

**25 October 2022**

Senator Nita Green  
Chair  
Senate Legal and Constitutional Affairs Legislation Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Senator Green

**Answers to Questions on Notice—Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022—17 October 2022 hearing**

1. On 14 October 2022, the Law Council made a [submission](#) to the Senate Legal and Constitutional Affairs Legislation Committee in response to its [inquiry](#) into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) (**Bill**).
2. On 17 October 2022, the Law Council attended the hearing for this inquiry. Ms Kate Eastman AM SC, Chair of the Law Council's Equal Opportunity Committee and Mr Matthew Wood, Principal Policy Lawyer at the Law Council appeared as witnesses before the Committee.
3. At the hearing, Senator Scarr asked the Law Council several questions. The Law Council took two of these questions on notice. These questions and the Law Council's answers are set out below.
4. The Law Council thanks the Committee for the opportunity to appear at the hearing and to provide this supplementary submission to answer the questions on notice.

**Answers to questions on notice**

Question 1

**Senator SCARR:** *You can take this next question on notice if you like. I had the benefit today of looking at their submission from the Australian Chamber of Commerce and Industry. In paragraph 31 they refer to a case—which is quite topical for today—where Her Honour*

Justice Gaudron is quoted. As we know, it is an historic day, with the majority of the High Court of Australia becoming women. This was a judgement she gave in relation to a case where she talked about the interpretation around what 'reasonably practicable' means. The Chamber of Commerce and Industry said: 'You've got a yardstick there in terms of the common law in terms of what "reasonably practicable" means. Try and continue to use the words "reasonably practicable" because that will make it easier for employers and those who are conducting a business or undertaking to comply with the law, as opposed to "possible".' **Can you understand the attraction I have to those words "reasonably practicable" when there's a High Court judgement by no less than Her Honour Mary Gaudron that provides a yardstick?**

**Ms Eastman:** I do. That might be a question that we take on notice—

**Senator SCARR:** I am happy for you to take it on notice.

### Law Council answer to Question 1

#### Context

5. It is worth making clear the different contexts in which the Australian Chamber of Commerce and Industry (**ACCI**) and the Law Council addressed the phrase 'so far as practicable' in their respective submissions to the Senate Committee.
6. The Law Council's submission related to the objects provision in paragraph 3(e) of the *Sex Discrimination Act 1984* (Cth) (**SDA**), which, if amended by the Bill in its present form, would provide (emphasis added):

*The objects of this Act are:*

...

*(e) to achieve, **so far as practicable**, substantive equality between men and women.*

7. The Law Council recommended that consideration be given to either removing the phrase 'so far as practicable' from paragraph 3(e) or replacing it with the phrase 'so far as possible'.
8. The Law Council submitted that:
  - the inclusion of the threshold 'so far as practicable' in the objects section of the SDA may give rise to the implication that rights codified in the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**)<sup>1</sup> will only be protected domestically to the extent that it is 'practicable' to do so.<sup>2</sup>
  - the threshold 'so far as practicable' falls short of what is proposed in Recommendation 16 of the Respect at Work report.<sup>3</sup>
9. The Law Council maintains this position, as discussed below.

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<sup>1</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, 13, available at <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women>.

<sup>2</sup> Law Council of Australia, submission to the Senate Standing Committee on Legal and Constitutional Affairs inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 [12]

<sup>3</sup> Ibid.

10. The ACCI's submission related to proposed section 47C, which would be inserted into SDA by item 8 of Schedule 2 to the Bill. Proposed section 47C would impose a positive duty on employers and persons conducting a business or undertaking (**PCBUs**) and would relevantly provide (emphasis added):

*(1) An employer or a person conducting a business or undertaking (the duty holder) must take reasonable and proportionate measures to eliminate, **as far as possible**:*

*(a) conduct covered by subsection (2) by persons covered by subsection (3);  
and*

*(b) conduct covered by subsection (4).*

11. The ACCI contrasted this proposed obligation with the obligation imposed on PCBUs under work health and safety law to ensure the health and safety of their workers by doing 'all that is reasonably practicable'.<sup>4</sup>

#### *Rationale for the Law Council position with respect to the objects clause*

12. The first object of the SDA is to 'give effect to certain provisions of the Convention on the Elimination of All Forms of Discrimination Against Women and to provisions of other relevant international instruments'.<sup>5</sup>

13. The term 'relevant international instrument' is defined to include CEDAW, the International Covenant on Civil and Political Rights;<sup>6</sup> the International Covenant on Economic, Social and Cultural Rights;<sup>7</sup> the Convention on the Rights of the Child;<sup>8</sup> and a number of International Labour Organisation Conventions relating (broadly expressed) to equal opportunity and addressing discrimination in employment.<sup>9</sup>

14. As noted, the fifth object, paragraph 3(e), will provide that it is an object of the SDA to, as far as practicable, achieve substantive equality between men and women.

15. Article 2 of CEDAW relevantly requires parties to undertake, in pursuit 'by all appropriate means and without delay a policy of eliminating discrimination against women':

*(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;*

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<sup>4</sup> Australian Chamber of Commerce and Industry submission to the Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, p 6.

<sup>5</sup> Paragraph 3(a) of the SDA.

<sup>6</sup> International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23).

<sup>7</sup> the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5).

<sup>8</sup> Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4)

<sup>9</sup> Subsection 4(1) of the SDA.

16. The Committee on the Elimination of Discrimination against Women has stated in relation to the content of article 2 that (emphasis added):<sup>10</sup>

*State parties are under an obligation to respect, protect and fulfil the right to non-discrimination of women and to ensure the development and advancement of women in order that they improve their position and implement **their right of de jure and de facto or substantive equality with men.***

17. That is, state parties are obliged to 'ensure' the substantive equality of women in law and in fact. An object that pursues that substantive equality 'as far as is practicable' falls short of that obligation.
18. Under international law, every treaty to which Australia is a party is binding upon it, and must be performed by it in good faith.<sup>11</sup> Where limitations on rights are permissible, they should be prescribed by law, be in pursuit of a legitimate objective, be rationally connected to their stated objective, and be a proportionate way to achieve that objective.<sup>12</sup>
19. The remainder of the SDA's provisions will be interpreted by reference to the objects provision. An object clause in legislation guides the interpretation of the Act and its provisions—the interpretation that would best achieve the purpose or object of the Act is to be preferred to each other interpretation.<sup>13</sup> It also guides the interpretation and scope of powers provided to officials under that Act—it assists to determine what is relevant or irrelevant to the exercise or power,<sup>14</sup> or whether the exercise of that power is reasonable or within power.<sup>15</sup>
20. The Law Council submits that its position on this point is consistent with Recommendation 16(a) of the Respect @Work Report, which is to:

*Amend the Sex Discrimination Act to ensure the objects include 'to achieve substantive equality between women and men'.*

21. It is also consistent with the position the Australian Human Rights Commission (**Commission**) took in its submission in 2008 to the *Inquiry into the effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality*,<sup>16</sup> in which it addressed the other objects of the SDA to 'so far as possible' eliminate certain kinds of discrimination.
22. In its submission to that inquiry, the Commission made the following recommendation:

*Recommendation 2: Objects of the SDA*

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<sup>10</sup> Committee on the Elimination of Discrimination against Women, 'General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women' (CEDAW/C/GC/28), 16 December 2010 [16].

<sup>11</sup> Vienna Convention on the Law of Treaties (acceded to by Australia 13 June 1974, entry into force for Australia and generally 27 January 1980), art 26.

<sup>12</sup> Parliamentary Joint Committee on Human Rights, Guide to human rights (June 2015) 5,7, available online: [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Human\\_Rights/Guidance\\_Notes\\_and\\_Resources](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/Guidance_Notes_and_Resources).

<sup>13</sup> Section 15AA of the *Acts Interpretation Act 1901* (Cth).

<sup>14</sup> *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 40 (Mason J).

<sup>15</sup> *Minister for Immigration and Border Protection v Stretton* [2016] FCAFC 11 [11]-[12] (Allsop CJ).

<sup>16</sup> Australian Human Rights Commission, *Inquiry into the effectiveness of the Sex Discrimination Act 1984 (Cth) in eliminating discrimination and promoting gender equality* (2008) [103]

*Amend the objects of the SDA to remove 'so far as is possible' and fully reflect the obligations of CEDAW and other international legal obligations under the ICCPR, ICESCR and ILO Conventions to eliminate discrimination and promote substantive gender equality.*

23. The Commission reasoned:

*96. The SDA was enacted to give effect to Australian's obligations under CEDAW. However, it has always been acknowledged that the SDA did not fully implement all obligations under CEDAW.<sup>17</sup>*

...

*100. The objects [in the SDA] currently fall short of reflecting international legal obligations under CEDAW in a number of ways.*

*101. In particular, section 3 qualifies its objects by use of the term 'so far as is possible' in relation to eliminating discrimination, including in the areas of sexual harassment and family responsibilities. The term 'so far as is possible' limits the object of the SDA in a way that is not provided under CEDAW. CEDAW provides that state parties are under a general obligation to eliminate discrimination against women. The term 'so far as is possible' reflects that the substantive provisions of the SDA do not go as far as this obligation under CEDAW.*

*102. HREOC considers that this term results in a qualified commitment to international obligations, which is inappropriate in respect of an Act of such importance as the SDA.*

24. Following the reasoning above, the Law Council submits that the best approach would be to include neither the phrase 'so far as practicable' nor the phrase 'so far as possible' in paragraph 3(e) of the SDA.

25. The Law Council in its original submission included the alternative option of replacing the phrase 'as far as practicable' with the phrase 'as far as possible', noting the latter phrase sets a higher threshold. The Law Council's submission on that point is consistent with the judgment in *Slivak v Lurgi*,<sup>18</sup> referred to by the ACCI in its submission and by Senator Scarr at the hearing.

26. In *Slivak v Lurgi*, Justice Gaudron considered the meaning of the phrase 'reasonably practicable' in the context of paragraph 24(2a)(a) of the *Occupational Health, Safety and Welfare Act 1986* (SA).

27. Section 24(2a)(a) of that Act is an operative provision, which provides:

*... the person who designs the structure must ensure so far as is reasonably practicable that the structure is designed so that the persons who are required to erect it are, in doing so, safe from injury and risks to health;*

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<sup>17</sup> See, generally, Hilary Charlesworth and Sara Charlesworth, 'The Sex Discrimination Act and International Law' (2004) 27 (3) University of New South Wales Law Journal 858; Sara Charlesworth, 'Understandings of Sex Discrimination in the Workplace: Limits and Possibilities' (Speech delivered at the Clare Burton Memorial Lecture, RMIT University, 2007), 2-3; Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69, pt II (1994), [3.2].

<sup>18</sup> *Slivak v Lurgi (Australia) Pty Ltd* [2001] HCA 6; (2001) 205 CLR 304.

28. In her decision, Justice Gaudron described the concept of ‘reasonably practicable’ as follows:

*... the question whether a measure is or is not reasonably practicable is one which requires no more than the making of a value judgment in the light of all the facts. Nevertheless, three general propositions are to be discerned from the decided cases:*

- (i) *the phrase “reasonably practicable” means something narrower than “physically possible” or “feasible”;*
  - (ii) *what is “reasonably practicable” is to be judged on the basis of what was known at the relevant time;*
  - (iii) *to determine what is “reasonably practicable” it is necessary to balance the likelihood of the risk occurring against the cost, time and trouble necessary to avert that risk.*<sup>19</sup>
29. Amongst other things, this judgment provides authority for the proposition that a requirement of ‘reasonably practicable’ sets a narrower [and therefore lower] threshold, or standard, than a requirement of what is ‘possible’ (see proposition (i) immediately above).

#### *Comments on the language used in the ‘positive duty’ provision*

30. As noted, the ACCI submission referred to by Senator Scarr in the hearing took issue with phrase ‘as far as is possible’ in proposed section 47C. Proposed subsection 47C(1) would impose a positive duty on employers and PCBUs to take ‘reasonable and proportionate measures to eliminate, as far as possible’ unlawful sexual and sex based harassment, sexual discrimination, hostile work environments and victimization.
31. ACCI took issue with both the lack of clarity in the phrase ‘as far as possible’ and that it appeared to impose a higher standard than health and safety laws, in which the phrase ‘as is reasonably practicable’ is used.<sup>20</sup> Senator Scarr indicated, relevantly, that he could ‘see the benefit of the yardstick being whether or not they have done everything to the extent reasonably practicable or as far as practicable, because it takes a realistic view of the resources that are available to them, their capacity et cetera’.<sup>21</sup>
32. The Law Council did not address the drafting of proposed subsection 47C(1) in its initial written submission and is not in a position to provide a comprehensive position on the drafting of the provision here.
33. For present purposes, however, in relation to the substance of the issue raised by Senator Scarr, the Law Council notes that, as drafted, the circumstances (or capacity) of each business will already be relevant to the content of the duty which applies to each duty holder and a determination of whether the duty has been complied with.

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<sup>19</sup> Ibid, [53].

<sup>20</sup> ACCI, Submission No 39 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* (16 October 2022) [32].

<sup>21</sup> Transcript of Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Sydney, 17 October 2022 13 (Senator Scarr).

34. First, there is the requirement in proposed subsection 47C(1) that the duty holder take 'reasonable and proportionate measures' to eliminate 'as far as possible' such conduct. The Law Council notes that the Explanatory Memorandum for the Bill states:<sup>22</sup>

*The requirement to 'take reasonable and proportionate measures' would mean that duty holders would need to proactively consider their compliance with the positive duty and any measures that would be appropriate to achieve compliance for their organisation in their particular circumstances. This may involve employers and PCBUs taking positive steps to identify and understand potential areas of noncompliance in their organisation, developing a strategy for meeting and maintaining compliance, and reviewing and improving compliance where appropriate. However, the precise form of these measures will differ significantly across organisations depending on their specific circumstances.*

35. Secondly, there is the compliance framework in proposed subsection 47C(6), which would allow the Commission to take into account the size, nature, circumstances, and resources of the duty holders' business, and the practicability and costs of steps to eliminate the prohibited conduct, in determining whether a duty holder has complied with the duty imposed by proposed subsection 47C(1).

## Question 2

**Senator SCARR:** *Is there any case law on what 'seriously demeaning' means, as opposed to 'demeaning'? Has the court ever considered what 'seriously' means? Maybe take this on notice. To give us an appreciation as to the consequence of dropping the word 'seriously', is there any case law on that?*

**Ms Eastman:** *Not that I'm aware of, at this point in time. That provision only came into operation in September last year, so it would be unlikely that the court has had to look at what that means and to work out, essentially, what 'seriously' means, to qualify the nature of demeaning conduct. But we'll make some further inquiries.*

## Law Council answer to Question 2

36. Section 28AA of the SDA applies if:
- a person engages in unwelcome conduct of a **seriously demeaning** nature in relation to the person harassed because of their sex (or a characteristic that applies to or is generally associated with people of that sex) (paragraph 28AA(1)(a)); and
  - the person does so in circumstances in which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated (paragraph 28AA(1)(b)).
37. The Law Council notes that section 28AA of the SDA commenced on 11 September 2021. The Law Council is not aware of any case law since that time with respect to the meaning of 'seriously' in the context of section 28AA of the SDA.
38. To understand the significance of a term used in legislation, it is necessary to consider whether the word has a specific statutory meaning as opposed to its ordinary or natural meaning and whether the term has been considered in case law.

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<sup>22</sup> Explanatory Memorandum for the Bill [82].

39. The term ‘seriously’ is not defined in the SDA or the *Acts Interpretation Act 1901* (Cth) and the threshold of ‘seriousness’ in the context of section 28AA of the SDA has not been considered in case law.
40. The courts have considered the term serious in the context of ‘serious misconduct’ under the *Fair Work Act 2009* (Cth). ‘Serious misconduct’ is defined in Regulation 1.07 of the *Fair Work Regulations 2009* (Cth) as misconduct of the most severe type and, when it occurs, it gives an employer the right to dismiss an employee without notice. It is clear from this example that the inclusion in a statutory provision of the term ‘serious’ sets a very high threshold.
41. The Explanatory Memorandum to the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Cth) (**Respect at Work Bill 2021**) says:
- By definition, to ‘demean’ is to debase or degrade another person. The inclusion of this term is intended to provide an appropriate limit on the scope of conduct captured under this provision.*<sup>23</sup> [emphasis added]
42. The Law Council submits that conduct that debases or degrades another person is already sufficiently serious to warrant prohibition,<sup>24</sup> and it is unnecessary to further qualify that conduct by requiring that it ‘seriously’ debases or degrades them. This is particularly the case where the conduct must also be found to be offensive, humiliating or intimidating under paragraph 28AA(b).
43. In its 2021 submission to the Senate Education and Employment Legislation Committee inquiry into the Respect at Work Bill 2021, the Law Council outlined the concerns of several of its constituent bodies that the inclusion of the word ‘seriously’ in paragraph 28AA(1)(a) of the SDA had the potential to undermine the stated purpose of the provision, which is to implement Recommendation 16(b) of the Respect@Work Report.<sup>25</sup>
44. In its 2022 submission to the Commonwealth Attorney-General’s Department (**AGD**) regarding AGD’s ‘Consultation Paper: Respect@Work—Options to progress further legislative recommendations’, the Law Council submitted that the inclusion of the word ‘seriously’ in the phrase ‘seriously demeaning’ sets:<sup>26</sup>

*... a high threshold that will likely be difficult to interpret and apply in practice ... Prima facie, ‘seriously demeaning’ conduct is likely to be a harder standard to meet*

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<sup>23</sup> Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at [141].

<sup>24</sup> Examples of conduct described as ‘demeaning’ in the case law include: an offer to pay a female fellow-employee money for sexual intercourse being ‘grossly demeaning’ in *Beamish v Zheng* [2004] FMCA 60, [16], as well as a ‘superior offering a reward to the first of [a female employee’s] teammates who ascertained if her breasts were real or not, making repeated comments about her anatomy, ... [and] showing her explicit images on his iPhone, including in the presence of other team members, and asking whether she liked those’ being described as both ‘thoroughly humiliating’ and ‘demeaning and degrading’ in obiter dicta in *Friend v Comcare* [2021] FCA 837.

<sup>25</sup> Law Council of Australia, submission to the Senate Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, 16 July 2021 <https://www.lawcouncil.asn.au/publicassets/509a87ab06f0-eb11-943f-005056be13b5/4046%20-%20Sex%20Discrimination%20and%20Fair%20Work%20%20Respect%20at%20Work%20%20Amendment%20Bill%202021.pdf> [26]-[27].

<sup>26</sup> Law Council of Australia, ‘Consultation Paper: Respect@Work – Options to progress further legislative recommendations’ (23 March 2022), <https://www.lawcouncil.asn.au/publicassets/056e0327-5cae-ec11-944c005056be13b5/4193%20-%20Respect%20Work%20Further%20Legislative%20Recommendations.pdf> [19].



*than that contemplated in Recommendation 16(c) of 'an intimidating, hostile, humiliating or offensive environment', including by virtue of the fact that it is both more specific and is overlaid as an additional threshold in section 28AA on top of the requirement that a reasonable person would be offended, humiliated or intimidated.*

45. The Law Council maintains its view that the intended operation of section 28AA has been curtailed by the provision's application only to conduct that is 'seriously demeaning'. The Law Council welcomes the amendment in the Bill to remove the additional threshold of 'seriously' from section 28AA.

Yours sincerely

**Mr Tass Liveris**  
**President**