



## **Australian Government**

Australian Government response to the  
Senate Legal and Constitutional Affairs Legislation Committee report:  
Anti-Discrimination and Human Rights Legislation Amendment  
(Respect at Work) Bill 2022 [Provisions]

JANUARY 2023

## Introduction

The Australian Government welcomes the opportunity to respond to the Senate Legal and Constitutional Affairs Legislation Committee's report, *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [Provisions]* (Committee Report) tabled on 3 November 2022.

The *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (the Act) received Royal Assent on 12 December 2022. The Act implements outstanding legislative recommendations from the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Respect@Work Report). In doing so, the Act strengthens the legal and regulatory frameworks relating to sexual harassment, and expands the role of the Australian Human Rights Commission (the Commission) in preventing sexual harassment and other forms of sex discrimination. The Government has committed to implementing all 55 Respect@Work recommendations in full.

The Australian Government's response to the report is set out below. The response addresses the recommendations contained in the report and in the additional comments.

## Recommendations

**Recommendation 1: The committee recommends that, six to 12 months after Royal Assent, the Attorney-General refers to the Australian Law Reform Commission an inquiry into the operation of the cost provisions proposed in the Bill, including a focus on public interest litigation under those provisions.**

The Government notes this recommendation.

The Government carefully considered this recommendation and listened to stakeholder concerns in relation to the cost protection provisions originally in the Bill, which were based on a recommendation of the Australian Human Rights Commission. As a result of these considerations the Government moved amendments to remove the cost protection provisions from the Bill.

The Government has referred the issue of costs in discrimination proceedings to the Attorney-General's Department for review. That review will begin immediately and be completed in May 2023. The Government intends to legislate the costs model recommended by that review as quickly as possible.

**Recommendation 2: The committee recommends that the Bill be passed.**

The Government supports this recommendation.

The Act received Royal Assent on 12 December 2022.

## **Additional comments by Senator Paul Scarr**

### **Recommendation 1: The wording of proposed section 28M be reconsidered to address the concerns raised by key stakeholders**

The Government does not support this recommendation.

Section 28M of the Act implements recommendation 16(c) of the Respect@Work Report and is informed by existing case law.

### **Recommendation 2: The phrase: ‘as far as possible’ in proposed subsection 47C(1) be replaced with: ‘so far as reasonably practicable’.**

The Government does not support this recommendation.

This proposal would depart from the language of recommendation 17 of the Respect@Work Report, which was based on the Victorian positive duty (section 15 of the Victorian *Equal Opportunity Act 2010*). The Government committed to the full implementation of the Respect@Work Report recommendations.

### **Recommendation 3: Given the benefit in separating the conciliation and enforcement roles of the AHRC, and the existing organisational capacity of the Fair Work Ombudsman throughout Australia, it is recommended that consideration be given to whether the compliance and enforcement function would be better carried out by the Fair Work Ombudsman with expert support from the AHRC.**

The Government does not support this recommendation.

The recommendation is not consistent with the Respect@Work Report. The Government supports the full implementation of the Respect@Work Report recommendations.

The protections in the Act are grounded in human rights law, based on Australia’s international human rights law obligations. The Commission is best placed to enforce these protections, having the experience and expertise in human rights and anti-discrimination law.

The Fair Work Ombudsman, as Australia’s workplace relations regulator, has its own separate role in ensuring compliance with the prohibition on sexual harassment under the *Fair Work Act 2009* (Fair Work Act). It is outside of the scope of the Fair Work Act and the Fair Work Ombudsman’s role for it to be regulating and enforcing anti-discrimination law in the human rights framework.

There are multiple frameworks that persons subject to sexual harassment or related unlawful conduct can access to seek redress. It is beneficial to provide people with the flexibility to choose the most appropriate avenue depending on their circumstances. The Government’s main priority, reflecting the findings of the Respect@Work Report, is to ensure these frameworks are aligned to the greatest extent possible. The Respect@Work Council also provides a mechanism for the Australian Human Rights Commission and the

Fair Work Ombudsman to work together to improve coordination, consistency and clarity across the various frameworks.

**Recommendation 4: It is further recommended that the AHRC dedicate extensive resources and capability to developing (in close consultation with relevant stakeholders) detailed guidelines for employers and PCBUs as to how they can discharge the positive duty arising under proposed subsection 47C(1), including guidelines specific for particular industries and workplace environments.**

The Government notes this recommendation.

Section 35A of the Act already confers specific functions on the Commission to prepare and publish guidelines for complying with the positive duty. These guidelines will be a valuable compliance mechanism in assisting duty holders to understand the nature of their obligations under the positive duty, and the measures they must take to achieve compliance. The Commission has expertise and experience in delivering such guidelines as its section 35A functions mirror its existing functions in relation to unlawful discrimination and human rights.

In the 2022-23 Budget, the Government invested \$5.8 million in funding, over four years, to enable the Commission to educate employers about the positive duty and enforce compliance once it is introduced.

The form and content of the guidelines will be a matter for the Commission.

**Recommendation 5: Further consideration be given to the appropriate costs allocation principles to avoid unintended consequences**

The Government supports this recommendation.

The Government carefully considered the Committee's report and listened to stakeholder concerns in relation to the cost protection provisions originally in the Bill, which were based on a recommendation of the Australian Human Rights Commission. As a result of these considerations the Government moved amendments to remove the cost protection provisions from the Bill.

The Government has referred the issue of costs in discrimination proceedings to the Attorney-General's Department for review. That review will begin immediately and be completed in May 2023. The Government intends to legislate the costs model recommended by that review as quickly as possible.

## **Additional comments by the Australian Greens**

### **Recommendation 1:**

#### **(a) Require employers to take ‘all reasonable steps’ to eliminate discrimination and harassment**

The Government does not support this recommendation.

This proposal would depart from the language of recommendation 17 of the Respect@Work Report, which was based on the Victorian positive duty (section 15 of the Victorian *Equal Opportunity Act 2010*). The Government committed to the full implementation of the Respect@Work Report recommendations.

#### **(b) Include consultation with employees and compliance with AHRC guidelines as relevant factors under s 47C(6)**

The Government does not support this recommendation.

The guidelines produced by the Commission under paragraph 35A(a) will inform their assessment of compliance with the positive duty. Furthermore, any requirement for employers to engage with their workers as part of complying with the positive duty is a matter for the Commission and the guidance they produce on compliance with the positive duty. Notably, the positive duty provision already enables ‘any relevant matter’ to be taken into account when considering compliance with the positive duty (see paragraph 47C(6)(d)).

#### **(c) Authorise the AHRC to publish compliance notices**

The Government does not support this recommendation.

When issuing a compliance notice, the Commission is required to set out the specific action that the person must take, or refrain from taking, in order to address the failure (see section 35F). Compliance notices will remain confidential at the initial stage to provide employers with a reasonable opportunity to rectify their actions and achieve compliance. If a person fails to comply with the compliance notice and the President of the Commission applies to the federal courts for an order to enforce compliance with the notice, the fact of the notice will be made public at that stage through the court process.

These provisions reflect the fact that the primary purpose of the compliance regime is not to name and shame employers for non-compliance but to lift standards and achieve cultural change to create safer, more respectful workplaces.

## **Recommendation 2:**

**Amend the hostile workplace environment provisions in s 28M to:**

- (a) remove the requirement for a person to ‘subject another person’ to a hostile work environment, and instead make it unlawful for a person to contribute to the maintenance of a workplace environment that is hostile**

The Government does not support this recommendation.

A person’s conduct does not need to be directed or targeted towards a specific person to be unlawful under section 28M. The primary difference between a hostile workplace environment and other forms of unlawful conduct, such as sexual harassment, is that the conduct is not necessarily directed towards a particular person, but results in a generally hostile environment for that person (and others).

- (b) apply to conduct that makes a workplace hostile on the grounds of any protected attribute under the Sex Discrimination Act 1984**

The Government does not support this recommendation.

Section 28M prohibits conduct that results in a hostile workplace environment on the ground of sex, consistent with recommendation 16(c) of the Respect@Work Report.

- (c) include intersectional factors such as age, sexual orientation, gender identity, race, religious belief and disability as considerations in determining whether a hostile workplace environment has been maintained**

The Government does not support this recommendation.

This amendment is unnecessary. Subsection 28M(3) of the Act already provides that any relevant circumstance may be taken into account for the purposes of determining whether a person has subjected another person to a workplace environment that is hostile on the ground of sex.

## **Recommendation 3:**

- (a) Apply the positive duty and hostile work environment provisions to preventing any form of unlawful discrimination**

The Government does not support this recommendation.

The scope of the positive duty in the Act is consistent with, and implements, recommendation 17 of the Respect@Work Report.

Similarly, the scope of section 28M is consistent with, and implements, recommendation 16(c) of the Respect@Work Report.

**(b) Amend the objects clause in the Sex Discrimination Act 1984 to reflect gender neutrality and intersectionality**

The Government does not support this recommendation.

The objects clause in the Act is consistent with, and implements, recommendation 16(a) of the Respect@Work Report.

**Recommendation 4: Amend s 46PSA to adopt an ‘equal access’ approach to costs protection for complaints.**

The Government notes this recommendation.

The Government carefully considered the Committee’s report and listened to stakeholder concerns in relation to the cost protection provisions originally in the Bill, which were based on a recommendation of the Australian Human Rights Commission. As a result of these considerations the Government moved amendments to remove the cost protection provisions from the bill.

The Government has referred the issue of costs in discrimination proceedings to the Attorney-General’s Department for review. That review will begin immediately and be completed in May 2023. The Government intends to legislate the costs model recommended by that review as quickly as possible.

**Recommendation 5:**

**(a) Extend WGEA reporting obligations to all organisations with 50 or more employees**

The Government does not support this recommendation.

This recommendation goes beyond the scope of the Respect@Work Report. The Act requires Commonwealth public sector agencies with 100 or more employees to comply with the Workplace Gender Equality Agency’s (WGEA) reporting requirements. This is consistent with the existing requirements for private sector organisations.

**(b) Amend WGEA reporting obligations to require relevant organisations to report on the steps they have taken to meet their positive duty, the number of sexual harassment and discrimination claims made, the number of claims resolved, and whether the organisation uses non-disclosure agreements.**

The Government does not support this recommendation.

The Government is focussed on ensuring alignment with the recommendations in the Respect@Work Report and notes that this recommendation goes beyond the scope of the Report. The Workplace Gender Equality Act 2012 (WGE Act) already requires private sector businesses with 100 or more employees to report to the WGEA on their gender equality indicators. This Act brings the Commonwealth public sector in line with the



reporting obligations of the private sector. Gender Equality Indicator 6 (sex-based harassment and discrimination), covers a range of matters that employers already report to WGEA on, including prevention policies, grievance processes and training relating to sex-based harassment and discrimination.

Furthermore, pursuant to recommendation 42 of the Respect@Work Report, WGEA is working with the Respect@Work Council to consider how good practice indicators for measuring and monitoring sexual harassment prevalence, prevention and response may apply to reporting in relation to sexual harassment under the WGEA Act. Some of these indicators are expected to cover employer activities/practices relating to risk assessment, processes for reporting, and supports for employees.

#### **Recommendation 6:**

##### **(a) Regularly review AHRC funding to ensure adequate resources are available for education, support, monitoring and enforcement**

The Government supports this recommendation.

The Government is providing \$10.5 million to the Commission over four years to support implementation of key Respect@Work recommendations. This includes \$5.8 million to educate employers about the positive duty and assess and enforce compliance once the legislation has commenced.

##### **(b) Support the extension of the existing network of independent Working Women's Centres across Australia, including a national body to coordinate the roll out**

The Government notes this recommendation.

The Government is providing \$8 million per year ongoing to ensure there are properly funded working women's centres in every Australian state and territory.

The Government is undertaking targeted consultation with working women's centres, state and territory governments and other key stakeholders to help inform the development of an effective new governance and funding model for the delivery of services across Australia.

#### **Recommendation 7: Include a requirement for a statutory review of the operation of the Bill within 12 - 18 months of the commencement of enforcement provisions, and then every five years.**

The Government supports this recommendation in principle.

During the debate on the Bill, the Government supported the amendment moved by the Jacqui Lambie Network and the Australian Greens in the Senate to require a statutory review of the amendments made by the Act. The review is required to commence as soon as practicable after 2 years of the last amendments in the Act commencing (being the

positive duty compliance functions of the Commission) and before 3 years of their commencement. The review would need to be completed within a period of 9 months.

A statutory review is an important mechanism to ensure that the Act is operating as intended, and the Commission is able to fulfil its functions, as provided in the Act.