain the single most significant barrier for applicants in accessing protection under the federal discrimination framework. The prospect of facing an order to pay the legal costs of the other party, as well as their own, if unsuccessful is presently the most significant disincentive to litigation under federal discrimination laws in Australia.

46. ADLEG notes the amendment to costs in Schedule 5 and appreciates the improvement on the present system. It is pleased to see the removal of proposed section 46PSA(3)(b) from the Exposure Draft under which an applicant in receipt of a grant of legal aid could have faced an order to pay a respondent's costs. However, ADLEG believes that a symmetrical costs protection scheme is limited, although used in the *Fair Work Act 2009* (Cth). ADLEG is concerned that a complainant could be considerably out of pocket, including possible bankruptcy, if funding their own legal representation. Lack of financial resources for litigation applies to the majority of the Australian population and operates as a major barrier to enforcing this law, which can only be enforced by affected individuals. This leads to serious under enforcement of the law. Most members of the Australian public would regard this as inequitable, particularly when it is the respondent, commonly a well-to-do business entity that has either improperly committed the act or acts of discrimination itself or is vicariously liable for an employee who has done so, and is able to deduct the cost of litigation from its tax obligations when individual may not be able to. In many cases the respondent generally can easily absorb the costs of representation as a legitimate business expense, as ADLEG pointed out in its August submission. In contrast, many survivors of discrimination are employees with limited resources and with characteristics that put them at greater risk. The *Respect@Work* Report revealed that survivors of sexual harassment disproportionately include young women under 30, Aboriginal and Torres Strait Islander people and people with disability, sectors of society unlikely to possess the substantial resources required to fund litigation.

47. The reality is that the prospect of costs will continue to deter complainants from pursuing litigation, so that decisions in the discrimination jurisdiction are largely dealt with behind closed doors. As so few cases proceed to a formal hearing (barely two per cent), the jurisprudence is renowned for its inconsistency and lack of development. ADLEG is concerned that this state of affairs will not be overcome by a symmetrical costs regime.

48. ADLEG therefore reiterates its recommendation for an asymmetric system of costs allocation, as suggested in its submission on the Exposure Draft, the basic features of which are that the applicant would be entitled to costs recovery if successful but would not pay the respondent's costs if unsuccessful (unless vexatious). Reducing the burden on applicants by adopting an asymmetrical costs regime would accord with the proposed overall legislative scheme of the Bill, which evinces a more realistic appreciation of the inequality of bargaining power confronting applicants. The asymmetrical model would

also take account of the public interest underpinning discrimination legislation that is designed to promote greater equality within society. Indeed, in recognition of public interest litigation, ADLEG draws the Committee's attention to the asymmetric costs model already existing in the whistleblowing provisions of the *Public Interest Disclosure Act 2013* (Cth) section 18 and the *Corporations Act 2001* (Cth), section 1317AH, which contain a similar exception in the case of proceedings instituted without reasonable cause.

49. ADLEG believes that the inequality underpinning the relationship between the parties in discrimination complaints constitutes a powerful argument in favour of an *asymmetrical* costs regime and exhorts the Committee to pay particular attention to it. Not only would applicants be able to recover costs if successful, but the model would offer them greater certainty at the outset. At present, the uncertainty is such that it could deter 'no-win no-fee' lawyers from representing applicants. The present proposal is dependent on the uncertain discretion of the court, which can only be exercised at the end of a hearing, whereas the asymmetrical model would provide an essential degree of certainty at the outset.

50. The proposed matters to be considered by a court in deciding whether the circumstances justify making a costs order are broad and fail to give clear direction to the judge. They can be read to suggest the discretion to order costs is quite open and not constrained. In contrast, a better formulation is found in section 570 of the *Fair Work Act 2009* (quoted below) which gives much clearer directions that it is only in very limited circumstances that costs can be ordered against an applicant. While this does not provide for an asymmetrical costs regime, it at least provides better protection against costs orders in genuine matters, and allows for greater opportunities for applicants to try to enforce the law and protect rights.

> **570 Costs only if proceedings instituted vexatiously etc.**
>
> (1) A party to proceedings (including an appeal) in a court (including a court of a State or Territory) in relation to a matter arising under this Act may be ordered by the court to pay costs incurred by another party to the proceedings only in accordance with subsection (2) or section 569 or 569A.
>
> Note: The Commonwealth might be ordered to pay costs under section 569. A State or Territory might be ordered to pay costs under section 569A.
>
> (2) The party may be ordered to pay the costs only if:
>
> (a) the court is satisfied that the party instituted the proceedings vexatiously or without reasonable cause; or
>
> (b) the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or
>
> (c) the court is satisfied of both of the following:

(i) the party unreasonably refused to participate in a matter before the FWC;

(ii) the matter arose from the same facts as the proceedings.

WGEA public sector reporting – Schedule 6

51. We **commend** the proposal to require Commonwealth public sector reporting to the WGE Agency set out in schedule 6 of the Bill. **ADLEG recommends that schedule 6 be supported.**

52. However, ADLEG recommends that the Government consider expanding the reporting obligations to require public reporting by the Commonwealth public sector in respect of all protected attributes and intersectionality. Further, ADLEG recommends that incidence of formal complaints of sexual harassment, sex-based harassment and hostile work environment harassment be added to the gender equality indicators in the Act. This would support the aim of strengthening the law against sexual harassment, sex-based harassment and hostile work environment harassment, and would also be consistent with the gender equality indicators in the *Gender Equality Act 2020* (Vic).

Victimisation – Schedule 7

53. We commend the proposal to make the federal discrimination laws consistent by ensuring that victimisation under any of the federal Acts can form the basis of a civil action.

54. Victimisation provisions are included in discrimination laws to ensure that those seeking to assert rights under the laws or to be witnesses in the process are protected from threats or harm intended to dissuade them from their involvement. As with prohibitions on witness threats in criminal and other areas of law, these are vital protections. This is particularly the case in discrimination law where complainants are often complaining about a person who has significant power in their life, for example, an employer or service provider. Similarly, witnesses may be employees of a party to a complaint and must be protected from threats to ensure they feel safe to give full and honest evidence.

55. Unfortunately, the approach taken in the Bill includes limits on the protections that are unnecessary and confusing. In particular, there are marked differences in the wording between the SDA and the proposed provision in the DDA on one hand and the proposed provisions in the RDA, and the ADA. These differences increase the inconsistencies in federal discrimination laws without providing any valid reason for doing so.

56. The existing provisions regarding victimisation—the justice administration offence provision—in section 94 of the SDA appears to require reference to the action being contrary to the legislation in order for protection to be accorded. Many individuals who raise a complaint with their employer would not be aware of the specific legislation that applies. Protection against victimisation is needed even before the applicable legislation is identified. **ADLEG recommends that section 94 of the SDA and equivalent provisions in the other federal discrimination laws be amended similarly to section 104(2) of the *Equal Opportunity Act 2010* (Vic) (EOAV) to provide:**

> (2) It is sufficient for subsection (1)(g) [which requires an allegation of a breach of the Act] that the allegation states the act or omission that would constitute the contravention without actually stating that this Act, or a provision of this Act, has been contravened.

57. The proposed victimisation provision to be added to the ADA is worded differently from the provision in the SDA section 47A, and the provision to be added to the DDA (proposed section 58A), which is worded similarly to section 47A of the SDA, and RDA (proposed section 18AA). The wording in the SDA is an effective approach which should be replicated in the RDA and ADA.

58. ADLEG notes, with concern, that the wording of the proposed provision in the RDA (schedule 7 part 1 clause 16, adding new section 18AA to the RDA) replicates in coverage the existing justice offence provisions in that Act: section 27(2). This limits the protection to threats and harm in employment and to the imposition of a financial or other penalty. This final paragraph of proposed section 18AA(2), paragraph(d), is not explicitly limited

to the employment context, but it is subject to being read *ejusdem generis* as limited to that context. There are no such limits in the SDA victimisation provisions that provide for a justice administration offence in section 94, and a basis for a complaint in section 47A. Rather than replicate that unjustifiably limited coverage in the justice offence provision, **ADLEG recommends that section 27(2) of the RDA be amended to reflect section 94 of the SDA and proposed section 18AA of the RDA be amended to reflect section 47A of the SDA.**

59. Similarly, ADLEG notes, with concern, that the wording of the proposed provision of the ADA (schedule 7, part 1, clause 4, adding new section 47A of the ADA) replicates in coverage the existing justice offence provisions in that Act: section 51. This limits the protection provided, including through requiring the person alleging victimisation to establish that the person who threatened them 'intended' the victim to 'fear that the threat will be carried out' or 'is reckless as to causing the second person to fear that the threat will be carried out': proposed section 47A(3). This imports a criminal burden on the person complaining of victimisation in a civil complaint process. There is no similar requirement in the SDA provisions. Again, rather than replicate the flawed approach found in the justice offence provision, **ADLEG recommends that section 51 of the ADA be amended to reflect section 94 of the SDA and proposed section 47A of the ADA be amended to reflect section 47A of the SDA.**

60. We also note that the justice administration offence provisions in the four federal discrimination laws do not carry a consistent penalty. The RDA and SDA carry a maximum penalty for individuals of 25 penalty units or imprisonment for 3 months or both and for corporations of 100 penalty units: section 27 RDA, section 94 SDA. In contrast, the DDA and ADA carry a maximum penalty of 6 months: section 42 DDA, section 51 ADA. There is no rational basis for this difference. ADLEG recommends that the justice administration offence provisions of the four federal discrimination laws be harmonised to provide a maximum penalty for individuals and, separately, for bodies corporate. Such penalties should not be limited to imprisonment and the maximum penalties set out in the legislation should be determined based on consideration of the penalties imposed for similar justice administration offences under other commonwealth laws. Examples of commonwealth laws that contain similar justice administration offences include the *Ombudsman Act 1976*, which imposes a maximum penalty of 6 months imprisonment.

61. ADLEG recommends that the proposed victimisation provisions in the Bill be supported with the amendments set out above.

Timeframes for making a complaint – Schedule 8

62. We **commend** the inclusion in the Bill of schedule 8 clause 1 which will make the federal discrimination laws consistent in respect of the timeframes for lodging complaints.

63. This clause provides that a complaint under any of the federal Acts could only be terminated by the AHRC on the basis of delay if it is made more than 24 months after the alleged unlawful conduct. This corrects the unfair and unjustified distinction currently found in federal discrimination law whereby complainants under three of the four federal Acts—the RDA, DDA and ADA—have only 6 months to lodge their complaint, and those complaining of breaches of the SDA have 24 months.

64. ADLEG recommends that schedule 8 clause 1 be supported.

Drafting style regarding characteristics in the SDA

65. Finally, we note that all provisions defining discrimination and harassment in the SDA repeat the 'characteristics provisions.'. This makes the legislation unnecessarily wordy and complex. The drafting could be simplified with reference to characteristics clauses by adopting the method used in the *Equal Opportunity Act 2010* (Vic) (EOAV) of providing that for all attributes covered by the Act, protection of the attribute also extends to its characteristics. Below is draft text based on section 7 of the EOAV but with changes to reflect the need to recognise that direct and indirect discrimination are not mutually exclusive, that discrimination on the basis of future attributes (as is the case in the DDA) should be covered as should intersectional discrimination and association with a person with one or more protected attributes.

#. Meaning of discrimination

(1) Discrimination means—

(a) direct and/or indirect discrimination on the basis of one or more attributes;

(2) Discrimination on the basis of one or more attributes includes discrimination on the basis—

(a) that a person has one or more attributes or had them at any time, whether or not person had those attributes at the time of the discrimination;

(b) of a characteristic that a person with that attribute or those attributes generally has;

(c) of a characteristic that is generally imputed to a person with that attribute or those;

(d) that a person is presumed to have that attribute or those attributes or to have one or more of the attributes at any time or will have one or more of the attributes at some time in the future;

(e) of personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

66. ADLEG recommends that the Bill be amended to include a provision in the form proposed in paragraph 65 below to streamline references to attributes and characteristics related to attributes. This could be further streamlined by adding the intersectionality provision (any combination of 2 or more of the characteristics).