

Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

Responses to questions on notice

Senate Education and Employment Legislation Committee

30 July 2021

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its Equal Opportunity Committee in the development of this response.

This response otherwise drew from the Law Council's consultations on *National Inquiry into Sexual Harassment in Australian Workplaces*, the *National Action Plan for Reducing Sexual Harassment into the Australian Legal profession*, its consultations on the Government's *Roadmap for Respect: Preventing and addressing sexual harassment in Australian workplaces*, on International Labour Organisation *Convention on Violence and Harassment in the World of Work*, and its consultations on the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021. The Law Council acknowledges and thanks its Constituent Bodies, Sections, expert Advisory Committees and stakeholders for their contributions to those consultations.

Introduction

1. The Law Council is grateful for the opportunity to have appeared before the Senate Education and Employment Legislation Committee (**Committee**) on 20 July 2021 in relation to its consideration of the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (**Bill**).
2. This response addresses the outstanding questions asked of the representatives.

Key issues for consideration

3. During the hearing, Senator O'Neill asked the following question:

Senator O'NEILL: This is our new workplace; the coordination is a little difficult. I just want to note that the NTEU indicated this piece of legislation as it is constructed—and I note you have made a number of specific recommendations about changes to words and additions that need to be made to make it good law based on your limited time and your high level of expertise. There were 55 recommendations, which were the outworkings of a very considered process by commissioner Jenkins, and only 40 of those were agreed, five were agreed in principle, one was agreed in part, nine were simply noted, and a number of key recommendations were in fact rejected—or are likely to be rejected. I'm very concerned that we will miss this opportunity to do the work that needs to be done. I'm concerned about the resistance to a positive duty that we are hearing constantly through the course of this hearing. I am concerned that we are going to lose the cultural moment. So could you take what I've said on notice already and give us a more detailed response. But I note the quality of the work you've done despite being unable to actually go to your members, who are more than stakeholders. These are experts who are critically informed in the law in so many pieces of legislation who were not given time to do so. Can I ask you to go to your submission and highlight any critical points you have not been able to put on the public record to date that need to be on the public record here?

4. Further to the matters raised at the hearing, the Law Council wishes to highlight to the Committee the matters raised from pages 13 to 17 in the 'workplace participants' section of its 16 July 2021 submission.
5. The Law Council otherwise relies on the balance of its submission dated 16 July 2021.

Further Respect@Work Recommendations not included in the Bill

Recommendations 16c,17 and 19

6. During the hearing, Senator O'Neill asked the following further question:

Senator O'NEILL: We need to understand what's happened. Can I also point you to page 2 of the ACTU submission, where they indicate that recommendations 28, 16C, 17, 18, 19, 23, 25 and 15 are not covered in this bill. Could you give your critical eye a once-over of that to indicate clearly for the committee what is lost if those elements of the recommendations from the Jenkins report do not come forward right now in this piece of legislation?

7. The Law Council notes that the 16 July 2021 July submission addresses some of the above-listed Respect@Work recommendations:
 - a. for Recommendation 16c, please see page 12;
 - b. for Recommendation 17, please see page 25; and
 - c. for Recommendation 19, please see page 28.
8. The Law Council otherwise addresses the balance of the specified Respect@Work Recommendations below.

Recommendation 18

9. Recommendation 18 is excerpted below for ease of reference:

The Commission be given the function of assessing compliance with the positive duty, and for enforcement. This may include providing the Commission with the power to:

- a. undertake assessments of the extent to which an organisation has complied with the duty, and issue compliance notices if it considers that an organisation has failed to comply
 - b. enter into agreements/enforceable undertakings with the organisation; and
 - c. apply to the Court for an order requiring compliance with the duty.
10. The Law Council notes that Recommendation 18 is tied to the implementation of positive duties (Recommendation 17) as recommended in the Law Council's submission of 16 July 2021.¹
 11. The Law Council considers that Recommendation 18 should be considered alongside any legislative amendments proposed to give effect to Recommendation 17.² The Law Council welcomes the opportunity to consult with our Constituent Bodies and experts, if and when any specific amendments of this nature are proposed for public consultation.

Recommendation 15

12. Recommendation 15 of the Respect@Work Report recommends that the Australian Government ratify the International Labour Organisation *Convention on Violence and Harassment in the World of Work (C 190)*.³ The premise of C190 is that everyone has the right to engage in a 'world of work' that is free from violence and harassment, including gender-based violence and harassment. Moreover, C190 recognises, among other things, that:⁴
 - a. violence and harassment in the world of work can constitute a human rights violation or abuse, and that violence and harassment is a threat to equal opportunities and is unacceptable;

¹ Please see the Law Council's 16 July 2021 submission, from page 25.

² As also noted in footnote 77 of the Law Council's 16 July 2021 submission.

³ International Labour Organisation, *Convention on Violence and Harassment in the World of Work (C 190)* Adopted by the Conference at its 108th session, 21 June 2019, available online: https://www.ilo.org/wcmsp5/groups/public/---ed_norm/--relconf/documents/meetingdocument/wcms_711570.pdf

⁴ C190, Preamble.

- b. this disproportionately affects women and girls; and
 - c. that an inclusive, integrated and gender-responsive approach, which tackles underlying causes and risk factors, including gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations, is essential to ending violence and harassment in the world of work.
- 13. The Law Council notes the observations of the Australian Human Rights Commission (**AHRC**) in the Respect@Work report that:

The Convention represents a broad-based approach to preventing gender-based violence and harassment at work, requires States to identify high risk sectors, occupations and work arrangements with respect to violence and harassment at work, and to implement targeted measures to effectively address such workers.⁵
- 14. The Law Council considers that the objectives of C190 are consistent with those of the Respect@Work Report and supports the Australian Government becoming ratifying member of the ILO Convention 190.

Recommendation 23:

- 15. Recommendation 23 provides that the *Australian Human Rights Commission Act* (Cth) 1986 (**AHRCA**) be amended to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the AHRCA that allow unions and other representative groups to bring a representative complaint to the Commission.
- 16. The Respect@Work report noted that the provisions to bring representative claims the Federal Court:⁶

...are technical and complex, and different to the requirements under the Australian Human Rights Commission Act.
- 17. While it was noted that some concerns had been expressed about the impact of litigation funding on representative claims, the AHRC ultimately found that:⁷

... engaging with the complexities of the court system can be difficult and costly for complainants and representative actions can allow genuine cases that previously may not have proceeded past the conciliation stage, and particularly those that have a public interest element, to be heard in court.... It also considers that attention should be given to simplifying standing requirements, and providing for consistent standing rules in Commonwealth discrimination law matters in bringing complaints to the Commission and to the courts.

⁵ The Australian Institute of Employment Rights, as quoted in Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report (2020)* (5 March 2020), 450 (**Respect@Work**) available online: <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>

⁶ For example see: *Federal Court of Australia Act 1976* (Cth) Pt IVA; Respect@Work, n5, 500.

⁷ Respect@Work, n5, 500.

18. This was not a matter specifically consulted on during the development of National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession (**National Action Plan**)⁸, nor has it been raised in subsequent consultations. Accordingly, the Law Council does not have a firm policy position on this recommendation at present.
19. Nonetheless, it is noted by way of observation that unions are conferred even broader standing than that recommended under Recommendation 15 under the *Fair Work Act 2009* (Cth) (**FWA**) in relation to multiple civil penalty provisions in the industrial context. For example, the National Union of Workers has in recent years initiated class actions under section 539 of the FWA, which provides that an *employee organisation*, including unions, can apply to the Federal Court on behalf of employees in relation to violations of the FWA.⁹

Recommendation 25:

20. Respect@Work Recommendation 25 calls for the amendment of the AHRCA to insert a costs protection provision consistent with section 570 of the FWA. For ease of reference, section 570 of the FWA is excerpted below:

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

21. The effect of such an amendment is that costs awards will only be awarded in exceptional circumstances, regardless of how meritorious the claim, with the result that sexual harassment claimants will in most cases have to bear the costs of their own legal expenses. Presently, costs in such cases will 'follow the event', meaning that successful claimants will also receive an award to compensate for their payment of legal fees.¹⁰ However, in cases where the claimant is not able to

⁸ Law Council of Australia, National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession (23 December 2020), (**National Action Plan**), available online: https://www.lawcouncil.asn.au/files/media-releases/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession_FINAL.pdf

⁹ Jones Day, Australian Workplace Class Action on the Rise, January 2019, available online:

<https://www.jonesday.com/en/insights/2019/01/australian-workplace-class-actions-on-the-rise>

¹⁰ Respect@Work, n5, 507. Also see Federal Court Practice Note GPN-COSTS, Federal Court of Australia, available online: <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-costs>.

establish their claim, the claimant is at risk of costs being awarded against them to compensate the successful party for their legal expenses.

22. The intent of Recommendation 25 is to protect claimants from exposure to costs being awarded against them, which was identified as a key disincentive for claimants pursuing sexual harassment matters in numerous submissions to the National Inquiry into Sexual Harassment in Australian Workplaces:¹¹

Legal Aid NSW, Gordon Legal, Kingsford Legal Centre, Redfern Legal Centre, Employment Law Centre of WA, Women's Legal Service NSW and the National Association of Community Legal Centres submitted that the current costs regime, where costs follow the event, operates as a disincentive to pursuing sexual harassment matters under the Sex Discrimination Act.

23. The AHRC considered that this disincentive negatively impacted on access to justice, particularly for vulnerable members of the community.¹²
24. It is also noted that Rule 40.51 of the Federal Court Rules 2011 provides the Federal Court with the power to issue a cost-capping order, also known as a maximum or protective cost order. The Court may also issue a no cost order at the conclusion of litigation. A similar provision is at Rule 21.03 of the Federal Circuit Court Rules 2001. However, these orders are discretionary and the Law Council has been advised these orders are rarely made, thereby providing prospective plaintiffs in sexual harassment matters with little certainty that they will be successful in a cost-capping order or no cost order application. The effect of this is that sexual harassment matters, and discrimination law matters generally, rarely proceed to the court stage due to the cost risk.
25. However, the Law Council has also been advised that, in the experience of some experts, so-called 'no costs jurisdictions' in fact discourage legal representation for complainants. For example, one commentator explained:

I have seen a significant shift towards the issue of discrimination cases in the federal jurisdiction where complainants are legally represented based on the capacity to recover costs on success. The quantum of damages payments in these cases are not sufficient to cover costs otherwise. Discrimination cases are often complex, stressful and hard fought. Unrepresented complainants are at a significant disadvantage, especially where respondents can afford representation.

I am concerned it would be a set back to the development of jurisprudence in this area to force complainants to proceed unrepresented. Further, I am not certain that a no costs jurisdiction will, in practice, translate to a greater incidence of cases – not only issued, but also not settled prematurely.

26. Noting the above comment, the Law Council observes that considerations about quantum of awards and awards for legal costs go hand-in hand. If successful complaints are in all but exceptional circumstances to bear their own legal costs,

¹¹ Respect@Work ,n5, 507.

¹¹ Ibid 500.

¹² Ibid 507.

this needs to be weighed against the likely quantum of any damages awarded in sexual harassment matters. That is, unless the damages outweigh the legal costs payable, the implementation of Respect@Work Recommendation 25 alone will simply create a different cost barrier for complaints. As noted by the AHRC:¹³

Some stakeholders submitted that the damages awarded in sexual harassment matters have historically been significantly lower than comparable jurisdictions in which an applicant suffers an illness as a result of unlawful conduct.

27. The Law Council accordingly notes Respect@Work Recommendation 24:

The Australian Government conduct further research on damages in sexual harassment matters and whether this reflects contemporary understandings of the nature, drivers, harms and impacts of sexual harassment. This research should inform judicial education and training.

28. The Law Council did not specifically consult on this issue in the development of the National Action Plan, and nor has a consensus been reached among responses to subsequent consultations. Nonetheless, the Law Council considers that Recommendations 24 and 25 must necessarily be considered together, and suggests that this consideration be undertaken with the aid of further quantitative analysis of this matter.

29. It is otherwise noted that further matters raised in consultation included:

- a. Any amendments in line with section 570 FWA could be balanced through the inclusion of a provision giving the court greater discretion to award costs 'in the interests of justice'. This is similar, for example, to the case of the Queensland Civil and Administrative Tribunal, in which parties generally bear their own legal costs except where 'the interests of justice require otherwise'.¹⁴
- b. There may be a benefit to having differing costs regimes at a federal level as compared to that in the states and territories, a one commentator noted.¹⁵

While costs usually follow the event in court proceedings, this is a point of difference in the federal and State regimes, and sometimes a relevant factor in choice of jurisdiction. A complainant with a strong case might choose the federal jurisdiction so as to recover costs, rather than run the risk of an award of damages in the State jurisdiction being eroded by costs, if costs are not awarded.

- c. It was further suggested that any changes to the costs in the federal regime should apply to proceedings under all of the federal anti-discrimination Acts.

¹³ Ibid 506.

¹⁴ Queensland Civil and Administrative Tribunal Act 2009 (QLD), [sections 100-102](#).

¹⁵ However it is noted that there are also other factors relevant to the choice of jurisdiction.

Recommendation 28:

30. Recommendation 28 provides for the Fair Work system to be reviewed to ensure and clarify that sexual harassment, using the definition in the SDA, is expressly prohibited.
31. While the subject Bill has introduced sexual harassment to some areas of the FWA, and the AHRC has made recommendations in respect of the FWA, it was also noted in the Respect@Work report that:¹⁶

The Commission has made recommendations in relation to several key areas aimed at ensuring sexual harassment is clearly prohibited conduct under the Fair Work Act and understood as serious misconduct. In making recommendations, the Commission has been mindful to maintain the coherence of the Fair Work system, especially the statutory principles and structure of the legislation.

32. Recommendation 28 accordingly provides for a broader consideration of the Fair Work system to ensure that sexual harassment is appropriately addressed. The Law Council supports the review as proposed in Recommendation 28.

The Law Council's Policy Work Addressing Sexual Harassment in the Legal Profession

33. The Law Council otherwise notes the following comment from Ms Eastman AM SC during the hearing:

Ms Eastman: We can do that. Our submission also notes the substantive work that the Law Council has done from July last year developing a national action plan for the legal profession in responding to sexual harassment. In that context we have looked very carefully at the *Respect@Work* report but we have also looked at a range of other inquiries that have been undertaken over the past year looking at sexual harassment, particularly sexual harassment within the legal profession, the operation of our conduct rules and the like. We have made reference to the work that we've done in that area in the submission but our focus in assisting the committee today is on the bill rather than to share with you the vast amount of work that we've done over the past year looking at sexual harassment generally. Of course, all of that work has informed our response to the bill. If it would be of assistance to the committee, we can take on notice perhaps highlighting some of those matters and also the points that you have raised with us, Senator O'Neill. Thank you.

34. Eliminating sexual harassment in the legal profession has been part of a long-running commitment from the Law Council and its Constituent Bodies regarding inclusion and diversity in the legal profession. In 2020, it was clear that we needed to re-think how to drive cultural change within the profession.

National Roundtable

35. On 8 July 2020, the Law Council convened the [National Roundtable Addressing Sexual Harassment](#). The Roundtable drew from the expertise of inclusion and diversity representatives from legal professional associations, regulators, women

¹⁶ Respect@Work, n5, 515.

lawyers' associations, law student representatives and the Sex Discrimination Commissioner, to review and make recommendations about the legal profession's policy responses to sexual harassment.

36. Following the National Roundtable, the Law Council consulted with its Constituent Bodies, external experts and worked with its Equal Opportunity Committee to develop the Law Council's National Action Plan.

National Action Plan

37. The National Action Plan brought together the determination of the Law Council's state and territory Constituent Bodies to address sexual harassment in the legal profession across the nation. It was designed to map a path forward that addresses the regulatory and cultural change factors necessary to facilitate better experiences for the legal professionals.
38. Moreover, the National Action Plan was designed to be a living document, setting out a framework for change, the specifics of which will continue to evolve as each measure is developed.
39. The Law Council has been working with the Constituent Bodies and its Equal Opportunity Committee to roll out the Action Items and recommendations under the National Action Plan. This commenced with proposed amendments to Australian Solicitors' Conduct Rule 42.

Australian Solicitors' Conduct Rule 42

40. The [Australian Solicitors' Conduct Rules \(ASCR\)](#) are a uniform set of ethical and professional conduct principles governing the conduct of Australia's solicitors, especially in their relations with clients, the courts, fellow legal practitioners and regulators. The ASCR are developed by the Law Council and reflects the considered view of the legal profession about the appropriate standards of ethical and professional conduct expected of legal practitioners.
41. The ASCR have been adopted and presently apply as the professional conduct rules for solicitors in: South Australia,¹⁷ Queensland,¹⁸ New South Wales and Victoria (and shortly Western Australia),¹⁹ Tasmania,²⁰ and the Australian Capital Territory.²¹
42. Following the consultations in the development of the National Action Plan, the Law Council proposed further amendments to Rule 42, which addresses anti-discrimination and harassment.²² These amendments are proposed to enable regulators to address complaints of sexual harassment as unsatisfactory professional conduct, where the subject conduct:

¹⁷ Effective from July 2011 as the *Law Society of South Australia, Australian Solicitors' Conduct Rules*.

¹⁸ Effective from June 2012, as the *Australian Solicitors' Conduct Rules 2012*.

¹⁹ Effective 1 July 2015, as the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*.

²⁰ Effective 1 October 2020, as the *Legal Profession (Solicitors' Conduct) Rules 2020*.

²¹ Effective 1 January 2016, as the *Legal Profession (Solicitors) Conduct Rules 2015*.

²² Per Action Item 3A of the National Action Plan.

- a. meets the thresholds for sexual harassment as addressed in the applicable Glossary definitions;
 - b. does not meet the thresholds for professional misconduct; and
 - c. does not necessarily occur in the course of legal practice, however that conduct falls short of the standards that a member of the public is entitled to expect of a lawyer in the circumstances.
43. To this end, the Law Council has been working with the Legal Services Council (LSC) regarding the implementation of a revised Rule 42, per Section 427 of the Legal Profession Uniform Law (**Uniform Law**).²³ This included Public Consultations on the proposed revisions to Rule 42 that commenced in April 2021.
44. Following the Public Consultations on the proposed amendments, the Law Council continues to work with the LSC and the non-Uniform Law jurisdictions on the implementation of the revised Rule the ASCR jurisdictions. This will include an updated *Commentary* on the ASCR to assist solicitors in their understanding of the revised Rule.

Time for Change portal

45. The [Time for change: Addressing Sexual Harassment](#) portal was published on the Law Council's website on 8 March 2021, and highlights the range of relevant resources currently available through the Law Council, the Law Council's Constituent Bodies and national initiatives. The Portal serves as a centralised source of information and suite of educational tools for addressing sexual harassment in the legal profession.²⁴
46. The portal will be updated as projects and materials are implemented under the National Action Plan, and by Constituent Bodies.

National Model Policy and best practice recommendations for complaints procedures

47. The Law Council is also developing a National Model Sexual Harassment Policy along with recommendations for best practice complaints processes for both regulators and workplaces.²⁵
48. The recommendations have in part been drawn from the National Roundtable discussions and the consultations informing the National Action Plan, and are designed to complement and build upon existing best-practice processes as far as possible.
49. It is envisaged that the development of these guidance materials, that reflect nationally agreed best practice standards, will improve the management of sexual

²³ In the Uniform Law jurisdictions, section 427(2) of the Uniform Law empowers the Law Council to develop proposed Uniform Rules for Legal Practice, Continuing Professional Development and Legal Profession Conduct so far as they apply or relate to solicitors.

²⁴ Per Action Item 3C of the National Action Plan.

²⁵ Per Action Items 3B and 3D of the National Action Plan.

harassment in the profession and promote a uniformity of approach across jurisdictions.

50. The Law Council is presently consulting on these documents. It is envisaged that once the final forms of these documents are endorsed, they will be published on the *Time for change: Addressing Sexual Harassment* portal for the guidance and benefit of the profession.