

**National Interest Analysis [2022] ATNIA 11
with attachment on consultation**

**International Labour Organization Convention concerning the elimination of
violence and harassment in the world of work (No. 190)**

adopted at Geneva on 21 June 2019

[2022] ATNIF 21

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

International Labour Organization Convention concerning the elimination of violence and harassment in the world of work (No. 190) adopted at Geneva on 21 June 2019

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Nature and timing of proposed treaty action

1. The proposed treaty action is ratification of the *International Labour Organization (ILO) Convention concerning the elimination of violence and harassment in the world of work, No. 190*, adopted at Geneva on 21 June 2019 (the Convention).
2. In accordance with Article 14(2), the Convention entered into force generally on 25 June 2021, being 12 months after the date on which the ratifications of 2 ILO Members had been registered by the Director-General. Article 14 provides that the Convention is binding only upon ILO Members that have had their ratifications registered with the Director-General of the International Labour Office.
3. It is proposed that Australia ratify the Convention as soon as practicable. Under Article 14(3), the Convention would enter into force for Australia 12 months after the date on which Australia's ratification is registered by the Director-General.
4. It is not proposed that Australia will make any reservation or declaration upon ratification.

Overview and national interest summary

5. Ratification would enhance Australia's standing in the international community and demonstrate Australia's ongoing commitment to the implementation of key ILO conventions and protocols. Australia would be able to authoritatively address issues of violence and harassment in the workplace, and interconnected issues such as discrimination of vulnerable groups, particularly within the Asia-Pacific region where gender-sensitive occupational safety and health continues to be a challenge.
6. Ratification would highlight the importance Australia places on eliminating instances of violence and harassment in the workplace, particularly ensuring women's safety at work, and reflect Australia's commitment to addressing the issue in an inclusive, integrated and gender-responsive way.
7. The primary purpose of the Convention is to respect, promote and realise the right of everyone to a world of work free from violence and harassment. Its provisions seek to:
 - ensure that domestic laws and other measures define, prohibit and prevent violence and harassment in the world of work
 - provide easy access to appropriate and effective remedies in cases of violence and harassment in the world of work, and
 - ensure there are appropriate guidance, training and awareness-raising initiatives in place.

Reasons for Australia to take the proposed treaty action

8. Ratification of the Convention is Recommendation 15 of the *'Respect@Work: Sexual Harassment National Inquiry Report'* and would build on a range of domestic law and policy initiatives which aim to prevent and eliminate violence and harassment in the workplace, including the recent *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*. Ratifying the Convention would highlight Australia's continued commitment to the domestic and international effort to addressing violence and harassment at work and reflect Australia's global leadership on issues of violence and harassment in the workplace.

9. The recently passed *Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022* legislates a right to 10 days of paid family and domestic violence leave to employees covered by the National Employment Standards (NES). If the Convention is ratified, Schedule 2 to the Bill, and in particular new section 757B, provides that NES entitlement to paid family and domestic violence leave would apply in full to state referral employees, and be extended to non-national system employees, thereby ensuring all employees in Australia have access to the leave entitlement. This extended coverage is consistent with Article 10(f) of the Convention, which requires member states to take appropriate measures to 'recognize the effects of domestic violence and, so far as is reasonably practicable, mitigate its impact in the world of work'.

10. Ratification of the Convention at this time would strengthen Australia's credentials within the broader international community and demonstrate its commitment to eliminating these practices globally. It would further build upon Australia's leadership on such issues within the ILO, noting Australia's significant involvement in the *'Meeting of Experts on Violence against Women and Men in the World of Work'* in 2016, which guided the ILO in the development of the Convention.

11. A key objective of Australia's engagement with the ILO is to provide policy leadership within the Asia-Pacific region in promoting international labour standards, with a particular focus on gender equality, as stipulated in the *'Partnership Arrangement between the Government of Australia and the ILO on a Strategic Engagement Framework'*. It would also complement existing work on improving labour standards in the region, particularly in relation to those that are disproportionately affected by violence and harassment in the workplace, such as the *Better Work Programme* to improve working conditions for employees in garment factories.

12. The Convention is being increasingly adopted by the global community. Since 2019, the Convention has been ratified by 20 of the 187 ILO Members including the United Kingdom.

Obligations

13. Articles 2 and 3 set out the scope of the Convention. Article 2 provides that the protections set out in the Convention extend to all 'workers and other persons in the world of work', including 'employees as defined by national law and practice', as well as persons subject to informal employment arrangements, trainees, interns, apprentices, persons whose employment has been terminated, employers, jobseekers, and volunteers. Article 3 sets out the range of contexts constituting the 'world of work'. Article 3 provides that the Convention extends to violence and harassment 'occurring in the course of, linked with or arising out of work', including incidents that occur outside of the

traditional workplace (for example, during work-related trips or in employer-provided accommodation).

14. Article 4 of the Convention obliges each Member to respect, promote and realise the right of everyone to a world of work free from violence and harassment. It requires Members, in consultation with social partners, to adopt an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work, and to recognise the roles and functions of government, employers and workers in adopting and implementing this approach.

15. Article 5 of the Convention requires Members to respect, promote and realise the fundamental principles and rights as defined by the ILO, with a view to preventing and eliminating violence and harassment in the world of work, which includes the right to freedom of association, effective recognition of the right to collective bargaining, the elimination of all forms of forced and compulsory labour, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation and the promotion of decent work.

16. Article 6 requires Members to adopt laws, regulations and policies ensuring the right to equality and non-discrimination in employment and occupation, including for women and other workers belonging to one or more vulnerable groups, including those that are disproportionately affected by violence and harassment in the world of work.

17. Article 7 requires Members to adopt laws and regulations to define and prohibit violence and harassment in the world of work, including gender-based violence and harassment. Definitions of these terms are set out in Article 1(1) of the Convention.

18. Article 8 requires Members to take appropriate measures to prevent violence and harassment in the world of work including recognising the role of public authorities in the case of informal economy workers, identifying in consultation with social partners the sectors or occupations in which workers are more exposed to violence and harassment, and taking measures to effectively protect such persons.

19. Article 9 requires Members to adopt laws and regulations requiring employers to take appropriate steps commensurate with their degree of control to prevent violence and harassment in the world of work, including gender-based violence and harassment. In particular such laws and regulations must require that employers, so far as reasonably practicable: adopt and implement a workplace policy on violence and harassment, take into account violence and harassment and associated psychosocial risks in the management of occupational health and safety, identify hazards and assess the risks of violence and harassment in the workplace and take measures to control such risks. Employers must also provide workers information and training on the hazards and risks of violence and harassment at work and the associated prevention and protection measures.

20. Article 10 of the Convention requires Members to take appropriate measures to monitor and enforce laws and regulations regarding violence and harassment in the world of work, ensure easy access to effective remedies and safe, fair and effective reporting and dispute resolutions mechanisms, protect the privacy and confidentiality of those individuals involved, provide for sanction in cases of violence and harassment at work, provide access to gender-responsive, safe and effective complaint and dispute resolution mechanisms for victims of gender-based violence and harassment in the workplace,

recognise the effects of domestic violence and mitigate its impact in the world of work, ensure workers have the right to remove themselves from a work situation that involves danger to life, health or safety due to violence and harassment and ensure that relevant authorities are empowered to deal with violence and harassment in the world of work.

21. Article 11 requires each Member to ensure violence and harassment in the world of work is addressed in relevant national policies, that employers, workers and authorities are provided with guidance, resources, training or other tools on the issue and that awareness-raising campaigns and initiatives are undertaken.

22. Under Article 22 of the ILO Constitution, each ILO Member must submit reports to the International Labour Office on the measures it has taken to give effect to the provisions of conventions to which it is a Party. The Governing Body determines which conventions are to be reported on in any given year. For this Convention, the first report would be due on 1 September in the year after the Convention enters into force for Australia.

Implementation

23. Law, policy and practice at the Commonwealth, State and Territory levels is consistent with Convention obligations, enabling Australia's ratification.

24. Australia gives effect to the obligations contained in the Convention through the national anti-discrimination framework, the *Fair Work Act 2009* (Cth), the *Work Health and Safety Act 2011* (Cth) (the Work Health and Safety Act) and the *Criminal Code Act 1995* (Cth) (the Criminal Code) in addition to state and territory-level anti-discrimination, equal opportunity, industrial relations and family and domestic violence laws, policies and practices.

25. Australia has also developed a range of guidance, training and awareness raising initiatives aimed at addressing violence and harassment, including in the workplace. At the federal level, for example, the Fair Work Ombudsman (FWO) has developed a range of publicly available online resources in consultation with employer, union and employee representatives, on a range of topics relating to workplace violence and harassment including bullying, harassment, discrimination and family violence. The Australian Human Rights Commission also provides online training materials, guidance documents and reports on these topics, particularly those relating to gender-based violence and harassment, such as sexual harassment, sex discrimination and family violence.

26. These Commonwealth, state and territory level measures are comprehensive in scope and acknowledge the important roles and functions of government, workers, employers and their respective organisations in combatting workplace violence and harassment. Overall, these measures demonstrate Australia's commitment to 'respect, promote and realise' the right of everyone to a workplace free from violence and harassment. Moreover, they uphold key fundamental principles and rights at work as outlined by the ILO, including the right to freedom of association, the right to collective bargaining, the elimination of forced labour and child labour, the elimination of discrimination in respect of employment and occupation and the promotion of decent work.

Work Health and Safety Framework

27. Australia has a model Work Health Safety Act which all states and territories have used as the basis of their work health and safety legislation, except Victoria. Victoria has its own Occupational Health and Safety Act, which while different is broadly in alignment with the model laws. Each jurisdiction has its own regulators to oversee and enforce compliance.

28. In all jurisdictions, work health safety legislation imposes a duty on persons conducting a business or undertaking to ensure as far as is reasonably practicable, the health and safety (both physical and psychological) of their workers, including eliminating or minimising risks to health and safety.

29. In all jurisdictions, employers must adopt workplace policies on violence and harassment, including through identification of risks and the implementation of control measures to minimise the occurrence of those risks (risk management approaches).

Workplace Relations Framework

30. Behaviours and actions which constitute violence and harassment in the workplace, including gender-based violence and harassment, are prohibited in Australia. At the federal level, the Fair Work Act prohibits employers from taking 'adverse action' against employees or prospective employees including but not limited to injuring employees in the course of their employment or discriminating against an employee. The Fair Work Act also prohibits employers from terminating an individual's employment on the basis of 'protected factors', such as race, colour, sex, sexual orientation. State and territory level anti-discrimination and equal opportunity legislation supplements these protections.

31. Australia's legislative framework provides victims of violence and harassment in the workplace with access to appropriate and effective remedies as well as effective reporting and dispute resolution mechanisms. Commonwealth authorities such as the FWO and Fair Work Commission (FWC) regulate, oversee and enforce federal laws which prohibit violence and harassment. For example, under the Fair Work Act, the FWO can appoint fair work inspectors, who are empowered to investigate and enforce compliance with relevant Commonwealth workplace laws. The FWC is empowered to carry out a range of functions including enforcing a safety net of minimum work conditions, facilitating good faith bargaining and the making of enterprise agreements, granting remedies for unfair dismissal, resolving workplace disputes and regulating industrial action.

32. The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Schedule 1, Part 8) proposes including a prohibition on sexual harassment in the Fair Work Act 2009 (Cth). The proposal aims to increase protections against workplace sexual harassment in the Act and give workers, including prospective workers, a new way to deal with sexual harassment complaints. The Bill also proposes amending the Fair Work Act to include gender identity, intersex status and breastfeeding in the list of protected attributes (Schedule 1, Part 9). This would flow through to several parts of the Act, including provisions dealing with discriminatory terms in agreements and awards and the general protections, and allow individuals who experience workplace discrimination on the basis of those attributes to pursue discrimination complaints through the Fair Work Commission.

33. Australia's federal, state and territory level criminal, anti-discrimination and work health and safety laws protect workers who are not sufficiently covered by formal arrangements at work by affording them protections against violence and harassment in the course of public life. For example, informal economy workers that are also considered 'gig economy' workers are covered under the Fair Work Act. Similarly, informal economy workers that classify as applicants to an employment service are eligible for protection under the Sex Discrimination Act.

Anti-Discrimination Framework

34. Vulnerable cohorts of workers and other persons who could be disproportionately affected by violence and harassment, are protected under Australia's federal anti-discrimination framework.¹ This framework:

- ensures that certain workplace decisions made within identified workplace relationships cannot take into account protected attributes (for example, sex, gender identity, pregnancy, intersex status) in public contexts,
- allows certain discriminatory measures that are necessary to achieve substantive equality for particular individuals and groups ('positive discrimination' or 'affirmative action'),
- contains vicarious liability provisions requiring employers to take all reasonable steps to prevent discrimination from occurring within the workplace.

35. With regard to gender-based violence and harassment, including sexual harassment, the Sex Discrimination Act gives effect to the UN *Convention on the Elimination of All Forms of Discrimination Against Women* and the ILO's *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*. The objective of the Sex Discrimination Act is to 'eliminate, so far as is possible, discrimination against persons' in the workplace, 'on the ground of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy or breastfeeding, on the ground of family responsibilities,' and discrimination 'involving sexual harassment' and 'harassment on the ground of sex.'² The Sex Discrimination Act also works to ensure the right to equality and non-discrimination for women workers.

36. The *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) defines harassment on the ground of sex for the purposes of the Sex Discrimination Act. This definition now captures conduct that occurs because of a person's sex and/or gender and recognises the harmful nature of discrimination or harassment on this basis.

Criminal Code

37. The federal Criminal Code criminalises a range of conduct that would constitute violence and harassment in the workplace, namely serious criminal offences such as slavery, servitude, forced labour and trafficking in persons. These criminal provisions also work to support Australia's compliance with key international instruments that seek to suppress the use of forced and compulsory labour such as the ILO's *Forced Labour*

¹ *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021; Racial Discrimination Act 1975; Disability Discrimination Act 1992; Australian Human Rights Commission Act 1986.*

² *Sex Discrimination Act 1984* (Cth) s 3.

Convention, 1930 (No. 29) and its 2014 Protocol,³ and the Abolition of Forced Labour Convention (No. 105).

Costs

38. There are no costs associated with the ratification of the Convention, as existing Commonwealth, State and Territory laws, policies and practices comply with the provisions of the Convention.

Regulation Impact Statement

39. The Office of Best Practice Regulation in the Department of Prime Minister and Cabinet has been consulted and has confirmed that a Regulation Impact Statement is not required.

Future treaty action

40. No future treaty action is expected to arise out of the ratification process for the Convention. However, future revision of the Convention could be made by a decision of the Governing Body of the ILO to place such revision on the agenda of the annual International Labour Conference (ILO Standing Orders Article 51) or of a preparatory technical conference (Constitution, Article 14(2); Standing Orders, Articles 45 and 46). Alternatively, the International Labour Conference may, by two-thirds of the votes cast by the delegates present, decide to include a subject on the agenda of the following session (Constitution, Article 16(3)) to revise the Convention. Proposals to amend existing labour standards occur rarely.

41. Any proposal to take binding treaty action in respect of an instrument arising out of a revision of the Convention would be subject to Australia's domestic treaty-making procedures, including tabling and consideration by the Joint Standing Committee on Treaties.

Withdrawal or denunciation

42. Article 15(1) of the Convention provides that a Member may denounce the Convention after the expiration of ten years from the date that the Convention first comes into force. If this right is not exercised, Members will be bound for another period of ten years and thereafter may denounce the Convention at the expiration of each successive ten-year period (Article 15(2)). Such denunciation would take effect one year after the registration of the act of denunciation with the International Labour Office (Article 15(1)).

43. The ten-yearly interval for denunciation of an ILO Convention or Protocol is a standard period and is included in nearly all ILO Conventions and Protocols.

44. The next opportunity to denounce the Convention would be during the 12 months following the first ten-yearly interval after the date of entry into force of the Convention.

45. Article 19 of the Convention provides that if the ILO Conference adopts a new convention that revises the Convention in whole or in part, ratification of the new

³ *International Labour Organization Protocol of 2014 to Forced Labour Convention 1930 (No. 29).*

convention shall entail the immediate denunciation of the Convention unless otherwise specified.

46. Any action to denounce the Convention, or ratify a replacement convention, would be subject to Australia's domestic treaty-making procedures.

Contact details

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Workplace Relations Group
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ATTACHMENT ON CONSULTATION

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CONSULTATION

Consultation with State and Territory governments

1. There has been consultation with State and Territory governments on the Convention throughout its development and adoption.
2. State and Territory governments have been advised of the Convention through the Technical Officers Network, which is dedicated to international labour affairs, including ratifications and regular ILO reporting obligations.
3. State and Territory governments were provided with the opportunity to comment on the draft texts of the Convention and to provide information for inclusion in the briefing for the Australian delegation to the International Labour Conference in 2018 and 2019 where the development of the Convention took place, and to respond to the ILO's reports on the development of the Convention.
4. The status of Australia's compliance with the Convention and prospects of ratification have been periodically discussed at meetings of the Technical Officers Network. All State and Territory governments have made available advice on their jurisdictional law, policy and practice to enable the completion of the law and practice assessment.
5. On 2 August 2022, the Minister for Employment and Workplace Relations wrote to all State and Territory governments confirming the Commonwealth's intention to ratify the Convention.

Other consultation

6. The proposed treaty-action has been discussed at meetings of the International Labour Affairs Committee (ILAC) of the National Workplace Relations Consultative Council on a periodic basis since the Convention was adopted by the ILO in 2019. The ILAC comprises the Commonwealth Department of Employment and Workplace Relations, the Australian Council of Trade Unions (ACTU) and the Australian Chamber of Commerce and Industry (ACCI). The ACTU and ACCI are, respectively, the worker and employer organisations that represent Australia in the ILO.
7. On 2 August 2022, the Minister for Employment and Workplace Relations wrote to both ACCI and the ACTU confirming the Commonwealth's intention to ratify the Convention. ACCI and the ACTU confirmed their support during ILAC on 11 October 2022.