Law Council
OF AUSTRALIA

Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

Legal and Constitutional Affairs Legislation Committee

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Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email mail@lawcouncil.asn.au
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612
Law Council of Australia Limited ABN 85 005 260 622
www.lawcouncil.asn.au

Table of Contents

About the Law Council of Australia

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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 internationally, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933 and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

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- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgement

The Law Council of Australia (**Law Council**) thanks the Law Society of New South Wales, the Law Society of South Australia, the Chair of its Equal Opportunity Committee, the Class Actions Committee of its Federal Litigation and Dispute Resolution Section, and Law Firms Australia for their input into this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide this submission to the Senate Legal and Constitutional Affairs Legislation Committee (the **Committee**) in response to its inquiry into the provisions of the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) (the **Bill**).

2. The Law Council made a submission (**2021 submission**) to the Senate Education and Employment Legislation Committee's inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (**Respect@Work Bill 2021**) and participated in a hearing during that committee's inquiry into the Respect@Work Bill 2021.[1]

3. In its 2021 submission and a later submission (**2022 submission**) to the Attorney-General's Department regarding its Consultation Paper: *Respect@Work—Options to progress further legislative recommendations* (**AGD Consultation Paper**),[2] the Law Council submitted that further amendments to the *Sex Discrimination Act 1984* (Cth) (**SDA**) are required to give effect in full to the recommendations of the Australian Human Rights Commission (**AHRC**) in its Respect@Work Report.[3] Importantly, these would:

   - introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual and sex-based harassment, and victimisation as far as possible;
   - provide the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment; and
   - amend the AHRC President's discretion under s 46PH of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) to terminate a complaint on the grounds of time so that this discretion does not arise until it has been 24 months since the alleged unlawful discrimination took place.[4]

4. The Law Council is pleased to see the inclusion of these amendments in the Bill, and appreciates Parliament having referred the bill for consideration by the Committee and for broader consultation.

5. The Law Council has addressed its submission by reference to the recommendations of the Respect@Work Report to which each amendment to be made by the bill responds. The Law Council is supportive of most of the amendments.

6. The Law Council recommends the following amendments to the Bill:

   - Recommendation 16(a): amend the objects clause, proposed paragraph 3(e) of the SDA:

[1] 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/509a87ab-06f0-eb11-943f-005056be13b5/4046%20-%20Sex%20Discrimination%20and%20Fair%20Work%20%20Respect%20at%20Work%20%20Amendment%20Bill%202021.pdf.
[2] 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-ec11-944c-005056be13b5/4193%20-%20Respect%20Work%20Further%20Legislative%20Recommendations.pdf.
[3] Australian Human Rights Commission, Respect@Work: Sexual Harassment National Inquiry Report (2020) (5 March 2020),(Respect@Work) available online: Respect@Work: Sexual Harassment National Inquiry Report (2020) | Australian Human Rights Commission.
[4] See also: Law Council of Australia, Call to Parties 2022 38.

- so that it is an objective of the SDA to 'achieve substantive equality for everyone, irrespective of gender or sexual orientation', rather than 'for men and women';
- to replace the phrase 'so far as practicable' with the phrase 'so far as possible' to set a higher bar and better reflect Australia's international obligations;

- Recommendation 16(b): consider addressing sex-based harassment through amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) as well as the SDA, noting that the FW Act already incorporates sexual harassment through amendments made by the Respect@Work Bill 2021;
- Recommendation 16(c): proposed section 28M should be redrafted in several respects to improve its clarity and certainty, as presently drafted it could have unintended consequences and generate protracted litigation around definitional issues;
- Recommendation 23: in relation to the proposed class actions scheme, while the Law Council does not have a settled position, consideration be given to:
  - permitting a class action to commence immediately, without first having to seek conciliation by the AHRC;
  - the implications of expanding class actions to other areas of discrimination law;
  - whether any consequential amendments are needed to manage the complexity of adding a class action scheme to that which already exists under the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**).
- Recommendation 25: on balance the Law Council supports the costs approach in the Bill, although it suggests that consideration be given to including a carve-out so that costs follow the event for class actions with certain characteristics.

7. The Law Council makes the following recommendations with respect to the implementation of the Bill:

- Recommendation 18: in relation to the exercise of its functions to enforce compliance with a positive duty, the Law Council notes the importance of ensuring the appropriate separation, for example, through 'information barriers' and 'structural arrangements', between the functions of the AHRC regarding conciliation and complaints resolution and the functions of the AHRC regarding compliance and enforcement under the SDA; and
- Recommendation 43: the Law Council emphasises the need for the Government to fund the Workplace Gender Equality Agency to adequately meet these expanded reporting obligations.

Comments on individual amendments

Recommendation 16(a)

8. Recommendation 16(a) of the Respect@Work Report is to:

Amend the Sex Discrimination Act to ensure:

a. the objects include 'to achieve substantive equality between women and men'.

9. Item 2 of Schedule 8 to the Bill would faithfully amend paragraph 3(e) of the SDA to provide that it is an object of the SDA 'to achieve, so far as practicable, *substantive equality* between men and women' (emphasis added). This amendment would replace the present object in paragraph 3(e) of the SDA 'to achieve, so far as practicable, *equality of opportunity* between men and women' (emphasis added).

10. In its 2021 submission, the Law Council recommended that paragraph 3(e) should be amended to replace the phrase 'to achieve, so far as practicable, equality of opportunity between men and women' with either:

(a) to achieve … 'substantive equality between women and men' (per recommendation 16(a)); or

(b) to achieve … 'substantive equality for everyone, irrespective of gender or sexual orientation'.[5]

11. The Law Council suggests consideration be given to adopting the construction at paragraph 10(b) immediately above. The Law Council draws the Committee's attention to the Commonwealth Latimer House Principles which state that 'gender-neutral language should be used in the drafting and use of legislation'.[6] There is a strong case here for gender-neutral language because the AHRC National Survey found that several harms that the Respect@Work Report sought to address are acute for people who identify as LGBTIQ+.[7] The Law Council submits that people who identify as neither man nor woman should be protected from discrimination.

12. The Law Council additionally submits, consistent with its 2021 submission in relation to the then proposed provision, that the words 'so far as is practicable' should be repealed from paragraph 3(e) of the SDA. The Law Council maintains the concerns expressed in its 2021 submission that such wording:

(a) introduces a lower standard than is proposed in Recommendation 16 of the Respect@Work Report;[8]

(b) is inconsistent with the balance of several other objects contained in section 3 of the SDA, which set a higher standard, being phrased in terms of the 'so far as it is possible' (paragraphs 3(b), 3(ba) and 3(c) of the SDA);[9] and

(c) may give rise to the implication that rights codified in the Convention on the Elimination of All Forms of Discrimination against Women[10] will only be protected domestically to the extent that it is 'practicable' to do so.[11]

[5] 2021 Submission 6.
[6] Commonwealth (Latimer House) Principles on the Three Branches of Government VII 1.
[7] Australian Human Rights Commission, Everyone's business: Fourth national survey on sexual harassment in Australian Workplaces (2018) 28.
[8] 2021 submission [14].
[9] Ibid.
[10] 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.
[11] 2021 submission [15].

13. In relation to paragraph 12(c), as the Law Council stated in that previous submission, under international law, every treaty to which Australia is party is binding upon it, and must be performed by it in good faith.[12] 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. An approach of implementing what is simply 'practicable' falls short of this aim, noting that the remainder of the SDA's provisions will be interpreted by reference to its purpose.

Recommendation

- **The Law Council supports this amendment at a minimum, but suggests consideration be given to further amending paragraph 3(e) of the SDA:**
  - **so that it is an objective of the SDA 'to achieve substantive equality *for everyone, irrespective of gender or sexual orientation*', rather than 'for men and women'; and**
  - **to either remove the phrase 'so far as practicable' or replace it with 'so far as possible'.**

Recommendation 16(b)

14. Recommendation 16(b) of the Respect@Work Report is to:

> *Amend the Sex Discrimination Act to ensure: …*
>
> *b. 'sex-based harassment' is expressly prohibited.*

15. Recommendation 16(b) was implemented through a series of amendments, made by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) (**Respect@Work Act 2021**), which inserted new section 28AA into the SDA which provides when a person will 'harass on the ground of sex' and includes the following element: the person engages in unwelcome conduct of a 'seriously demeaning nature' in relation to the person harassed.

16. Item 3 of Schedule 8 to the Bill would amend section 28AA of the SDA to remove the word 'seriously' from the reference to conduct of a 'seriously demeaning nature'.

17. This amendment is somewhat consistent with the recommendation the Law Council made in its 2021 submission that the phrase 'of a seriously demeaning nature' be deleted from section 28AA.[13] As the Law Council noted in that submission, given that the stated purpose of the inclusion of section 28AA was to clarify that sex-based harassment should be regarded as sex discrimination under the existing terms of the Act, it is unclear why an additional and higher threshold was included than that which applies to sexual harassment.[14]

18. As such, the Law Council supports the amendment which would be made by item 3 of Schedule 8 to the Bill.

19. In its 2021 submission, the Law Council also suggested that consideration be given to addressing harassment on the ground of sex through amendments to the *Fair Work*

[12] 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.
[13] 2021 submission [32].
[14] Ibid [24]–[28].

Act 2009 (Cth) (**FW Act**).[15] The Law Council queried whether it was intended that sex-based harassment be dealt with separately from sexual harassment, noting that only the latter is included in the FW Act. The Law Council reiterates its previous submission that consideration be given to amending the Bill so that it amends the FW Act to prohibit harassment on the grounds of sex in the same way that it prohibits sexual harassment.

Recommendation

- **The Law Council supports item 3 of Schedule 8 to the Bill which would repeal the word 'seriously' from paragraph 28AA(1)(a) of the SDA.**
- **The Law Council recommends that consideration be given to addressing sex-based harassment through amendments to the FW Act.**

Recommendation 16(c)

20. Recommendation 16(c) of the Respect@Work Report is to:

Amend the Sex Discrimination Act to ensure:

c. creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited.

21. Item 5 of Schedule 1 to the Respect@Work 2022 Bill would insert section 28M into the SDA, creating a new hostile workplace prohibition.

Context

22. The AHRC's Respect@Work Report noted that conduct that creates an intimidating, hostile, humiliating, or offensive environment for a person may also be captured through the existing sex discrimination provisions in the SDA, constituting discrimination on the ground of sex.[16]

23. The AHRC went on to note, however, that there was limited judicial authority on the issue and that '[w]hile it has been traditionally accepted that a sexually hostile work environment could constitute unlawful sex discrimination under the Sex Discrimination Act, the Commission considers that there is merit in clarifying the law'.[17]

24. The AGD Consultation Paper set out the case for creating a new hostile work environment prohibition despite that existing case law (footnotes in original):[18]

> *Whilst Australian anti-discrimination case law recognises that the creation of a hostile work environment can constitute sex discrimination and/or sexual harassment, the Respect@Work Report observed that the concept of a hostile work environment may not routinely be recognised or accepted as falling within the existing Sex Discrimination Act framework.*[19]

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[15] Ibid [31]–[32].
[16] AHRC, Respect@Work Report 536: see s 14(2)(c) of the SDA
[17] Ibid 538. The AHRC reiterated this position in its submission to the Senate Education and Employment Legislation Committee's inquiry into the Respect@Work Bill 2021: Australian Human Rights Commission, Submission 19 to the to the Senate Education and Employment Legislation.
Committee, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (9 July 2021) 11.
[18] AGD Consultation Paper [38]-[39].
[19] Respect@Work Report 460.

> *While individual cases have found sex discrimination and sexual harassment to be made out when elements of a hostile work environment have been present, these cases turned on their individual circumstances and how the particular work environment amounted to sexual harassment.*[20]
>
> *…*
>
> *Under the Sex Discrimination Act, complaints can be made by individuals to the AHRC. The purpose of any legislative amendment prohibiting this conduct under the Sex Discrimination Act would be to provide a complaints-based mechanism for dealing with hostile work environments and additional clarity that such conduct is unacceptable in the workplace.*

25. The Explanatory Memorandum for the Respect@Work 2022 Bill asserts a similar rationale for inserting a new hostile work environment prohibition into the SDA:[21]

> *While the courts have determined that conduct that results in a hostile work environment may be captured through existing provisions of the SD Act, this is not well understood or recognised by employers and PCBUs. This amendment would provide clarity and certainty to the law and set clear boundaries on acceptable conduct in the workplace.*

26. In its 2022 submission, prior to a provision being drafted, the Law Council queried what types of hostile work environments on the basis of sex remain that would not constitute sexual harassment (section 28A), harassment on ground of sex (section 28AA) or sex discrimination (section 14), and whether it is appropriate to address these environments through an express legislative provision.[22]

27. It noted that paragraph 14(2)(d) of the SDA, which is commonly used, does not require conduct to have been deployed in relation to the harassed employee. Instead, it applies a different nexus, requiring that the employee—to have been discriminated against by their employer on the ground of sex—must have been subject to 'detriment', which has been held to include a hostile environment.

28. Paragraph 14(2)(d) of the SDA provides:

> It is unlawful for an employer to discriminate against an employee on the ground of the employee's sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities:
>
> (a) in the terms or conditions of employment that the employer affords the employee;
> (b) by denying the employee access, or limiting the employee's access, to opportunities for promotion, transfer or training, or to any other benefits associated with employment;
> (c) by dismissing the employee; or
> (d) by subjecting the employee to any other detriment.

29. The 2022 submission noted that, while past judicial decisions illustrate that some courts have been less willing to extend the concept of sex discrimination to the conduct of one employee against another employee, as opposed to the conduct of an employer against an employee, section 14 has in general been interpreted broadly.[23]

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[20] *O'Callaghan v Loder and the Commissioner for Main Roads* [1983] 3 NSWLR 89; *Hill v Water Resources Commission* [1985] EOC 92-127; *Horne v Press Clough Joint Venture* [1994] EOC 92, 92-591; *Carter v Linuki Pty Ltd trading as Aussie Hire & Fitzgerald* (EOD) [2005] NSWADTAP 40, 11-18.
[21] Explanatory Memorandum, Respect@Work 2022 Bill, General Outline [7] on page 4.
[22] 2022 submission [24].
[23] Ibid [23].

30. The Law Council concluded in its 2022 submission that 'education on the interpretation and application of the current case law is required, rather than the introduction of an express prohibition, which could in its scope have the unintended consequence of introducing further complexity into the legislative regime'.[24]

31. Having said that, the Law Council agrees the case law is not perfectly clear and supports in principle the objective of providing clarity in the law through legislation. However, it suggests that further work may be required to ensure the provision has a clear and certain operation, for the reasons set out below.

32. It is worth noting at this stage that the provision has some support in the Law Council's constituent bodies. The Law Society of NSW considers that a legislative provision that expressly prohibits subjecting persons to a hostile workplace environment on the ground of sex is necessary, given the limited case law at a federal level recognising that a hostile work environment could constitute sex-based discrimination. In its view (footnotes in the original):

> *Behaviour, which may not be directed at a specific person and, alone, may not constitute sexual harassment, can nevertheless foster a hostile environment if taken as part of a cumulative pattern of behaviour or conduct.*[25] *Accordingly, we consider the proposed section 28M addresses an important gap in the current law, by allowing individuals to make a complaint to the Australian Human Rights Commission ("AHRC") where they have been exposed to a hostile environment on the ground of sex.*
>
> *Section 28M … sets out the meaning of a hostile workplace environment with sufficient clarity, noting that terms such as 'offensive, intimidating or humiliating' conduct are well established in anti-discrimination law and have been employed in other comparable jurisdictions.*[26]

The proposed new hostile work environment prohibition

Description of the provision

33. Item 5 of Schedule 1 to the Bill would insert section 28M into the SDA.

34. Subsection 28M(1) would provide that it is unlawful to subject another person to a workplace that is hostile on the ground of sex (**hostile workplace prohibition**).

35. Subsection 28M(2) is effectively a definitional provision, which provides when the unlawful conduct referred to in subsection 28M(1) would occur. It provides that a person subjects another person to a workplace that is hostile on the ground of sex if the following three limbs are satisfied:

    (a) the **first person engages in conduct in a workplace** where the first person or the second person, or both, work;

    (b) the **second person is in the workplace** at the same time as or after the conduct occurs; and

    (c) a reasonable person, having regard to all the circumstances, would have anticipated the possibility of the conduct [by the first person] resulting in the workplace

[24] Ibid [3].
[25] Legal Section of the Human Rights and Equal Opportunity Commission 'The Right to a Discrimination-Free Workplace', Australian Human Rights Commission (webpage), https://humanrights.gov.au/our-work/right-discrimination-free-workplace#fn0 (July 2008).
[26] Section 26 *Equality Act 2010* UK.

environment being offensive, intimidating or humiliating to a person of the sex of the second person by reason of:

(i) the sex of the person; or

(ii) a characteristic that appertains generally to persons of the sex of the person; or

(iii) a characteristic that is generally imputed to persons of the sex of the person.

36. Subsection 28M(3) dictates that the 'circumstances' to be taken into account for the purposes of limb (c) must include the following matters:

(a) the seriousness of the conduct;
(b) whether the conduct was continuous or repetitive;
(c) the role, influence or authority of the person engaging in the conduct;
(d) any other relevant circumstance.

37. Limbs (a) and (b) are objective provisions determined by the existence of facts—there is conduct in a workplace by the first person; the second person is in the workplace at or after that time. Interestingly, it is not necessary that both parties must 'work' in the workplace. As such, either the first person (the person engaging in the conduct) or the second person (the person subjected to that conduct) may be a customer or client, for example—so long as the other person works at the workplace.[27]

38. Limb (c) sets up what is couched as an objective 'reasonable person' test. However, it contains subjective elements.

39. The starting point is the conduct itself—this is an element determined by facts.

40. However, strictly speaking, it does not appear necessary, for the purpose of that test, to make an actual factual finding that a hostile workplace environment had in fact been created by that conduct. Nor does it require a finding of the actual state of mind of the 'second person' themselves. Nor does it require the 'reasonable person' to stand in the shoes of the first person.

41. The question is in fact whether a reasonable person, in all the circumstances, *would have anticipated the possibility* of the conduct resulting in the workplace being offensive, intimidating or humiliating to *a person of the sex of the second person*.

42. That is, the 'reasonable person' needs to weigh up how that conduct would be experienced by a hypothetical person of the sex in question. This is made clear in the following example included in the Explanatory Memorandum (emphasis added):[28]

> *For example, a number of professional football players choose to display pornographic images, some of which include violent slurs about women, in the male locker room of their club. The players believe the locker room is private and do not expect other people to see the images. The owners of the football club organise a deep clean of the facilities ahead of the new season and a number of female cleaners are required to clean the locker room. One of the cleaners, Aisha, lodges a complaint on the basis that the players have engaged in conduct that resulted in a hostile workplace environment. Aisha establishes that the players engaged in conduct in her workplace and she was in the workplace after the conduct occurred*

[27] See Explanatory Memorandum, Respect@Work Bill 2022, [22]-[24] on page 24.
[28] Ibid [37] on page 27.

(paragraphs 28M(2)(a) and (b)). ***In this example, a reasonable person may anticipate the possibility that the players' conduct would result in a workplace that is offensive, intimidating or humiliating for women by reason of their sex. It is not relevant that the players did not anticipate that any women, including Aisha, would be impacted by their conduct.***

Contrasting the hostile work environment provision to existence prohibitions in the SDA

43. The construction used in proposed subsection 28M(2) is broadly similar to that in subsections 28A(1) and 28AA(1), which are also definitional provisions—they define the prohibitions on sexual harassment and harassment on the ground of sex respectively.

44. Subsection 28A(1), for example, contains two limbs. It provides that a person sexually harasses another person if:

    (a) either:

        (i) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

        (ii) engages in other unwelcome conduct of a sexual nature in relation to the person harassed;

    (b) in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

45. That is, subsection 28A(1) employs a broadly similar structure to proposed subsection 28M(2): the first limb involves conduct; the second limb involves consideration of whether a 'reasonable person' would have 'anticipated the possibility' that conduct would offend, humiliate or intimidate another.

46. However, on closer inspection, there are some important distinctions to be made.

47. Firstly, the first limb in subsection 28A(1) turns on not just the mere existence of conduct but a factual finding about the nature of that conduct and how it has been experienced by another. That is, the conduct must be 'unwelcome'.

48. The *Macquarie Concise Dictionary* does not define 'unwelcome'; however, it relevantly defines welcome as 'agreeable, as something coming, occurring or experienced'.[29] This suggests unwelcome conduct would be conduct which is not agreeable to the person to whom it is directed.

49. Secondly, the second limb in subsection 28A(1) turns on not the anticipated experience of a hypothetical person, but the anticipation of the possibility that *the person to whom the conduct is directed* would be offended, humiliated, or intimidated by that 'unwelcome conduct of a sexual nature'.

50. As a result, the nexus between the limbs in subsection 28A(1) is close:

    - conduct by person A directed at a person B;
    - the conduct by person A is *unwelcome* to person B; and

[29] *Macquarie Concise Dictionary* (8th edition 2020) 'welcome' (def 7).

- an anticipation of the possibility of person B's experience of person A's unwelcome conduct as offensive, humiliating or intimidating.

51. The nexus between the limbs in subsection 28M(2) is more distant:

- conduct by person A of a non-specified kind not directed at a person;
- the conduct could potentially affect the experience of others in a 'workplace environment'; and
- an anticipation of the possibility of *a hypothetical person of a particular sex's* experience of person A's conduct as offensive, humiliating or intimidating.

52. This broad nexus between the limbs in subsection 28M(2) may create challenges in applying the law consistently. These include:

- the extent to which a person's conduct affects a 'workplace environment' and what is meant by that term;
- the extent to which it is possible to form a view as to the possibility a hypothetical person of the sex in question would be offended, intimidated, and humiliated by the workplace environment as a result of the conduct; and
- as a corollary of the previous point, assuming the possibility that different members of a sex may or may not experience a hostile workplace environment resulting from or influenced by conduct, whether it would be sufficient for a minority or even one person of that sex to be offended for the conduct to be unlawful.

53. A key rule of law principle is that the law must be clear and certain.[30] In particular, people must be able to know in advance whether their conduct might be unlawful.[31] Provisions should be clearly drafted so that they do not inadvertently capture a wide range of unintended conduct or result in protracted litigation with respect to the scope of the provision.

54. It is not clear to the Law Council whether it is possible to amend the provision to ensure it has an appropriate level of certainty and clarity. The Law Council understands that the ambit of a prohibition on conduct not directed at a particular person, focusing on the potential experience of any person of a particular sex, may necessarily require some level of speculation.

55. By way of suggestion, means by which it may be possible to provide certainty as to whether conduct is unlawful may include:

- to require there to be some factual finding about the nature of the conduct, akin to the concept of 'unwelcome conduct' in subsection 28A(1);
- to require there to be a factual finding about the impact the conduct had on a workplace environment;
- a clear definition of 'workplace environment';

[30] Law Council of Australia, 'Policy Statement – Rule of Law Principles' (March 2011), https://www.lawcouncil.asn.au/publicassets/046c7bd7-e1d6-e611-80d2-005056be66b1/1103-Policy-Statement-Rule-of-Law-Principles.pdf Principle 1 on page 2.
[31] Ibid.

- to focus the reasonable person test on the perspective/level of anticipation of the person engaging in the conduct, rather than a hypothetical bystander; and

- to strengthen 'possibility' to some level of likelihood.

56. Arguably, these amendments may bring the provision closer to its intended ambit.

57. The Explanatory Memorandum for the Respect@Work 2022 Bill details some of this case law as informing proposed section 28M (footnotes retained from the original; emphasis added):[32]

> *The concept of a hostile workplace environment has been explored in Australian case law. For example, in Johanson v Michael Blackledge Meats [2001] FMCA 6, a hostile work environment was defined as 'conduct of a sexual nature in which another person, whether the intended target or not, who has not sought or invited the conduct,* ***experiences offence, humiliation or intimidation*** *and, in the circumstances, a* ***reasonable person would have anticipated that reaction****.'*[33] *The concept of a hostile work environment has also been found to apply when* ***a pattern of behaviour is designed to exclude a person*** *on the ground of sex and make them feel unwelcome and uncomfortable.*[34] *The primary difference between a hostile work environment and other forms of unlawful conduct, such as sexual harassment, is that the conduct is not directed towards a particular person, but* ***results in a generally hostile environment.***

58. Those cases actually suggest a different test than that in proposed section 28M. That is, in those cases:

- a factual finding is made about the experience of the second person, rather than a hypothetical person of a particular sex;

- the threshold is that a 'reasonable person would have anticipated *that reaction*', not the *possibility* of that reaction;

- there is a finding about the intent of the behaviour; and

- there is a finding about the outcome of the behaviour.

Other issues

Section 8A

59. Proposed section 8A would clarify that a workplace environment may be offensive, intimidating or humiliating to a person if it is 'offensive, intimidating or humiliating' by reason of two or more matters that include sex or a characteristic which appertains generally or is generally imputed to a person of that sex, whether or not the sex or the characteristic is the dominant or substantial reason.

60. That is, put another way, it provides that a workplace environment may be offensive, intimidating or humiliating for the purposes of section 28M only because of the person's sex or the relevant characteristic.

61. The EM suggests the purpose of new section 8A is to perform the same function as section 8 of the SDA, 'which provides that where certain provisions of the SD Act

[32] Explanatory Memorandum, Respect@Work 2022 Bill, [8] on page 21.
[33] *Johanson v Michael Blackledge Meats* [2001] FMCA 6, [89],
[34] See, eg, *Hill v Water Resources Commission* [1985] EOC 92-127.

define unlawful discrimination to mean the doing of an act by reason of a particular matter (such as sex), that includes the doing of an act for more than just that reason'.[35]

62. Section 8 and proposed section 8A are actually drafted differently:

- section 8 refers to the *reason for doing the act* which makes up the unwelcome conduct—it provides that it may be for both a discriminatory on non-discriminatory reason;
- section 8A refers to the relationship between the hostile work environment and the reason for the second person's offence, intimidation or humiliation—it does not actually attach to the conduct itself.

63. This is a product of a provision (section 28M), which does not require a finding in relation to the conduct itself. Unless section 28M is amended in the manner suggested above, to require some kind of finding about the conduct itself, section 8A as drafted may in fact further complicate the operation of section 28M.

Bystanders

64. The Law Council notes that the Explanatory Memorandum to the Bill provides at paragraph 32:

> The inclusion of paragraph 28M(3)(c) is also intended to provide appropriate limits on the application of the provision to people who are bystanders. For example, if a senior manager observes junior employees engaging in conduct that results in a hostile workplace environment and fails to act or intervene, the senior manager's conduct may also be contributing to the hostile workplace environment. However, it is not intended that the provision would capture inaction by people in junior positions or with limited influence and authority.

65. However, given the operation of section 28M turns on the person 'engag[ing] in conduct' it is very difficult to see how the provision can apply to bystanders by reason of their 'inaction'.

66. If this is the intended operation, further amendments may need to be made to section 28M.

Alternative approaches

67. As noted, the Law Council considers that education and training, supplemented by the existence of strong internal and external policies and complaints procedures, could make a considerable positive difference to preventing hostile work environments from arising.

68. The Law Council also considers the new positive duties imposed on all employers and persons conducting a business of undertaking (**PCBUs**) to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment, and victimisation as far as possible will also assist to mitigate the possibility of conduct that generates a hostile work environment from occurring.

Recommendation

[35] Explanatory Memorandum, Respect@Work 2022 Bill, [17] on page 23.

- **The Law Council suggests section 28M should be redrafted in the manner described at [55] to give the law a more certain and clear application.**
- **However, it considers that education on the interpretation and application of the current case law with respect to the creation of a hostile work environment, and the impact of the new positive duty on employers, may provide a feasible alternative approach to a new hostile work environment prohibition.**

Recommendation 16(d)

69. Recommendation 16(d) of the Respect@Work Report is to:

> *Amend the Sex Discrimination Act to ensure:*
>
> *d. the definition of 'workplace participant' and 'workplace' covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed.*

70. Item 3 of Schedule 1 to the Bill would amend subsection 4(1) of the SDA to insert a new defined term 'workplace' and provide that it has the same meaning as in section 8 of the *Workplace Health and Safety Act 2011* (Cth) (**WHS Act**). The term 'workplace' would be included in the new provisions in the SDA relating to a hostile workplace environment and imposing a positive duty to eliminate discriminatory activity in the workplace.

71. Section 8 of the WHS Act defines 'workplace' as:

> *a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.*

72. The Respect@Work Act 2021 partially addressed Recommendation 16(d) by amending the SDA toto incorporate the definition of 'worker' from the WHS Act in the SDA (see section 4 SDA). Subsection 7(1) of the WHS Act defines 'worker' as:

> *(1) A person is a worker if the person carries out work in any capacity for a person conducting a business or undertaking, including work as:*
> *(a) an employee; or*
> *(b) a contractor or subcontractor; or*
> *(c) an employee of a contractor or subcontractor; or*
> *(d) an employee of a labour hire company who has been assigned to work in the person's business or undertaking; or*
> *(e) an outworker; or*
> *(f) an apprentice or trainee; or*
> *(g) a student gaining work experience; or*
> *(h) a volunteer; or*
> *(i) a person of a prescribed class.*

73. The Law Council welcomes those amendments made by the Respect@Work Act 2021 which are intended to ensure that persons not previously covered under the SD Act, such as interns, volunteers and self-employed workers, members of parliament, their staff, judges, and state public servants, are all covered by the SDA.[36]

[36] Sex Discrimination and Fair work (Respect at Work) Amendment Bill 2021, *Revised Explanatory Memorandum* [15].

74. In its 2021 submission, the Law Council expressed in-principle support for the expansion of the SDA's coverage to broader range of workers, noting Recommendation 16(d) calls for the coverage of 'all persons in the world of work'.[37]

75. The Law Council welcomes the inclusion through the Bill of the definition of 'workplace' from the WHS Act. This definition would include any place where a worker goes, or is likely to be, while at work, such as corridors, foyers, lifts, lunchrooms and bathrooms. It also includes places where work is performed from time to time, even if there is no work being carried out at the place at the time of the unlawful conduct.[38]

76. The Law Council notes that the way in which the term 'workplace' is used in the provisions of the bill would allow people who are not workers in that workplace, such as clients or customers, to benefit from certain protections under the SDA. The Law Council refers, for example, to proposed section 28M. The Explanatory Memorandum states that section 28M:

> *Refers to the 'first person' and 'second person' rather than using other terms, such as employer, employee, PCBU or worker. This is intended to ensure the provision applies broadly in the workplace and can cover all types of people who may impact, or be impacted by, a workplace environment, including customers and clients.*[39]

77. While the proposed positive duty is discussed below, it is worth noting here that the Law Council also supports subsection 47C(5), which is drafted in such a way that the positive duty on employers and persons conducting a business or undertaking is owed only to employees and workers respectively. This provision would, appropriately, not extend to customers or clients.

78. The Law Council considers that the utilisation of the definition of 'workplace' in the Bill gives effect to Recommendation 16(d).

Recommendation 17

79. Recommendation 17 of the Respect@Work Report is that:

> *The Sex Discrimination Act be amended to introduce a positive duty for all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered including, but not limited to:*
>
> *a. the size of the person's business or operations*
>
> *b. the nature and circumstances of the person's business or operations*
>
> *c. the person's resources*
>
> *d. the person's business and operational priorities*
>
> *e. the practicability and the cost of the measures*
>
> *f. all other relevant facts and circumstances.*

80. Item 8 of Part 1 of Schedule 2 would insert section 47C into the SDA. This provision would impose a duty on the 'duty holder' (employers and persons conducting a

[37] 2021 submission [41].
[38] See Explanatory Memorandum, Work Health and Safety Bill 2011 < Work Health and Safety Bill 2011 – Parliament of Australia (aph.gov.au)>
[39] Explanatory Memorandum to the Respect@Work Bill 2022, p. 24.

business or undertaking (**PCBU**s)) to 'take reasonable and proportionate measures to eliminate, as far as possible' certain conduct prohibited by the Act—including discrimination on the ground of the person's sex, sexual harassment or harassment on the ground of sex, the creation of a hostile workplace environment, and certain acts of victimisation—by the duty holder, their employees, workers and agents. The scope of the duty extends differently depending on the unlawful conduct in question.

81. Subsection 47C(6) would set out the matters to be taken into account when determining compliance with the positive duty: a) size, nature and circumstances of the business/PCBU; b) resources, including financial; c) practicability and the cost of steps to eliminate the conduct; and d) any other relevant matter.

82. The Law Council has long supported the introduction of a positive duty on employers to prevent sexual harassment from occurring.[40]

83. The Law Council welcomes the inclusion in the Bill of prescribed matters to be taken into account by the AHRC in determining compliance with the positive duty, which will require the AHRC to take into account the size, circumstances and resources of individual law firms when determining compliance.

Recommendation

- **The Law Council supports provisions imposing positive duties on employers and PCBUs to be inserted by item 8 of Part 1 to Schedule 2.**

Recommendation 18

84. Recommendation 18 of the Respect@Work Report is that:

> *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*
>
> *c. apply to the Court for an order requiring compliance with the duty.*

85. Part 2 of Schedule 2 would add new sections to the AHRC Act to confer functions on the AHRC to monitor and assess compliance with the positive duty when necessary, including the options:

- on Royal Assent (Division 1 of Part 2), to:
    - publish guidelines, promote understanding, and undertake education and research to assist compliance with the positive duty in relation to sex discrimination (proposed section 35A);

[40] Law Council submission to the 2019 National Inquiry into Sexual Harassment in Australian Workplaces, https://www.lawcouncil.asn.au/publicassets/1bde0b80-d23e-e911-93fc-005056be13b5/3587%20-%20AHRC%20NISHAW%20Submission.pdf

- twelve months after Royal Assent (Division 2 of Part 2), amongst other things, to:
    - conduct inquiries into a person's compliance with the positive duty in relation to sex discrimination and provide recommendations to achieve compliance (see proposed section 35B);
    - give a compliance notice specifying the action that a person must take, or refrain from taking, to address their non-compliance (proposed section 35F);
    - apply to the federal courts for an order to direct compliance with the compliance notice (proposed section 35J); and
    - enter into enforceable undertakings in accordance with the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (proposed section 35K).

86. The Law Council has long supported the introduction of a positive duty and associated compliance function for the AHRC.[41] The AHRC's compliance functions would ensure that the positive duty is enforceable, extending compliance with the SDA beyond the existing individual complaints mechanism.

87. As has been extensively noted, the current system is reactive rather than proactive in addressing issues such as sexual harassment.[42] This approach places the burden of responsibility for ensuring compliance with discrimination law on the individuals who have been affected by non-compliance. Such individuals generally lack adequate resources and support, and experience power imbalance in the system. The Law Council views the introduction of a positive duty as an important access-to-justice mechanism.

88. The Law Council notes that Division 2 of Part 2 of Schedule 2 to the Respect@Work 2022 Bill would commence 12 months after Royal Assent. The Law Council supports this graduated introduction of compliance functions. It will provide a sufficient grace period for employers and PCBUs to make arrangements under Division 1, in order to comply with the new positive duty.

89. Law Firms Australia submits that, given the 12-month implementation period, the proposed AHRC guidelines for complying with the positive duty should be published within three months of assent. The Law Council agrees that the AHRC's guidelines will need to be published early enough in the 12-month period to afford law firms sufficient time to make the necessary arrangements. Acknowledging that the AHRC also has limited resourcing, the Law Council would suggest the Guidelines be published three to six months after Royal Assent.

90. The Law Council queries why the AHRC's functions under proposed section 35A relate only to sex discrimination whereas section 47C introduces a positive duty in relation to:
    - sex discrimination;
    - sexual and sex-based harassment;

[41] Law Council of Australia, National Inquiry into Sexual Harassment in Australian Workplaces, Submission 26 February 2019: https://www.lawcouncil.asn.au/publicassets/1bde0b80-d23e-e911-93fc-005056be13b5/3587%20-%20AHRC%20NISHAW%20Submission.pdf.
[42] Australian Human Rights Commission, *Free and Equal – A Reform Agenda for Federal Discrimination Laws* (2021), 56.

- hostile work environments; and
- victimisation as far as possible.

91. For example, the Law Council queries why the AHRC is not also required to publish guidelines for compliance with hostile environment provisions.

92. The Law Society of New South Wales notes that:

> *The proposed changes would require a significant increase in funding, resourcing and expertise in the AHRC … We also suggest that, in the initial phase of introducing a positive duty under the Bill, further consideration should be given to implementing co-regulatory mechanisms (eg voluntary audits, development of action plans) to increase understanding and compliance across businesses. In this regard, the Law Society supports the proposed AHRC functions under section 35A, which include, inter alia, publishing guidelines for complying with the positive duty in respect of sex discrimination, and undertaking research and educational programs in relation to this duty.*

93. The Law Society of New South Wales comments that:

> *In relation to proposed section 35J(2), we suggest that consideration be given to enabling courts to impose pecuniary penalties for failure to comply with a compliance notice. Such a provision could be modelled on the current provisions of the Fair Work Act 2009 for noncompliance with a notice from the Fair Work Ombudsman.*

94. The Law Council notes that approaches to compliance are often graduated, beginning with a cooperative and coregulatory approach, and make use of coercive enforcement powers only where necessary, such as in instances of repeated non-compliance. This approach was supported by the AHRC in its recent broader discrimination law position paper in December 2021.[43]

95. While the Law Council supports the introduction of these compliance powers, it submits that thought needs to be given to restrict the AHRC's power to delegate these compliance functions. Section 19 of the AHRC Act might need to be amended to ensure that the relevant officials to whom the compliance powers are delegated have the necessary skills and expertise to exercise the powers and perform the new functions.

96. The Law Council also notes the importance of ensuring the appropriate separation, for example, through 'information barriers' and 'structural arrangements', between the functions of the AHRC regarding conciliation and complaints resolution and the functions of the AHRC regarding compliance and enforcement under the SDA. The perception of impartiality and independence is essential for any tribunal with jurisdiction to resolve complaints of workplace sexual harassment.

Recommendation

- **The Law Council generally supports the compliance powers given to the AHRC under Part 2 of Schedule 2 to the Bill.**
- **The Law Council:**
  - **suggests consideration be given to expanding the AHRC's function to publish guidelines, promote understanding, and**

[43] See Australian Human Rights Commission, Free and Equal – A Reform Agenda for Federal Discrimination Laws (December 2021) 93

undertake education and research to assist compliance with the positive duty to other prohibitions, particularly the hostile work environment;

- **suggests thought be given to confining the AHRC's power to delegate these compliance functions, to ensure the relevant officials have the necessary skills and expertise to exercise the powers and perform the new function; and**
- **notes the importance of ensuring the appropriate separation between the functions of the AHRC regarding conciliation and complaints resolution and the functions of the AHRC regarding compliance and enforcement under the SDA.**

Recommendation 19

97. Recommendation 19 of the Respect@Work Report is to:

> *Amend the Australian Human Rights Commission Act to provide the Commission with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment. Unlawful discrimination includes any conduct that is unlawful under the federal discrimination laws. The Commission should be given powers to require:*
>
> *a. the giving of information*
>
> *b. the production of documents*
>
> *c. the examination of witnesses*
>
> *with penalties applying for non-compliance, when conducting such an inquiry.*

98. Schedule 3 to the Bill would insert Division 4B into Part II of the AHRC Act, which would confer new functions on the AHRC to conduct inquiries into any matter which may relate to systemic or suspected systemic unlawful discrimination and anything incidental or conductive to that function.[44] It would co-opt existing powers to obtain information and documents and examine witness in relation to the performance of those functions.[45]

99. Section 3 of the AHRC Act provides:

> ***unlawful discrimination*** means any acts, omissions or practices that are unlawful under:
>
> (aa) Part 4 of the *Age Discrimination Act 2004*; or
>
> (a) Part 2 of the *Disability Discrimination Act 1992*; or
>
> (b) Part II or IIA of the *Racial Discrimination Act 1975*; or
>
> (c) Part II of the *Sex Discrimination Act 1984*;
>
> and includes any conduct that is an offence under:
>
> (ca) Division 2 of Part 5 of the *Age Discrimination Act 2004* (other than section 52); or
>
> (d) Division 4 of Part 2 of the *Disability Discrimination Act 1992*; or
>
> (e) subsection 27(2) of the *Racial Discrimination Act 1975*.

[44] Proposed section 35L of the AHRC Act.
[45] Proposed section 35N of the AHRC Act.

100. New subsection 35L(2) of the AHRC Act would define 'systemic unlawful discrimination' to mean 'unlawful discrimination' that:

- affects a class or group of persons; and
- is continuous, repetitive or forms a pattern.

101. The Law Council has long supported the inclusion of an inquiry power for systemic harassment and discrimination.[46] In its 2019 submission to the AHRC, National Inquiry into Sexual Harassment in Australian Workplaces, the Law Council stated:

> *Many complaints processes, including the statutory complaints process under the [AHRC Act], as discussed at paragraph [139], but also informal complaints processes within organisations, require any complaint to be made and progressed by the individual sexually harassed person. This places a burden on the individual, who is often not adequately supported or is experiencing the impacts considered below, which impair their ability to 'self-help'. It also prevents society addressing the issue of sexual harassment in a structural or systemic way. As Adrienne Morton asserts, this impacts the take-up and efficacy of complaints processes: because 'targets of sexual harassment often respond passively to the conduct … organisational approaches which rely exclusively on individual complaints made by targets of sexual harassment are unlikely to be successful'.*[47]

102. Proposed clause 35M would allow the AHRC to perform its systemic inquiry functions:

- when requested to do so by the Minister (new paragraph 35M(a)), or
- when it appears to the AHRC to be desirable to do so (new paragraph 35M (b)).

103. In its 2022 submission, Law Council cautioned that, 'it is important that the circumstances in which the AHRC may conduct investigations on its own initiative are carefully considered and clearly outlined'.[48] The Law Council has also previously suggested that regard may be had to the limits imposed on the Victorian Equal Opportunity and Human Rights Commission's power to conduct its own investigations under section 127 of the Equal Opportunity Act 2010 (Vic)'.[49]

104. The Law Society of NSW notes that (footnote in the original):

> *Under proposed section 35M(b), the AHRC is empowered to perform its systemic inquiry functions "[when] it appears to the Commission to be desirable to do so." While this provision is, in our view, consistent with the independent nature of the AHRC as a Paris Principles compliant institution,*[50] *we suggest that consideration be given to further clarifying the circumstances under which the AHRC may initiate an investigation under section 35M(b).*

105. On the other hand, a number of specialist committees of the Law Society of South Australia expressed support for the provision in its existing form; including that Law Society's:

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[46] Law Council of Australia, National Inquiry into Sexual Harassment in Australian Workplaces, Submission 26 February 2019: https://www.lawcouncil.asn.au/publicassets/1bde0b80-d23e-e911-93fc-005056be13b5/3587%20-%20AHRC%20NISHAW%20Submission.pdf.
[47] Ibid submission [328].
[48] 2022 submission [73].
[49] 2019 submission [125].
[50] See Asia Pacific Forum of National Human Rights Institutions, 'Fact Sheet 2: What do the Paris Principles say?' (webpage) https://asiapacificforum.net/members/what-are-nhris/paris-principles/.

- Women Lawyers' Committee, which queried the inclusion of additional prescribed considerations for the exercise of this inquiry power because of the potential for such a qualifier to result in challenges to the exercise of the powers;

- Aboriginal Issues Committee, which expressed support for conferring a broad inquiry function on the AHRC in this way, observing the issue from the context of racial discrimination.

106. The Law Council notes that the description of the AHRC's functions under section 35L would limit the AHRC's discretion under new paragraph 35M(b). In addition, a procedural fairness requirement is built into the inquiry provisions at section 35P.

107. On balance, the Law Council supports the provision and notes the above for consideration.

Recommendation

- **The Law Council supports the broad inquiry power in the Bill.**

Recommendation 21

108. Recommendation 21 of the Respect@Work Report is to:

Amend the Australian Human Rights Commission Act to make explicit that any conduct that is an offence under section 94 of the Sex Discrimination Act can form the basis of a civil action for unlawful discrimination.

109. The Respect at Work Act 2021 implemented this recommendation, i.e., amended the SDA to make explicit that any conduct that is an offence under section 94 of the SDA (which prohibits victimisation against a person) can form the basis of a civil—and not just criminal—action for unlawful discrimination.

110. Schedule 7 to the Respect@Work 2022 Bill would clarify that victimisation can be the basis for a civil—and not just criminal—action under the *Age Discrimination Act 2004* (Cth), the *Disability Discrimination Act 1992* (Cth), and the *Racial Discrimination Act 1975* (Cth).

Recommendation

- The Law Council supports this amendment on the basis that it will ensure consistency with respect to this particular issue between the discrimination laws.

Recommendation 22

111. Recommendation 22 of the Respect@Work Report is to:

Amend the Australian Human Rights Commission Act so that the President's discretion to terminate a complaint under the Sex Discrimination Act on the grounds of time does not arise until it has been 24 months since the alleged unlawful discrimination took place.

112. This recommendation was faithfully given effect by the Respect at Work Act 2021, leaving a distinction between the AHRC's discretion to terminate a complaint on the ground of the amount of time elapsed after the alleged acts, omissions or practices took place between:

- complaints under the SDA—where the discretion is enlivened after 24 months; and
- in any other case—where the discretion is enlivened after 6 months.

113. The Law Council agrees with the AHRC that processes for making complaints to the AHRC and subsequently going to court should operate in a manner that ensures access to justice.

114. In its Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces, the Commission heard that the six-month timeframe associated with this discretion fails to recognise the complex reasons why a victim may delay making a sexual harassment complaint immediately following the alleged incident. The Commission recommended this timeframe for exercising the discretion to terminate be extended to 24 months.

115. The Respect at Work Act 2021 extended this time period to 24 months for complaints relating to the SD Act only. This amendment would extend the period of time in paragraph 46PH(1)(b) from 6 months to 24 months for complaints initiated in relation to all the Commonwealth anti-discrimination Acts.

116. The Law Council supports this amendment.

Recommendation 23

117. Recommendation 23 of the Respect@Work Report is to:

> *Amend the Australian Human Rights Commission Act to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the Australian Human Rights Commission Act that allow unions and other representative groups to bring a representative complaint to the Commission.*

118. The amendments that would be made by Schedule 4 to the Respect@Work 2022 Bill would allow unions and other representative bodies to bring representative actions in the federal courts,[51] following the termination of a complaint by the President under subsection 46PO(1) of the AHRC Act.

119. Currently, while unions and other representative bodies can bring representative complaints to the AHRC on behalf of one or more persons, they cannot pursue those complaints in the federal court. This is due to procedural barriers under the AHRC Act and the FCA Act.

120. Specifically, the AHRC Act provides that only an 'affected person' in relation to the complaint may make an application to the federal courts.[52] An 'affected person' is defined in the AHRC Act as a person on whose behalf the complaint was lodged.[53] In the Respect@Work Report, the AHRC noted that the effect of this is that representative bodies, including unions and public-interest-based organisations, are

[51] In this submission, a reference to 'Federal courts' means the Federal Court of Australia and Federal Circuit and Family Court of Australia.
[52] Section 46PO(1) of the AHRC Act.
[53] Ibid section 3.

prevented from 'bringing an action in the courts—even if they have pursued the complaint in the AHRC first'.[54]

121. Similarly, while the FCA Act allows representative proceedings, only persons with a 'sufficient interest' to commence a proceeding on his or her own behalf against another person may commence a proceeding on behalf of others.[55] This means that third parties such as unions who make representative complaints under the AHRC Act cannot pursue those actions in the federal courts under the FCA Act.

122. The Respect@Work Report concluded that amendments should be made to the AHRC Act to enable appropriate representative bodies and unions to commence unlawful discrimination proceedings.[56] Its view is that 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.[57]

123. Consistent with the Respect@Work Report recommendation, new subsection 46PO(2A) would permit a court application to be made by the exact persons who can presently bring a complaint:

- a person, or two or more persons, aggrieved by the alleged acts, omissions, or practices (**aggrieved person(s)**)—on their own behalf or on behalf of others;
- a person or trade union—on behalf of one or more other aggrieved persons (**representative complaint**).

124. New section 46POA would impose conditions for making a representative application and new section 46POB would impose additional rules applying to representative applications.

Comments

125. The Law Society of NSW is of the view that the proposed amendments set out in Schedule 4 to the Bill are 'uncontroversial', noting that the Federal Court of Australia already allows representative proceedings to be commenced in certain circumstances.

126. The Law Society of South Australia notes that its Civil Litigation Committee supports this amendment, which would assist with overcoming barriers associated with instituting and navigating the court process.

127. However, the Law Council has not reached a final position on the provision, noting that the proposal introduces a number of complexities. To illustrate, it raises four specific issues for consideration.

1. Impact on conciliation

128. The Law Council considers that this appeal avenue may give rise to unintended impacts on the conciliation process. For example, there may be risks that decisions made within conciliation processes, e.g., limiting the scope of complaints to matters that can fall within the AHRC's powers, could have consequences for subsequent FCA actions in which broader causes of action may be otherwise considered.

[54] AHRC, Respect@Work Report 599.
[55] Section 33D of the *Federal Court of Australia Act 1976* (Cth).
[56] AHRC, Respect@Work Report 582.
[57] Ibid.

129. A preferable response may be to permit a class action to commence immediately, without first having to seek conciliation by the AHRC. This may also reduce the complexity, duration, and cost of the overall process.[58]

2. Impact on other areas of discrimination

130. The Law Council notes that the proposed amendments to the AHRC Act would be available in relation to all aspects of discrimination under relevant federal anti-discrimination legislation. Further consideration may be necessary of the implications of the proposal given the recent case law on class actions regarding discrimination outside the sex discrimination framework, for example under the *Racial Discrimination Act 1975* (Cth).[59]

3. Complexity

131. The Law Council is also concerned about the complexity caused by the creation of this additional pathway. The Law Council notes that, while the Bill adds a pathway for representative actions brought by third parties, it would provide two possible pathways for representative actions brought by affected persons themselves under the SDA, that is 1) the new scheme under the AHRC Act, which allows a person or trade union to make an application; and 2) the existing scheme under the FCA Act. The creation of this additional category of class action, with its own rules and procedural requirements, could generate complexity with respect to procedural rules and case management.

4. Opt-in regime

132. Subsection 46POA(1) of the Bill would require that each person on whose behalf a representative application is made must consent in writing to their inclusion in the proceedings. This is effectively an opt-in approach. This differs from the situation in the AHRC where a representative complaint may be lodged without the consent of class members (see subsection 46PB(4)). It also differs from the class action regime under Part IVA of the FCA Act, which adopts an opt out approach.[60]

133. Part IVA of the FCA Act contains the federal class action regime which operates on the default basis of an opt-out structure. Under this system a class action can be commenced without the express consent of group members.[61]

134. The opt-out structure for class actions was recommended more generally by the Australian Law Reform Commission (**ALRC**) because it promotes access to justice and efficiency. Group members who cannot be identified at the outset, or who are unable to elect affirmatively to participate due to social or economic barriers, are not excluded from the legal system and a potential remedy.[62] The Law Council generally supports the present approach taken in the FCA Act,[63] although it recognises that the particular nature of these cases arguably warrants a different approach. The Law

[58] 2022 Submission 6.
[59] See, eg, Wotton v State of Queensland (No 5) [2016] FCA 1457; Jones Day, Class Actions in Australia: 2016 in Review (March 2017) 5; Dawson v Commonwealth of Australia (No 2) [2021] FCA 1636.
[60] Section 33E of the FCA.
[61] Ibid.
[62] Australian Law Reform Commission, Grouped Proceedings in the Federal Court (Report No 46, 14 December 1988) [92], [106]-[107].
[63] Law Council of Australia, 'Corporations Amendment (Improving Outcomes For Litigation Funding Participants) Bill 2021' (5 November 2021) https://www.lawcouncil.asn.au/publicassets/c845eca3-e841-ec11-9443-005056be13b5/4119%20-%20Improving%20Outcomes%20for%20Litigation%20Funding%20Participants%20Bill.pdf, [15]-24].

Council does not underestimate the challenges faced by victim–survivors in bringing complaints about sexual harassment, and the need to empower victim–survivors.

135. The Law Council notes that the Explanatory Memorandum states that consent is required in the context of these representative applications:

> … because of the nature and consequences of court, and the need to shield often vulnerable individuals from the emotional and mental toll associated with court proceedings unless they consent to lodge a representative application.[64]

136. It is also noted in the Explanatory Memorandum that this opt-in approach differs to the opt-out approach under the class action regime in Part IVA of the FC Act because:

> unlike class actions, a representative application cannot be broadened to be on behalf of more individuals at the court stage than were present at the time the representative complaint was terminated in the AHRC.[65]

137. These are sound public policy reasons.

138. The Women Lawyers Committee of the Law Society of South Australia supports the 'opt-in' approach taken in the Bill, noting that it would prevent 'the effect of disempowering victims'.

Recommendation

- **In relation to conciliation, consider permitting a class action to commence immediately, without first having to seek conciliation by the AHRC.**
- **Consider the implications of expanding the class actions provisions to other areas of discrimination, given the recent case law on class actions regarding discrimination outside the sex discrimination framework.**
- **Consideration should also be given to whether any consequential amendments are needed to manage the complexity of adding a class action scheme to that which already exists under the FCA Act.**

Recommendation 25

139. Recommendation 25 of the Respect@Work Report is:

> *Insert a cost protection provision into the AHRC Act to provide that each party to anti-discrimination proceedings bear their own costs, unless the court, based on prescribed factors, orders a party to pay the other party's costs.*

140. The Law Council notes that options for costs provisions for unlawful discrimination can be categorised into four approaches:

(a) *'Costs follow the event' approach*, which is the current status quo, where the court has a broad discretion to award costs and in most matters the unsuccessful party will be ordered to pay the costs of the successful party.

[64] Explanatory Memorandum to the Respect@Work Bill 2022 [308], p.82.
[65] Ibid [308].

(b) *'No costs' approach*, which is the term often given to the approach under section 570 of the FW Act and was Recommendation 25 of the Respect@Work Report. Under this approach, parties bear their own costs unless one party acted vexatiously or unreasonably. That is, the court will usually make no costs order, unless the conduct of a party warrants it.

(c) *'Cost neutrality' approach,* which is the approach adopted under the present Bill as referred to in the Explanatory Memorandum,[66] and Recommendation 16 of the AHRC's position paper titled *A Reform Agenda for Federal Discrimination Laws*.[67] Under this approach, the court has discretion to depart from the default position that parties bear their own costs and instead make a costs order where it considers this would be 'just', having regard to statutory criteria.

(d) *'Equal access' approach,* which is a proposal that would provide that a plaintiff may only be ordered to pay costs in certain circumstances, such as where their claim is determined to be vexatious or initiated without reasonable cause. In other words, this approach favours the plaintiff or applicant. If a plaintiff is successful, their costs will be covered by the other party and where a plaintiff is unsuccessful, they will bear only their own costs.

141. These four approaches are sometimes described using different terms and can be further varied depending on the level of discretion available to a court to depart from the default position of the approach.

142. Under the current law, in sexual harassment and sex discrimination claims, the award of costs is at the discretion of the court.[68] While this discretion is broad,[69] the general rule is that costs 'follow the event', meaning that in most matters the unsuccessful party will be ordered to pay the costs of the successful party.[70]

143. Rule 40.51 of the *Federal Court Rules 2011* (Cth) gives the Federal Court 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. However, both of these orders are discretionary, and the Law Council has been advised that these orders are rarely made, thereby providing prospective plaintiffs in sexual harassment and sex discrimination matters with little certainty that they will be successful in a cost-capping order or no-cost order application.

144. Accordingly, under the current legal framework, where a plaintiff brings a sexual harassment or sex discrimination claim and is unsuccessful, they are likely to be ordered to pay the costs of the respondent. This is referred to as the adverse cost risk for unsuccessful plaintiffs, and has been recognised as a primary obstacle to people who have suffered sexual harassment or sex discrimination pursuing court proceedings. The AHRC, in the Respect@Work Report, considered that this disincentive negatively impacts access to justice, particularly for vulnerable members of the community.[71]

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[66] Explanatory Memorandum, Respect@Work Bill 2022, [3535].
[67] Australian Human Rights Commission, *A Reform Agenda for Federal Discrimination Laws* (December 2021) <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>.
[68] Federal Court of Australia Act 1976 (Cth), s 43.
[69] Ibid, s 43(3). See also Federal Court Rules 2011 (Cth).
[70] See, e.g., Federal Court of Australia, Legal Costs (website, undated)<https://www.fedcourt.gov.au/going-to-court/i-am-a-party/court-processes/legal-costs>; Federal Court Rules 2011 (Cth), r 40.03; Oshlack v Richmond River Council (1998) 193 CLR 72; Judicial Commission of New South Wales, Civil Trials Benchbook, 'Costs' (website, March 2021).
[71] Australian Human Rights Commission, Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces (Report, March 2020) 507.

145. In its Respect@Work Report, the AHRC proposed an amendment based on section 570 of the FW Act.[72] The FW Act model—a no-costs approach—provides that costs may only be ordered against a party if the court is satisfied that the party instituted the proceedings vexatiously or without cause, or if the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs.

146. The Law Council notes that the FW Act 'no costs' model is not included in the Bill. New subsection 46PSA(1) in the AHRC Act would provide that each party would bear their own costs in an 'unlawful discrimination proceeding', as a default position. That is, the 'cost neutrality' approach would apply to all kinds of discrimination proceedings, not only to sex discrimination proceedings.

147. New subsection 46PSA(2) would provide that the federal courts have discretion to depart from the default position and make orders as to costs, as the court considers just. A finding of justifying circumstances is an essential precursor to the court making a costs order under subsection 46PSA(2). New subsection 46PSA(3) sets out the non-exhaustive circumstances that the court must consider in assessing whether to make an order as to costs. The prescribed circumstances include the parties' financial circumstances, conduct, offers to settle, and whether a party has been wholly unsuccessful, or the matter involves an issue of public importance.

148. The Explanatory Memorandum states that the Bill:[73]

> *adopts a 'cost neutrality' approach in line with the Commission's updated position on costs protection reform in its Free and Equal Position Paper.[74] This diverges from the approach under section 570 of the Fair Work Act because it allows the court to consider matters broader than only the conduct of the parties, such as the financial circumstances of the parties, the outcome of proceedings and the public importance of the matter.*
>
> *…*
>
> *This is approach is preferred because it provides applicants and respondents with greater certainty around the costs they would be required to pay if they commence legal proceedings. It also provides greater flexibility to award costs to successful parties if it would be appropriate to do so, rather than only considering the conduct of the parties [as is the case with the 'no costs' approach].*

149. The Law Council has to date received mixed views in relation to the likely effect of the adoption of a 'cost neutrality' approach on representative proceedings in particular.

150. The Law Society of NSW does not support this approach and instead advocates for an 'equal access approach'. That is:

> *… a protective provision providing that a plaintiff may only be ordered to pay costs where their claim is determined to be vexatious or initiated without reasonable cause; or where the plaintiff pays only the quantum of costs that their conduct has caused the respondent to incur. This would have the effect that, in most matters where a plaintiff is successful, their costs will be covered by the respondent and, where a plaintiff is unsuccessful, they will bear only their own costs.*

151. The Queensland Law Society has previously commented on Recommendation 25, noting it does not object to an 'equal costs' provision, provided that a plaintiff may only

[72] Respect@Work Report 589.
[73] Explanatory Memorandum [35] on 9.
[74] Australian Human Rights Commission, *Free and Equal – A Reform Agenda for Federal Discrimination Laws* (2021), 196

be ordered to pay costs: 1) where their claim is determined to be vexatious or initiated without reasonable cause; or 2) where the plaintiff pays only the quantum of costs that their conduct has caused the respondent to incur, which is determined to be unreasonable. However, the Queensland Law Society also noted that 'criteria about when costs should be awarded, for example, when this is in the public interest, could be included in any amending provision'.

152. The Class Actions Committee of the Law Council's Federal Litigation and Dispute Resolution Section submitted that there is an access-to-justice risk unless costs follow the event. The Committee notes that class actions are expensive to run and law firms often rely on the prospect of recovering party/party costs to fund these proceedings. Complainants may therefore not be able to secure legal representation because there is no prospect of recovering part/party costs if they are successful. This may lead complainants to forgo court proceedings, commit large sums of their own funds to secure legal representation, or proceed as unrepresented litigants. In addition, the proposed approach would likely exclude any possibility of a third-party litigation funder supporting such class actions.

153. That Committee suggested that section 1317AH of the *Corporations Act 2001* (Cth) be employed as an alternative model to the model used in proposed section 46PSA of the AHRC Act. Section 1317AH relevantly provides:

> *(2) The claimant must not be ordered by the court to pay costs incurred by another party to the proceedings, except in accordance with subsection (3) of this section.*
> *(3) The claimant may be ordered to pay the costs only if:*
> *(a) the court is satisfied that the claimant instituted the proceedings vexatiously or without reasonable cause; or*
> *(b) the court is satisfied that the claimant's unreasonable act or omission caused the other party to incur the costs.*

154. Another constituent body noted that, in practical terms, the potential for a party to recover party/party costs in court often provides leverage for complainants in settlement negotiations.

155. The Law Council suggests consideration be given to the matters raised above, noting its concerns about the potential application of the provision to unlawful discrimination class actions, and the access to justice risks that this approach could cause.

Recommendation

- **The Law Council proposes either of the following amendments:**
  1. **A carve out/exclusion from the operation of section 46PSA for class actions, or class actions that are of a certain complexity, such as involving large amounts of speculative costs, third party litigation funding, or large numbers of affected persons, or**
  2. **The addition of the following criteria to subsection 46PSA(3):**
     (g) whether the proceedings are representative proceedings involving [X number] or more affected persons;
     (h) the complexity of the proceedings.

Recommendation 43

156. Recommendation 43 of the Respect@Work Report is:

(a) amend the Workplace Gender Equality Act 2012 to require public sector organisations to report to the Workplace Gender Equality Agency on its gender equality indicators

(b) fund the Workplace Gender Equality Agency adequately to meet these expanded reporting obligations.

157. Schedule 6 to the Bill would amend the *Workplace Gender Equality Act 2012 (Cth)* (**WGE Act**) to require Commonwealth public sector organisations to report to the Workplace Gender Equality Agency against gender equality indicators.

158. In its November 2021 submission to the Department of Prime Minister and Cabinet regarding the Review of the Workplace Gender Equality Act 2012 (Cth), the Law Council supported these measures.[75]

159. In that submission, the Law Council noted that any reforms to the WGE Act should have regard to Australia's obligations to respect, protect and fulfil its international human rights law obligations, with respect to the rights to equality and discrimination, and the rights to work.[76] These include that Australia must take all appropriate measures, to ensure the full development and advancement of women, including in the economic field. While there have been improvements, Australia's national gender pay gap remains persistent, and much remains to be done in this area. Any reforms pursued should work in concert to respond to critical issues.

Recommendation

- **The Law Council supports the amendments to the WGE Act to require public sector organisations to report to the Workplace Gender Equality Agency on its gender equality indicators, in a similar vein to the existing requirement for non-public sector employers with 100 or more employees to report to the Workplace Gender Equality Agency.**
- **The Law Council emphasises the need for the Government to fund the Workplace Gender Equality Agency to adequately meet these expanded reporting obligations.**

[75] Law Council, 'Review of the Workplace Gender Equality Act 2012', 24 November 2021, lawcouncil.asn.au/publicassets/d2d435af-504e-ec11-9444-005056be13b5/4131%20-%20Review%20of%20the%20Workplace%20Gender%20Equality%20Act%202012%20%20Cth.pdf [32]-[33].
[76] Ibid [5].