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Submission to the Review of the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022

Senate Legal and Constitutional Affairs Legislation Committee

Submission by the Attorney-General's Department

Contents

Abbreviations

Acts Interpretation Act	*Acts Interpretation Act 1901*
AD Act	*Age Discrimination Act 2004*
Commission	Australian Human Rights Commission
AHRC Act	*Australian Human Rights Commission Act 1986*
Bill	Anti- Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022
DD Act	*Disability Discrimination Act 1922*
FC Act	*Federal Court of Australia Act 1976*
Federal Courts	Federal Court of Australia and Federal Circuit and Family Court of Australia
Free and Equal Position Paper	Free and Equal: A reform agenda for federal discrimination laws – Position Paper (2021)
PCBU	A person conducting a business or undertaking
RD Act	*Racial Discrimination Act 1975*
Regulatory Powers Act	*Regulatory Powers (Standard Provisions) Act 2014*
Respect@Work Report	Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020)
Respect at Work Act 2021	Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021
Respect at Work Bill 2021	Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021
SD Act	*Sex Discrimination Act 1984*
Model WHS laws	*Work Health and Safety Act 2011*
WGEA	Workplace Gender Equality Agency
WGE Act	*Workplace Gender Equality Act 2012*

Introduction

1. The Attorney-General's Department (the department) welcomes the Senate Legal and Constitutional Affairs Legislation Committee's review of the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (the Bill).

2. The Bill would implement 7 of the outstanding recommendations of the Sex Discrimination Commissioner's Respect@Work Report that require legislative action. The Bill marks a significant step in fulfilling the Australian Government's election commitment to implement all recommendations of the Respect@Work Report and is critical for ensuring safer, respectful and more equitable workplaces in Australia.

3. The Respect@Work Report made 55 recommendations focused on preventing and responding to sexual harassment in Australian workplaces. In particular, the Respect@Work Report recommended a number of legislative amendments to strengthen and clarify the legal and regulatory frameworks relating to workplace sexual harassment. The Respect@Work Report concluded that the existing frameworks are complex, difficult to navigate, overly reactive rather than focused on prevention, and place a significant burden on individuals who experience sexual harassment to make a complaint.[1]

4. The Bill would implement recommendations 16, 17, 18, 19, 23, 25 and 43 of the Respect@Work Report. The cornerstone reform is the introduction of a positive duty in the SD Act that would require employers and PCBUs to take reasonable and proportionate measures to eliminate specified forms of unlawful sex discrimination, including sexual harassment, as far as possible. The Bill would also expand the role of the Commission by providing it with new powers to monitor and enforce compliance with the positive duty, including the ability to give compliance notices and enter into enforceable undertakings.

5. The Bill also makes a number of ancillary amendments arising from the changes made by the Respect at Work Act 2021 to provide consistency across the Commonwealth anti-discrimination framework and achieve the intended outcomes of the Respect@Work Report.

6. The department provided the draft legislation to targeted stakeholders, including the Respect@Work Council, employer and industry bodies, unions, legal and advocacy bodies, and academics, for consultation and their feedback informed the development of the Bill in its current form. The Bill was also informed by the extensive consultation that was conducted as part of the *National Inquiry into Sexual Harassment in Australian Workplaces*, which underpinned the Respect@Work Report.

[1] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in the Workplace* (Report, 29 January 2020) 14 ('*Respect@Work Report*').

7. In addition to this Bill, the Government continues to progress work to implement all recommendations of the Respect@Work Report as a priority. This includes the development of legislation to implement recommendation 28 of the Respect@Work Report, which concerns the inclusion of a prohibition against sexual harassment in the Fair Work Act, which is being progressed separately by the Minister for Employment and Workplace Relations.

Overview of measures included in the Bill

8. The Bill would implement 7 recommendations of the Respect@Work Report relating to anti-discrimination law and workplace gender equality that require legislative action (recommendations 16, 17, 18, 19, 23, 25, 43). This submission provides an overview of the key measures in the Bill. Further information on the background and drafting of these amendments, including illustrative examples, can be found in the Explanatory Memorandum.[2]

Hostile workplace environments

9. The Bill would insert a new provision in the SD Act to prohibit conduct that subjects another person to a workplace environment that is hostile on the ground of sex. This amendment would implement recommendation 16(c) of the Respect@Work Report.

10. The Respect@Work Report found that sexual harassment may occur where a workplace environment is sexually charged or hostile, even if the specific conduct is not directed at a particular person.[3] The existence of these environments can increase the risk of people experiencing other forms of unlawful discrimination, such as sexual harassment.

11. While the courts have determined that conduct that results in a hostile workplace environment may be captured through existing provisions of the SD Act,[4] this is not well understood or recognised by employers or workers. This amendment would provide clarity and certainty to the law and set clear boundaries on acceptable conduct in the workplace.[5]

12. The provision is intended to align with other provisions in the SD Act by using existing terms and concepts, such as a reasonable person test that considers whether the conduct was 'offensive, intimidating or humiliating.' This would enable existing case law to be considered when interpreting and

[2] Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) 107 (*'Explanatory Memorandum')*
[3] Ibid 458.
[4] See *Horne v Press Clough Joint Venture* (1994) EOC 92-591, 77, 175; *Hill v Water Resources Commission* [1985] EOC 92-127.
[5] *Respect@Work Report* (n 1) 461.

applying the new provision. The provision also uses the same definition of 'workplace' as the model WHS laws, which would provide consistency across the SD Act and WHS frameworks.

Coverage of bystanders or junior employees

13. The provision sets out the circumstances that must be considered when determining whether a person's conduct is unlawful. These circumstances include the role, influence or authority of the person engaging in the conduct and any other relevant circumstance.[6] The inclusion of these circumstances is intended to provide appropriate limits on the application of the provision to people who are bystanders or have limited authority or influence in an organisation, such as junior employees.

Conduct by groups of people

14. The provision would cover conduct engaged in by multiple people, rather than just one individual. For example, where a number of employees choose to display offensive materials in the workplace, a fellow employee exposed to these materials could lodge a complaint against one or all of their colleagues as well as the employer, if appropriate. This is similar to the way other prohibitions operate if multiple people have been involved in the alleged unlawful discrimination.

Limited to sex, rather than all protected attributes

15. The provision would prohibit conduct that results in a hostile workplace environment on the ground of sex (or related characteristics) only. This scope is consistent with the recommendation of the Respect@Work Report and the existing case law relating to hostile workplace environments. However, the department notes that the prohibition does not require the relevant conduct to *only* be by reason of sex (or related characteristics). It also applies to conduct that is by reason of sex and other matters, such as race and age, regardless of whether sex was the dominant or substantial reason for their engagement in the conduct.[7]

Conduct does not need to be directed to a specific person

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

[6] See new subsection 28M(3).
[7] See new subsection 8A.

17. To lodge a complaint with the Commission under this provision, a person must be an 'aggrieved person' pursuant to the requirements in the AHRC Act. A person is likely to be 'aggrieved' if they have been subjected to the hostile workplace environment, even if the alleged conduct was general in nature.

Circumstances to be considered

18. The Bill would provide a list of circumstances to be taken into account when determining whether a person's conduct is unlawful. This includes the seriousness of the conduct and whether the conduct was repetitive. The department notes that these circumstances are different to those listed in existing section 28A (sexual harassment) and 28AA (sex-based harassment) in the SD Act. Notably, the provision does not require consideration of factors that relate to the person impacted by the conduct, such as their particular characteristics or vulnerabilities.

19. The list of circumstances to be considered in the new provision reflects the fact that it is intended to prohibit conduct that is not directed towards a specific person (unlike sexual and sex-based harassment). For this reason, the reasonable person test requires an objective assessment as to whether a reasonable person would anticipate that the relevant conduct could result in a workplace environment that would be offensive, intimidating or humiliating to a person of the sex of the second person. The 'reasonableness' should be considered by reference to the conduct of the person engaging in the conduct, rather than their intention or the way the conduct was received by the person subjected to the hostile workplace environment.

Introducing a positive duty to eliminate unlawful sex discrimination

20. The Bill would introduce a positive duty on employers and PCBUs to take 'reasonable and proportionate measures' to eliminate, as far as possible, unlawful sex discrimination, sexual harassment, sex-based harassment, hostile workplace environments, and victimisation in the SD Act. These amendments would implement recommendation 17 of the Respect@Work Report.

21. The Respect@Work Report observed that the current legal framework is not effectively preventing sexual harassment because it is focused on addressing and responding to conduct that has already occurred.[8] This amendment is intended to shift this focus by requiring employers and PCBUs to proactively prevent discrimination and harassment in their workplaces in order to achieve compliance with the SD Act.[9]

22. The positive duty would require an employer or PCBU (the duty holder) to take reasonable and proportionate measures to eliminate, as far as possible:

[8] *Respect@Work Report* (n 1) 31; 443; 480.
[9] Ibid 479.

- **their workers, employees and agents** from engaging in unlawful sex discrimination, sexual and sex-based harassment, hostile workplace environments, and victimisation, and
- **third parties (such as customers and clients)**, from subjecting their employees or workers to sexual and sex-based harassment, hostile workplace environments and victimisation.

23. As the provisions in the positive duty are linked to existing provisions in the SD Act, the positive duty would only require duty holders to take measures to eliminate conduct that is already unlawful.[10]

Coverage of businesses and volunteer organisations

24. The Bill would introduce a positive duty on both 'employers' and 'persons conducting a business or undertaking.' The term 'employment' is defined in the SD Act to include part-time and temporary employment and work under contract for services.[11] This definition also extends to the corresponding terms 'employer' and 'employee.' This means that the positive duty would cover micro, small, medium and large businesses.

25. The Respect at Work Act 2021 inserted the definition of a 'person conducting a business or undertaking' into the SD Act. A PCBU is defined to include a person who is a 'person conducting a business or undertaking' within the meaning of the model WHS laws. The phrase 'business or undertaking' is intended to be read broadly and covers businesses or undertakings conducted by persons including employers, principal contractors, head contractors, franchisors and the Crown. This means that the positive duty would also cover a sole trader or self-employed person.

26. Under the model WHS laws, the concept of PCBU does not extend to volunteer associations made up entirely of volunteers and without any employees. Therefore, volunteer organisations that only have volunteers would not be covered by the positive duty. This is appropriate given the nature of volunteer organisations and their limited human resources capacity.

[10] Ibid 479.
[11] Section 4 of the *Sex Discrimination Act 1984.*

Coverage of third parties

27. The positive duty would extend to third parties, such as customers and clients, noting that the Respect@Work Report found that workers are often harassed by third parties and sexual harassment is more prevalent in industries that involve a high level of contact with third parties.[12]

28. The positive duty operates so that duty holders are required to take reasonable and proportionate measures to eliminate unlawful conduct by their employees, workers or agents *towards third parties*, such as sexual harassment, as far as possible. This may involve implementing policies and procedures and providing training to their employees that specifically relates to third parties.

29. The positive duty would also require duty holders to take reasonable and proportionate measures to eliminate specific conduct being directed *towards their employees or workers*, such as sexual harassment, *by third parties*, as far as possible. This does not mean that duty holders are expected to control the conduct of third parties, such as customers. However, it would require duty holders to take measures to protect their employees and workers, such as ensuring the workplace culture does not increase the risk of their staff experiencing harassment.

'Reasonable and proportionate measures'

30. The requirement on duty holders to take 'reasonable and proportionate' measures means that duty holders would need to proactively consider their compliance with the positive duty and any measures that would be appropriate to achieve compliance for their business. The meaning of 'reasonable and proportionate measures' will vary between duty holders in accordance with their particular circumstances.

31. The Bill would provide that the non-exhaustive matters to be considered by the decision-maker when determining whether the duty holder is complying with the positive duty include the size, nature and circumstances of the business or undertaking, the duty holder's resources, whether financial or otherwise, and the practicability and costs associated with the steps.[13] These considerations would ensure that the positive duty is adaptable and can be applied by all employers and PCBUs, including microbusinesses.

[12] Ibid 256.
[13] See new subsection 47C(4).

32. In practice, 'reasonable and proportionate measures' may involve a business implementing policies and procedures relating to harassment and discrimination, providing regular training and support to employees, and treating complaints of harassment and discrimination seriously. The Commission will be responsible for producing guidance for employers on the practice measures that can be taken to comply with the positive duty.

33. A person's business or operational priorities is not included as an explicit matter to be considered in determining whether a duty holder has complied with the positive duty, as was included in the Respect@Work Report. While the specific measures required to achieve compliance with the positive duty will vary between employers and PCBUs in line with their circumstances, compliance with the law must be a priority for all, regardless of other business or operational priorities.

Broader positive duties

34. The positive duty is limited to sex discrimination, sexual and sex-based harassment, hostile workplace environments and victimisation in the employment context. This is consistent with the scope of the Respect@Work Report and directly implements recommendation 17. The introduction of a broader positive duty that covers all anti-discrimination laws, or operates in other areas of public life outside the employment context, is beyond the scope of this Bill.

Existing WHS duties

35. The positive duty is intended to operate concurrently with the existing duties in the model WHS laws. Both duties are aimed at achieving the same outcome: the prevention of sexual harassment and related conduct.

36. The department notes that both the model WHS laws and the positive duty in the SD Act would require employers and PCBUs to do what is *reasonable* in the circumstances. In terms of assessing what is reasonable, the list of matters for consideration in the Bill[14] substantially overlaps with the list of relevant matters in section 18 of the model WHS laws. In practice, this indicates that employers and PCBUs would take the same practical steps, such as implementing policies and conducting training, to meet their obligations under both frameworks. It is intended that the model WHS laws and positive duty in the SD Act would operate in a mutually reinforcing way to build safer and more respectful workplaces.[15]

[14] See new subsection 47C(4).
[15] *Respect@Work Report* (n 1) 480.

Enforcing the positive duty

37. The Bill would insert new provisions in the AHRC Act to enable the Commission to monitor and enforce compliance with the positive duty in the SD Act. These amendments would implement recommendation 18 of the Respect@Work Report.

38. The Respect@Work Report recommended that the positive duty be accompanied by an appropriate enforcement mechanism to ensure the duty is effective and not merely aspirational or symbolic. An appropriate enforcement mechanism would ease the burden on individuals by enabling the Commission to initiate actions to address unlawful discrimination, rather than relying on individuals to make complaints.

39. The Bill would confer a number of functions on the Commission to ensure that duty holders are supported to meet their obligations and achieve compliance. For example, the Bill would confer functions on the Commission to prepare and publish guidelines for complying with the positive duty and promoting understanding, and public discussion, of the positive duty. As noted in the Respect@Work Report, these functions would enable the Commission to work collaboratively with employers to support and assist them in complying with the positive duty.

40. The Bill would also provide the Commission with the full suite of compliance powers to enforce the positive duty. These measures are intended to be used by the Commission as necessary, if efforts to achieve voluntary compliance have been unsuccessful. These powers include options to:

- conduct inquiries into a person's compliance with the positive duty and provide recommendations to achieve compliance,
- give a compliance notice specifying the action that a person must take, or refrain from taking, to address their non-compliance,
- apply to the federal courts for an order to direct compliance with the compliance notice, and
- enter into enforceable undertakings in accordance with the Regulatory Powers Act.

41. These compliance tools are focused on requiring action by employers to eliminate, as far as possible, harassment and discrimination from occurring in their workplaces, rather than the use of pecuniary penalties. The intention of this compliance regime is not to penalise employers for non-compliance – it is focused on lifting standards and achieving cultural change to create safer, more respectful workplaces.

'Reasonably suspects'

42. The Commission is able to initiate an inquiry into a person's compliance with the positive duty if it 'reasonably suspects' that a person is not complying. This is a lower threshold than 'reasonable belief' to reflect the fact that the Commission may have access to limited information about a person's level of

compliance prior to commencing an inquiry. This test would require the Commission to point to the factual basis that informed its suspicion that a person is not complying with the positive duty. For example, a reasonable suspicion could be based on information provided by other agencies or regulators, information disclosed by impacted individuals, or media reporting.

Procedural fairness

43. The Commission must also undertake its inquiries in accordance with procedural fairness rules and mechanisms. The Bill includes provisions to ensure employers and PCBUs can seek reconsideration of a compliance notice or apply to the Federal Courts for review of a compliance notice by a different decision-maker. The Commission must also notify a person if they are commencing an inquiry and provide them with the opportunity to make submissions about their compliance. These review mechanisms would ensure that duty holders are afforded procedural fairness during the inquiry process and have opportunities to seek review.

Role of the Commission as a regulator

44. The Commission is the most appropriate body to monitor and enforce compliance with the positive duty because it has significant expertise and experience in applying anti-discrimination laws. The Commission will be able to leverage its existing expertise when considering compliance with the positive duty and is well positioned to provide advice to employers about the measures required to achieve compliance.

45. The Bill also provides for delayed commencement of the Commission's new compliance tools to enforce the positive duty. This will provide the Commission with time to establish its new functions and build its expertise in undertaking compliance activities.

Enabling systemic inquiries into unlawful discrimination

46. The Bill would insert a new provision in the AHRC Act to provide the Commission with a broad inquiry function to inquire into systemic unlawful discrimination or suspected systemic unlawful discrimination. This amendment would implement recommendation 19 of the Respect@Work Report.

47. The Respect@Work Report found that there are significant cultural and systemic factors driving sexual harassment in the workplace and addressing these systemic drivers can be challenging.[16] As such, the Respect@Work Report recommended that the Commission be provided with an enhanced inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment.

[16] Ibid 644.

Definition of systemic unlawful discrimination

48. The Bill would provide that the Commission can inquire into any matter that may relate to systemic unlawful discrimination or suspected systemic unlawful discrimination. The inquiry function would apply to all forms of unlawful discrimination under the Commonwealth anti-discrimination framework.

49. The Bill 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.' This definition reflects the type of cultural and institutional forms of discrimination that were identified in the Respect@Work Report.

50. This definition would enable the Commission to inquire into instances of unlawful discrimination within individual businesses where, for example, a number of people are similarly affected, as well as instances of unlawful discrimination across multiple businesses within a broader industry or sector. This function would also enable the Commission to address the cultural, institutional and other systemic factors that drive sexual harassment in the workplace, which may be difficult to address through conciliation of individual complaints.

Own motion powers

51. The Bill would enable the Commission to perform its systemic inquiry functions when requested to do so by the Minister or when the Commission considers it to be desirable to do so. This broad remit would enable the Commission to commence an inquiry on its own motion (without the need for Ministerial request), such as where an organisation has requested an inquiry or the Commission has become aware of issues relating to an organisation or sector. There would be no prerequisite for an individual to make a complaint to the Commission before it can initiate an inquiry. The explicit intention of the new inquiry function, much like the positive duty compliance function, is to alleviate the burden on individuals to make a complaint in order for the issue they face to be addressed. The use of the term 'desirable' is designed to provide the Commission with flexibility to consider a range of circumstances when determining whether to conduct an inquiry.

52. The Commission would be able to use its existing powers in relation to this new systemic unlawful discrimination inquiry function. This would mean that the Commission would be able to compel information and documents from organisations and persons as it sees fit to aid its inquiry into an issue of systemic unlawful discrimination. This may include business records, evidence of communications, policy and procedure documents and so on.

Public reports

53. The Commission would also be able to report to the Minister or publish a report at the conclusion of an inquiry into systemic unlawful discrimination, or both. The publication of these reports (where the Commission chooses to do so) may promote greater transparency and understanding of systemic discrimination, both for employers and the broader community. The Commission's report, if they choose to publish one, may identify recommendations for a range of actors to implement.

Enabling representative applications in the Federal Courts

54. The Bill would amend the AHRC Act to enable representative bodies to make representative applications on behalf of people who have experienced unlawful discrimination in the Federal Courts. This amendment would implement recommendation 23 of the Respect@Work Report.

55. The Respect@Work Report recognised that engaging with the complexities of the court system can be difficult and costly for applicants and representative applications can provide a mechanism for genuine cases to be heard.[17] It was also noted that representative applications may be particularly valuable in circumstances where a systemic problem affects a wide class of persons.[18]

Remove procedural barriers for representative bodies

56. Currently, the AHRC Act enables representative bodies, such as unions, to initiate a representative complaint in the Commission on behalf of one or more persons. However, representative bodies are unable to make an application to the Federal Courts on behalf of the group if the matter is not resolved and terminated by the Commission. This means that the ability to initiate court proceedings under the AHRC Act is more constrained than the ability to bring complaints to the Commission, which creates procedural challenges for representative bodies.

57. The Bill would remove these procedural barriers by ensuring that a representative body that has lodged a complaint on behalf of one or more affected persons in the Commission (a representative complaint) may make an application to the Federal Courts if the representative complaint is terminated. This would improve support for people who experience harassment and discrimination to navigate the legal system and resolve their complaints in the Federal Courts. It would also better enable issues of systemic discrimination, affecting a broad range of people, to be addressed.

[17] Ibid 500.
[18] Ibid.

Representative applications versus representative proceedings

58. The department notes that the FC Act allows representative proceedings to be commenced in the Federal Court of Australia in distinct circumstances, in what are known as 'class actions'. For example, one requirement is that 7 or more persons have claims against the same person.[19] However, as noted in the Respect@Work Report, class actions are rarely used in the anti-discrimination context because of the technical and complex requirements under the FC Act.[20] It is important to note that class actions are a distinct and separate mechanism from representative applications made under the AHRC Act and are not impacted by the amendments in this Bill.

'Person or trade union'

59. The Bill would provide that a representative application can be made by a 'person or trade union' who lodged the terminated complaint on behalf of one or more affected persons. The use of the terms 'person or trade union' would provide consistency with the current representative complaint's provisions in the AHRC Act and guarantees that there is no narrowing in standing between the Commission and court stages. All representative bodies, including unions and advocacy groups, would be captured by this provision as the term 'person' covers both individuals and organisations (pursuant to the Acts Interpretation Act).

60. This Bill would require that a representative application is made by the representative body who lodged the terminated representative complaint, on behalf of one or more affected persons. This means that, as is the case for representative complaints in the Commission, representative bodies cannot commence an application in the Federal Courts unless it is on behalf of at least one affected person. The need for a representative body to act on behalf of at least one aggrieved person reflects the nature of anti-discrimination law which is concerned with advancing the rights of individuals. It would not be appropriate for representative bodies to commence proceedings against an employer, for example, in the absence of an affected person.

Consent requirements in representative applications

61. This Bill would require that each person on whose behalf a representative application is being made consents in writing to their inclusion. This differs to the requirement in the Commission where a representative complaint may be lodged *without* the consent of class members. This approach is considered appropriate for conciliation in the Commission as it is free, informal and confidential.

[19] See section 33C of the *Federal Court of Australia Act 1976*
[20] Ibid.

62. However, under the Bill, consent is required in the context of representative applications at the court stage. Given the public nature of court processes, the need to provide evidence and the potential implications for any future individual action, it is important that individuals have consented to their involvement and understand any cost implications.

63. The department also notes that representative applications are generally confined to identifiable groups of people who have been impacted by the same conduct, such as a discriminatory policy applied by an employer or discrimination towards a group by a particular person. In these cases, it is important that the applicants and respondents are aware of all other parties and the full details of the matter.

64. The department notes that this approach to consent differs to the class action regime under the FC Act. This is 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 Commission. The department also notes that if a representative body believes that specific conduct has affected a large group of people and they cannot be easily identified (and consent sought), it may be more appropriate for the representative body to consider accessing the class action framework which can accommodate these circumstances.

Introducing a cost protection provision

65. The Bill would insert a cost protection provision in the AHRC Act to provide greater certainty to parties during court proceedings in relation to costs. This amendment would achieve the policy objective of recommendation 25 of the Respect@Work Report.

66. The Respect@Work Report heard that the risk of adverse cost orders acts as a disincentive to applicants considering pursuing their sexual harassment matters in the federal courts.[21] It was noted that the current practice, in which costs follow the event, means that applicants may be liable for the costs of both parties if they are unsuccessful.[22] This may deter applicants from initiating court proceedings and presents access to justice concerns, particularly for vulnerable members of the community.

Cost neutrality

67. To address the findings of the Respect@Work Report, the Bill adopts a 'cost neutrality' approach which provides that, as the default position, each party would bear their own costs in an unlawful discrimination proceeding. However, the courts would retain discretion to depart from this default position and make cost orders where they consider it just to do so. In considering whether to depart from the default position, the federal courts must have regard to the following non-exhaustive factors:

[21] Ibid 507.
[22] Ibid 507.

- the financial circumstances of each of the parties to the proceedings;
- the conduct of the parties to the proceedings;
- whether any party to the proceedings has been wholly unsuccessful in the proceedings; and
- whether the subject matter of the proceedings involves an issue of public importance.[23]

68. This approach would provide applicants (and their legal representatives) with a degree of certainty over the potential costs they may be required to pay if they commence legal proceedings, whether they are successful or not. The amendments would improve access to justice as applicants are less likely to be deterred from commencing litigation if they can have confidence that they would only liable for their own costs if they were unsuccessful. This level of certainty would increase over time as jurisprudence relating to the new cost protection provision is developed.

69. This approach differs from the model recommended in the Respect@Work Report, which proposed an amendment based on section 570 of the Fair Work Act. The Fair Work Act provides that costs may only be ordered against a party if the court is satisfied that the party initiated 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. This approach does not provide the courts with flexibility to award costs to the successful party, if it would be appropriate to do so, which may adversely impact the capacity for applicants to access legal representation on a 'no win-no fee' basis.

70. The cost neutrality approach in the Bill aligns with the Commission's updated position on costs in its *Free and Equal Position Paper*.[24] This approach balances the need for certainty and the clear impact costs can have on applicants taking action in the courts, against the unintended consequences of cost reform, such as impacting access to legal representation. This approach is also more consistent with the approach taken in discrimination law matters in state and territory jurisdictions.

[23] See new subsection 46PSA(3).
[24] *Australian Human Rights Commission, Free and Equal: A reform agenda for federal discrimination laws* (Position Paper, 2021) 155 ('*Free and Equal Paper*').

'Equal Access' as asymmetrical cost protection

71. The model in the Bill differs from the 'Equal Access' model that has been proposed by some stakeholders. Under the 'Equal Access' model, an applicant would not be liable for the respondent's costs unless they are found to have commenced the proceedings vexatiously or unreasonably. This means that if the applicant is unsuccessful, each party would bear their own legal costs. However, if the applicant is successful, the respondent would be liable for the costs of both parties as well as any damages awarded. Under this model, the respondent has limited capacity to recover their own legal costs, even if they are successful. This model is designed to remove the risk of adverse costs for applicants and shift the financial burden of legal proceedings from the applicant to the respondent.[25]

72. The cost neutrality approach is adopted in the Bill, rather than the Equal Access model, because it would allow the courts to exercise discretion and make costs orders appropriate to the conduct of the parties and the merits of the matter. It would also ensure that respondents are able to recover their costs if they are successful and it would be just to do so, noting that it is not appropriate or accurate to assume that all respondents are well-resourced. Given the majority of respondents to unlawful discrimination claims are not large corporations, there may be circumstances, beyond vexatious or unreasonable proceedings, where a costs order against an applicant is justified, particularly where they are unsuccessful. The approach in the Bill seeks to addresses the significant barrier that costs present for applicants in a way that achieves fairness for both parties.

[25] See Grata Fund, *The Impossible Choice: Losing the family home or pursuing justice – the cost of litigation in Australia* (Report, 2022) <https://www.gratafund.org.au/reports_submissions>.

Amendments to require Commonwealth public sector reporting to WGEA

73. The Bill would amend the WGE Act to bring the Commonwealth public sector into line with the private sector by requiring Commonwealth public sector organisations with 100 or more employees to comply with WGEA's public reporting requirements. This amendment would implement recommendation 43(a) of the Respect@Work Report for the Commonwealth public sector.

74. The Respect@Work Report observed that existing avenues for public reporting on sexual harassment, including to WGEA, should be expanded to cover more of the Australian workforce. This would enable more robust data to be obtained and provide a more accurate and comprehensive understanding of the situation in Australian workplaces.

75. The Bill would only require Commonwealth public sector organisations with 100 or more employees to report to WGEA. This is consistent with the existing requirements for private sector organisations. It would not be appropriate for smaller agencies, with fewer than 100 employees, to be required to comply as the annual reporting requirements would be disproportionately onerous and impractical.

76. The amendments in the Bill do not include state and territory public sector organisations. Due to differences in how states and territories collect and store data, state and territory reporting is anticipated to progress on a different timeline than Commonwealth reporting. WGEA is currently working collaboratively with states and territories and will conduct a state and territory reporting pilot later this year and early next year.

Amendments relating to victimising conduct

77. The Bill would clarify that victimising conduct can form the basis of a civil action for unlawful discrimination and a criminal action for all the Commonwealth anti-discrimination Acts. Victimising conduct occurs when a person threatens or subjects another person to some form of detriment because they are taking action to address discrimination or harassment, such as making a complaint to the Commission.

78. The Respect at Work Act 2021 made this change in relation to the SD Act, but not the other Acts. There remains some judicial uncertainty as to whether a person can make a civil complaint about victimising conduct under the other Commonwealth anti-discrimination laws, which was not addressed by amending the SD Act alone.[26] This Bill would resolve that uncertainty for the other Commonwealth anti-discrimination Acts and achieve consistency across the Commonwealth anti-discrimination

[26] *Respect@Work Report* (n 1) 489-490.

framework. The amendments would also implement recommendation two of the Senate Education and Employment Legislation Committee's report on the Respect at Work Bill 2021.[27]

79. The amendments would have a limited retrospective operation, in the same way as the amendments to the SD Act did pursuant to the Respect at Work Act 2021. It is appropriate for these provisions to apply retrospectively because they merely confirm the civil jurisdiction of an existing prohibition, rather than introduce a new form of liability. The retrospective operation of these amendments would also ensure that individuals who have made a civil claim of victimisation prior to the Bill commencing can still proceed with their claim, as if it were made under the new provision.

Extending the time period to make a complaint

80. The Bill would amend the discretionary grounds on which a complaint made under the AD Act, DD Act and RD Act may be terminated by the President of the Commission. This is consistent with the amendments to the SD Act made by the Respect at Work Act 2021. Instead of the current 6-month timeframe, a complaint under the AD Act, DD Act or RD Act could only be terminated if it is made more than 24 months after the alleged unlawful conduct took place.

81. A timeframe, albeit a discretionary one, is required to ensure the Commission can undertake a fair inquiry into a complaint and conduct an effective conciliation. It recognises that without a reasonable timeframe it might be difficult to locate, contact and meaningfully engage with individuals and witnesses involved.

82. A 24-month timeframe was recommended in the Respect@Work Report in relation to the SD Act to reduce procedural barriers arising from complainants being delayed in making a complaint under the SD Act. The President already has and would retain their discretion to consider a complaint beyond this timeframe. However, this amendment would reassure applicants who lodge complaints under these other Acts that their complaints would not be dismissed if they are lodged within 24 months of the alleged conduct occurring.

83. This Bill would also ensure the timeframe is consistent for complaints across all Commonwealth anti-discrimination laws. A consistent timeframe would enable the Commission to more effectively manage intersectional complaints and would address the confusion that the differing timeframes has caused for complainants accessing the Commission's conciliation functions.

[27] Senate Education and Employment Legislation Committee, *Report on Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (August 2021).

Amending the objects of the SD Act

84. The Bill would replace the current objects clause in paragraph 3(e) of the SD Act, inserted by the Respect at Work Act 2021, which states that an object of the Act is 'to achieve, so far as practicable, *equality of opportunity* between men and women' to instead state that an object of the Act is to 'achieve *substantive equality* between men and women'. This would implement recommendation 16(a) of the Respect@Work Report.

85. The Respect@Work Report found that gender inequality is a key driver of workplace sexual harassment.[28] This amendment would ensure that the SD Act is underpinned by a comprehensive understanding of equality and assist in clarifying its underlying purposes and foundational principles. The objects clause of an Act also has practical legal relevance because, to the extent that the provisions of the Act are ambiguous, they will be interpreted by the courts in a way that is consistent with its objects.

86. As outlined in the Explanatory Memorandum, the SD Act already recognises the concept of 'substantive equality' when providing for 'special measures' under section 7D. The rationale of the special measures mechanism is that it is often necessary to account for differences and disadvantages between people to ensure equality of outcomes, not just equality of treatment. Therefore, substantive equality is an existing concept in the SD Act.

87. The inclusion of the terms 'men and women' in the objects clause is consistent with the language in recommendation 16(a) of the Respect@Work Report. The SD Act does not define the terms 'men' and 'women' to ensure that the terms are able to be interpreted broadly. This language is also consistent with the existing structure of the SD Act, which already contains an objects clause relating to the elimination of discrimination on the other grounds of discrimination covered by the SD Act.

Amending the sex-based harassment prohibition

88. The Bill would amend subsection 28AA(1) of the SD Act, which prohibits harassment on the ground of sex, to remove the reference to conduct of a 'seriously' demeaning nature. This amendment would ensure that the provision is consistent with the objective of recommendation 16(b) of the Respect@Work Report.

89. As outlined in the Explanatory Memorandum, this amendment would ensure that the provision does not impose an unnecessarily high threshold for a complaint of sex-based harassment to be successful.[29] It would also ensure that the sex-based harassment provision does not create a uniquely burdensome test

[28] *Respect@Work Report* (n 1) 18, 92, 138-152.
[29] *Explanatory Memorandum* (n 23) 107.

for applicants by aligning the threshold more closely with the existing threshold for sexual harassment, which requires conduct to be 'of a sexual nature' and does not set any further qualifiers.

90. The department notes that there are already adequate safeguards in place to ensure that the prohibition captures an appropriate level of conduct. In order for an applicant to be successful, they would still need to establish that the conduct was 'unwelcome' and 'demeaning' as well as 'offensive, humiliating or intimidating' to a reasonable person. These limbs would ensure that the provision effectively captures the type of conduct that has been identified in the case law and the Respect@Work Report.

Conclusion

91. The department welcomes the Committee's inquiry into the Bill, and hopes that this submission assists the Committee in understanding the purpose and intent of the proposed measures in the Bill.