Australian Human Rights Commission

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

Submission to the Senate Legal and Constitutional Affairs Legislation Committee

13 October 2022

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1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Bill) introduced by the Australian Government.

2 Overview and context

2. Sexual harassment is prevalent in workplaces throughout Australia. A 2018 national survey conducted by the Commission found that one third of people who had been in the workforce in the previous five years had experienced workplace sexual harassment.[1]

3. The impacts on those who experience sexual harassment, particularly women, can be devastating. Those impacts take many forms but include financial, social, emotional, physical and psychological harm.

4. In 2018, the Sex Discrimination Commissioner and the Minister for Women announced a National Inquiry into Sexual Harassment in Australian Workplaces (Inquiry). The report of the Inquiry, Respect@Work[2], recommended a new model to improve the coordination, consistency and clarity between anti-discrimination, employment and work health and safety laws. The Respect@Work report made 55 recommendations, many of which required a legislative response.

5. The Commission welcomes the present Bill. It considers that it is a good faith implementation of the remaining outstanding Respect@Work recommendations that relate to changes to the federal law. The Commission commends the Australian Government on introducing these historic and far-reaching reforms.

6. On 2 September 2021, the Australian Parliament passed the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) (First Respect@Work Amendment Act). This Act gave effect to a number of recommendations made in the Respect@Work report and broadened and strengthened the federal laws that protect workers from sexual harassment and sex discrimination in the workplace. These changes included explicitly providing that not only sexual harassment, but also sex-based harassment is prohibited. It expanded the coverage of protections against sexual harassment (but not sex discrimination) to all workers and workplaces

including, for the first time, to interns, volunteers and the self-employed. It expanded the protection against sexual harassment *and* sex discrimination to State public servants. And it clarified that all of the provisions of the *Sex Discrimination Act 1984* (Cth) (SDA) extend to Members of Parliament, their staff and judicial officers throughout Australia.

7. Responding to a series of court decisions that cast doubt on whether the Federal Court of Australia (FCA) and the Federal Circuit and Family Court of Australia (FCFCA) had jurisdiction to determine a complaint of victimisation as part of a civil proceeding, the First Respect@Work Amendment Act also clarified that victimising conduct under the SDA can form the basis of a civil action for unlawful discrimination.

8. In its submission to the Senate Education and Employment Legislation Committee (First Respect@Work submission) in relation to its inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, the Commission congratulated the Australian Government on these proposed legislative changes and its commitment to taking action to strengthen, simplify and streamline the laws that protect workers from sexual harassment and sex discrimination in the workplace. The Commission's submission also identified additional amendments that it considered could, and should, be made urgently to further enhance protections and strengthen the laws dealt with by the Bill. Many of the amendments proposed by the Commission in its submission were based on recommendations from the Respect@Work report that remained unimplemented.

9. The Commission is pleased to note that every additional amendment directly related to a Respect@Work recommendation that it proposed in its First Respect@Work submission has been adopted and given effect to in the present Bill. The changes proposed in this Bill will have a major impact on the effectiveness of the law relating to sex discrimination, sexual harassment, and sex-based harassment in Australia.

10. The present Bill implements many significant recommendations from the Respect@Work report — most notably the introduction of a positive duty on all employers and persons conducting a business or undertaking (PCBUs) to take 'reasonable and proportionate measures' to eliminate sex discrimination, including sexual and sex-based harassment. In the Commission's view, this will be a powerful tool in promoting broad systemic and cultural change around sex discrimination and sexual and sex-based harassment in the workplace. As the present Bill also confers new powers on the Commission to monitor and assess compliance with this positive duty, it shifts the burden away from remedial action by individual complainants and towards

employers taking proactive and preventative action to eliminate unlawful conduct. This is a very welcome evolution in the framing of anti-discrimination law.

11. While acknowledging the need for decisive action in this area, in light of the short timeframe for the preparation of submissions in response to this Bill, this submission does not purport to be exhaustive or respond to every proposed change. The following recommendations are principally directed at technical issues that the Commission has identified in the Bill that will improve the operation of the proposed laws, as well as broader suggestions regarding equivalency across federal discrimination law.

12. In its 2021 position paper, *Free and Equal: A reform agenda for federal discrimination laws*[3] (Free and Equal position paper), the Commission set out four integrated sets of reforms to improve the effectiveness of federal discrimination laws. These reforms build on and go beyond the scope of implementing the recommendations of the Respect@Work report, but many are just as pressing. The Commission looks forward to further discussions with the Australian Government about implementing the unaddressed reforms in its Free and Equal position paper. This would shift the focus of the federal discrimination law system to a more preventative approach across all four discrimination laws, not just the SDA.

13. The Commission welcomed the Australian Government's commitment to fully implement all 55 recommendations from the Respect@Work report. The changes proposed in this Bill, particularly the positive duty in relation to sex discrimination and the conferral of new enforcement powers on the Commission, have the potential to achieve significant systemic reform. To perform its new functions effectively, the Commission will require additional resources and it welcomes further discussions with the Australian Government on this issue in due course.

14. Subject to the specific recommendations detailed in this submission to further improve the Bill, the Commission recommends that the Bill be passed.

3 Recommendations

15. The Commission makes the following recommendations.

Recommendation 1

The Commission recommends that proposed section 28M of the *Sex Discrimination Act 1986* (Cth) be amended to make clear that the term

'engages in conduct' in subsection 28M(2)(a) extends to conduct by omission, such as a failure to intervene or act.

Recommendation 2

The Commission recommends that further consideration be given to whether there might be any unintended effects of broadening subsections 10(4) and 11(4) of the *Sex Discrimination Act 1984* (Cth) to include work health and safety laws.

Recommendation 3

The Commission recommends that an explicit timeframe of 28 days be inserted into proposed section 35H of the *Australian Human Rights Commission Act 1986* (Cth) to clarify the period in which a person can seek review of a compliance notice in the Federal Court or the Federal Circuit and Family Court of Australia.

Recommendation 4

The Commission recommends that proposed section 35G of the *Australian Human Rights Commission Act 1986* (Cth) be amended to provide the Commission with express statutory authority to publish compliance notices on its website once any periods for reconsideration or review have expired.

Recommendation 5

The Commission recommends that proposed section 35C of the *Australian Human Rights Commission Act 1986* (Cth) be amended to make clear that the term 'as soon as practicable' in subsection 35C(1) extends to issues of safety, or that express clarification to this effect is included in the Explanatory Memorandum to the Bill.

Recommendation 6

The Commission recommends that protections in the *Sex Discrimination Act 1984* (Cth) for unpaid workplace participants, including volunteers, interns and students, against sexual harassment and sex-based harassment, also be extended to protect these groups against sex discrimination and discrimination on each of the grounds set out in the *Sex Discrimination Act*

1984 (Cth), *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

Recommendation 7

The Commission recommends that, subject to the previous recommendations, the Bill be passed.

4 Amendments to the *Sex Discrimination Act 1984* (Cth)

4.1 Hostile work environment

16. During the Inquiry, the Commission heard that the existence of a sexually permeated, hostile work environment was not routinely recognised as constituting sexual harassment. This includes workplaces where pornographic material was displayed, or which were characterised by inappropriate sexual comments, innuendo and offensive jokes.

17. While some early tribunal decisions recognised that a sexually hostile work environment could constitute discrimination on the grounds of sex, there is limited case law on this issue at the federal level under the SDA. The Inquiry concluded that it would be valuable for the SDA to include an express prohibition on creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex.[4]

18. Schedule 1 of the Bill will insert a new section 28M into the SDA and make explicit that subjecting another person to a hostile work environment on the ground of sex is unlawful under the SDA. The Bill will make subjecting another person to a hostile work environment 'unlawful discrimination' for the purposes of subsection 3(1) of the AHRC Act. This means that a person who considers that they have been subjected to a hostile workplace environment on the basis of sex can lodge a complaint with the Commission under section 46P of the AHRC Act. If the matter cannot be successfully conciliated by the Commission, the person may make an application to the federal courts for determination.

19. The Commission welcomes this implementation of Recommendation 16(c) of the Respect@Work report and considers that it provides clarity and certainty to the law, particularly in relation to conduct that may not be directed towards any particular person but results in a generally hostile environment on the basis of sex.

20. The Explanatory Memorandum to the Bill suggests that proposed section 28M is intended to extend to some bystander conduct, particularly by senior managers, if these people observe problematic behaviour in a workplace and fail to intervene or act.[5] The Commission considers that this is appropriate given that senior staff and management exercise greater authority or influence over workplace environments and culture.

21. Under proposed subsection 28M(2), a person (the first person) will subject another person (the second person) to a workplace environment that is hostile on the ground of sex if the first person 'engages in conduct' in a workplace where the first person or the second person work, the second person is in the workplace at the same time or after the conduct occurs, and that conduct is found to contravene the 'reasonable person' test in subsection 28M(2)(c).

22. While it may be arguable that conduct by omission (a failure to intervene or act) can amount to 'engaging in conduct' for the purposes of this provision — or is potentially covered by the ancillary liability provision in section 105 of the SDA) — the Commission recommends that proposed section 28M be amended to more clearly reflect the legislative intention set out in the Explanatory Memorandum.

Recommendation 1

The Commission recommends that proposed section 28M of the *Sex Discrimination Act 1986* (Cth) be amended to make clear that the term 'engages in conduct' in subsection 28M(2)(a) extends to conduct by omission, such as a failure to intervene or act.

4.2 Objects clause

23. The objects clause of an Act encapsulates what the piece of legislation seeks to achieve. It has practical legal relevance because, to the extent that the provisions of the Act are ambiguous, they will be interpreted in a way that is consistent with its objects.

24. The Respect@Work report recommended that section 3 of the SDA be amended to include a statement that one of the objects of the Act is 'to achieve substantive equality between women and men'.[6]

25. The concept of 'substantive equality' recognises that there is not currently a level playing field for everyone in society. Some people face individual disadvantage and some groups, including women, face structural barriers to equal participation in public life.

26. The SDA already explicitly identifies substantive equality as a goal. Section 7D refers to substantive equality when dealing with 'special measures'. The idea behind special measures is that it is sometimes necessary for differences and disadvantages between people to be taken into account in order to ensure that everyone is treated equally and fairly.

27. The First Respect@Work Amendment Act amended the objects clause of the SDA, but to something different from that recommended in the Respect@Work report. The Act amended section 3 of the SDA to provide that one of the objects of the Act is 'to achieve, so far as practicable, equality of opportunity between men and women'.

28. The Commission's view is that this is a more qualified object and only picks up part of Australia's obligation under the *Convention on the Elimination of All Forms of Discrimination Against Women* which refers to achieving the objective of 'equality of opportunity *and treatment*' between women and men.[7] Further, unlike the concept of 'substantive equality', the concept of 'equality of opportunity' is not otherwise contained in the SDA.

29. This Bill would amend the objects clause in the SDA to state that an object of the SDA is to 'achieve substantive equality between men and women'. The Commission welcomes this change.

4.3 Changes to sections 10 and 11 of the *Australian Human Rights Commission Act 1986* (Cth)

30. The Bill amends sections 10 and 11 of the SDA by inserting reference to 'work health and safety' into subsections 10(2) and 11(2).

31. The Explanatory Memorandum to the Bill provides that these changes have been made principally to provide for the concurrent operation of the SDA and State and Territory work health and safety laws.[8] The Commission acknowledges the importance of ensuring the concurrent application of State and Territory work health and safety laws, particularly given that the amendments in the Bill are likely to result in a greater overlap between the SDA and work health and safety frameworks. However, given the serious consequences that arise for complainants from the operation of subsections 10(4) and 11(4) of the SDA, the Commission recommends that further consideration be given to whether there may be any unintended effects of broadening subsections 10(4) and 11(4) to include work health and safety laws.

32. Australia has multiple schemes for the protection of people against discrimination, involving legislation at both the Commonwealth level and the State and Territory level. In general, the Commonwealth laws permit the concurrent operation of State and Territory laws that deal with discrimination on the same grounds and further relevant human rights objects.[9] Each State and Territory has anti-discrimination or equal opportunity legislation and anti-discrimination agencies that can receive complaints under State or Territory law.

33. To limit the potential for 'double remedies' a mechanism exists to prevent a person from bringing a complaint under the SDA to the Commission if they have already brought a complaint to a State or Territory body dealing with the same subject matter. In general terms, a person must choose between dealing with their discrimination matter under State or Territory law or Commonwealth law and, once they choose, they are bound by their election.

34. In practice, the Commission deals with questions involving election of jurisdiction under the SDA under subsection 10(4). This provision operates to remove the jurisdiction of the Commission to receive complaints under the SDA if a person has 'made a complaint', 'instituted a proceeding' or 'taken any other action' under a State or Territory law that 'deals with a matter dealt with' by the SDA. If subsection 10(4) applies, it means that the Commission cannot inquire into, or attempt to conciliate, the complaint, and consequently it cannot proceed to the federal courts. Any complaint is defeated at the outset.

35. Presently, reference in subsection 10(4) of the SDA to a 'State or Territory law' is limited to a law of a State or Territory that deals with discrimination on the basis of the attributes protected in the SDA. The Bill proposes to extend this definition to include any law of a State or Territory that deals with work health and safety. This broadens the category of laws that can result in a person being barred from making a complaint to the Commission under the SDA because they have made a complaint, instituted a proceeding or taken any other action under that State or Territory law.

36. The Explanatory Memorandum to the Bill states that:

> As the model WHS laws do not provide for equivalent individual complaints to be made to a WHS regulator, subsections 10(4) and 11(4) will not have any impact on individuals by virtue of the addition of 'work health and safety' to subsections 10(2) and 11(2). It is intended that a worker will be able to raise a WHS issue at their workplace and exercise rights such as the right to cease work without this precluding them from also taking action through the Commission. Further, these amendments would only relate to state and territory WHS laws. As a result,

applications that are made under federal and state or territory industrial relations laws to stop sexual harassment or bullying are intended to operate unaffected.[10]

37. Given the tight deadline for the provision of submissions in this inquiry, the Commission has been unable to consider the laws of the various States and Territories that arguably 'deal with' work health and safety and also potentially overlap with sex discrimination, sexual harassment, sex-based harassment, hostile work environments and victimisation, and the types of actions, proceedings or complaints that are available under them. This means that we are unable to confirm the claim made in the Explanatory Memorandum that the inclusion of 'work health and safety' in subsections 10(4) and 11(4) of the SDA will have no impact on individual complainants.

38. The Commission notes that the present Bill provides no statutory definition or closed category of work health and safety laws for the purpose of subsections 10(4) and 11(4). While the Explanatory Memorandum references the model Work, Health and Safety laws, the Bill does not seek to limit subsection 10(4) to these specific laws. Without further consideration, the Commission is unable to ascertain if there may be other laws of the various States and Territories that could arguably be said to 'deal with' work health and safety. Additionally, while the Explanatory Memorandum appears to distinguish between 'industrial relations laws' and 'work health and safety laws' for the purpose of 'stop sexual harassment' orders, this distinction is not made explicit in the terms of the provision.

39. The Commission notes that the new subsection 10(4) will explicitly exclude claims of workers' compensation from the operation of subsection 10(4), clarifying that a person is not prevented from making a claim under the SDA to the Commission if they have also made a claim for workers' compensation. Given the different purposes of workers' compensation schemes and the federal discrimination law, the Commission considers that this is an important exclusion and supports it.

40. As the operation of subsection 10(4) of SDA has the critical impact for complainants of terminating their complaint at the outset, and goes directly to a limitation on the Commission's jurisdiction to entertain complaints, the Commission considers that any broadening of its terms needs to be carefully considered.

Recommendation 2

The Commission recommends that further consideration be given to whether there might be any unintended effects of broadening subsections 10(4) and

11(4) of the *Sex Discrimination Act 1984* (Cth) to include work health and safety laws.

4.4 Introduction of a positive duty to eliminate sex discrimination, harassment and victimisation in the workplace

41. An important reform recommended in the Respect@Work report was the introduction of a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible.[11]

42. The Respect@Work report noted the limitations of the current legal and regulatory framework relating to sex discrimination and harassment, including its remedial and reactive focus and its reliance on individual complainants to bring complaints. As the Inquiry heard, there are a range of reasons why people may be reluctant to make a complaint of sexual harassment. These include fear that it will impact on career prospects, contract renewal or hours of work;[12] a fear that they will not be believed;[13] a fear that employers may retaliate and claim they had not complied with the terms of their visas;[14] as well as a range of other cultural and language barriers.[15] The 2018 national survey on sexual harassment found that only 17% of people who experienced sexual harassment in the workplace in the last five years made a formal report or complaint.[16]

43. This Bill would insert a new Part IIA into the SDA, which introduces a positive duty on employers and PCBUs to eliminate, as far as possible, certain discriminatory conduct such as sex discrimination, sexual harassment, sex-based harassment, conduct relating to hostile work environments on the ground of sex and victimisation in the work context.

44. The Commission commends the Australian Government on implementing Recommendation 17 of the Respect@Work report in this Bill and considers that it will be a powerful mechanism in promoting broad systemic and cultural change within the community.

4.5 Changing the threshold for sex-based harassment

45. During the Inquiry, the Commission heard that many people experience harassment at work that is on the basis of their sex but that is not sexual in nature. The First Respect@Work Amendment Act introduced section 28AA

into the SDA which creates a separate, clearly identified category of unlawful conduct that explicitly prohibits sex-based harassment.

46. Section 28AA applies if:

- a person engages in unwelcome conduct of a seriously demeaning nature in relation to the person harassed because of their sex (or a characteristic that applies to or is generally associated with people of that sex); and
- the person does so in circumstances in which a reasonable person would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

47. This Bill would amend section 28AA to remove the term 'seriously' from the above definition.

48. In its First Respect@Work submission, the Commission expressed concerns that the threshold of 'seriously demeaning' in section 28AA set the bar too high. It noted that the Explanatory Memorandum to that Bill said:

> By definition, to 'demean' is to debase or degrade another person. The inclusion of this term is intended to provide an appropriate limit on the scope of conduct captured under this provision.[17]

49. The Commission submitted that conduct that debases or degrades another person is already sufficiently serious to warrant prohibition, and it is unnecessary to further qualify that conduct by requiring that it 'seriously' debases or degrades them. The Commission recommended that the phrase 'seriously demeaning' be replaced with 'demeaning' and it is pleased that this recommendation would be implemented by the present Bill.

5 Amendments to the *Australian Human Rights Commission Act 1986* (Cth)

50. The Bill proposes important amendments to the AHRC Act, including the conferral of powers on the Commission to monitor and enforce compliance with the positive duty in relation to sex discrimination, and new 'cost neutrality' provisions that apply to unlawful discrimination matters in the federal courts.

51. These amendments are welcome and implement major recommendations from the Respect@Work report and the Free and Equal position paper.

5.1 Conferral of powers on the Commission to monitor and assess compliance with the positive duty

(a) Enforcement of a positive duty

52. In the Respect@Work report, the Commission recommended that it be given the function of assessing compliance with a positive duty, as well as powers to enforce compliance with a positive duty. It made a number of suggestions as to how this enforcement function could be carried out which were based on similar existing regulatory models. This recommendation was restated by the Commission to the Senate Education and Employment Legislation Committee in its First Respect@Work submission.

53. The Commission commends the Australian Government for including an appropriate enforcement mechanism to accompany the introduction of the positive duty in this Bill and welcomes its proposed new powers.

54. New Division 4A of the AHRC Act would confer functions on the Commission to monitor and assess compliance with the positive duty, including 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 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 (Standard Provisions) Act 2014* (Cth) (Regulatory Powers Act).

55. Under the new subsection 35B(1) of the AHRC Act, the Commission may inquire into a person's compliance with the positive duty if it 'reasonably suspects' that a relevant person is not complying. The Explanatory Memorandum to the Bill provides that:

> Reasonable suspicion involves less than a reasonable belief, but more than a possibility. This test would require the Commission to be able to point to the factual basis which informed its suspicion that a person is not complying with the positive duty. The reasonableness of any suspicion must be judged in light of the facts available to the Commission at the time. For example, a reasonable suspicion could be based on information or advice provided by other agencies or regulators, information disclosed by impacted individuals, or media reporting.[18]

56. The Commission considers that this is an appropriate threshold for the engagement of its inquiry powers in relation to the positive duty, including the requirement that it be able to identify a reasonable factual basis to support its suspicion that a person is not complying with the positive duty.

57. The Commission also notes that the proposed compliance functions conferred on the Commission include appropriate procedural fairness mechanisms for employers and PCBUs, including provisions to ensure employers and PCBUs can seek reconsideration of a compliance notice within the Commission or apply to the federal courts for review of a compliance notice.

(b) Publication of enforceable undertakings and compliance notices

Enforceable undertakings

58. In the present Bill, new section 35K of the AHRC Act would engage Part 6 of the Regulatory Powers Act and empower the Commission to enter into, and enforce, undertakings in relation to compliance with the positive duty in relation to sex discrimination.

59. Under section 114(1) of the Regulatory Powers Act, the President of the Commission will be able to accept written undertakings from a person, including that the person will take specified action, or will refrain from taking specified action, to comply with the positive duty in relation to sex discrimination.

60. The new subsection 35K(5) explicitly provides that enforceable undertakings given in relation to the positive duty may be published on the Commission's website. The Explanatory Memorandum to the Bill states:

> Subsection 35K(5) provides that the President (or their delegate) has the discretion to publish an enforceable undertaking on the Commission's website. This will be important, in cases where the Commission deems it necessary, to ensure the commitments made under the undertaking are clear to the public. As the Free and Equal Position Paper recognises, this is a 'good way of communicating to industry, and to the community, the consequences of breaching the law.'[19]

61. A body of publicly available enforceable undertakings provides clarity, precedent and certainty for the entities entering into them, as well as other duty holders, about the specific and appropriate steps required to be in compliance with the law.

62. The Commission welcomes the transparency inherent in this new enforceable undertaking regime and considers that such transparency should also be explicitly extended to its functions relating to the issuance of compliance notices in relation to the positive duty.

Compliance notices

63. Proposed section 35C of the AHRC Act provides that, as soon as practicable after commencing an inquiry into a person's compliance with the positive duty, the Commission must give the person a written notice stating the grounds on which the Commission commenced the inquiry. It also provides that the Commission must not find that a person is not complying with the positive duty unless it has provided the person, at their option, with a reasonable opportunity to make written submissions and/or appear before the Commission (either in person or by a representative) and make oral submissions. These safeguards give effect to important due process rights and the Commission considers them appropriate.

64. Proposed section 35E of the AHRC Act provides that if, as a result of an inquiry into a person's compliance with the positive duty in relation to sex discrimination, the Commission finds that the person is not complying, the Commission must notify the person in writing of its finding and provide reasons for its decision. It also has the discretion to notify the person of any recommendations by the Commission for preventing a repetition or continuation of the failure to comply.

65. Proposed section 35F provides that if, as a result of an inquiry into compliance with the positive duty, the Commission finds that a person is not complying, the President may issue a compliance notice.

66. A compliance notice must:

- set out the name of the person to whom the notice is given
- set out brief details of the failure to comply
- specify action that the person must take, or refrain from taking, in order to address the failure
- specify a reasonable period (starting at least 21 days after the day the notice is given) within which the person must take, or refrain from taking, the specified action

- if the President considers it appropriate—specify a reasonable period within which the person must provide the Commission with evidence that the person has taken, or refrained from taking, the specified action
- set out any other matters prescribed by regulations.

67. Proposed new subsections 35G(1) and 35G(2) would enable a person who has received a compliance notice to request reconsideration of the notice by the President (or their delegate) within 21 days of receiving the notice. This creates an accessible mechanism of internal reconsideration within the Commission, including for any required actions specified in the compliance notice. Reconsideration requests must be actioned expeditiously and, if performed by a delegate of the President, must be undertaken by a senior staff member not involved in issuing the compliance notice.

68. Under the scheme proposed in the Bill, a person who has been given a compliance notice by the President is entitled to apply to the FCA or the FCFCA for review of the notice. The person may seek review on the grounds that they have not failed to comply with the positive duty, as set out in the notice, or that the notice does not comply with certain procedural requirements. A person is not required to seek reconsideration of the notice at the Commission before applying to the federal courts. Following an application for review, the relevant court can stay the operation of the compliance notice, and can ultimately confirm, vary or set it aside after reviewing it.

69. The Commission notes that, while proposed section 35G provides a period of 21 days for a person to seek reconsideration of a compliance notice by the President, proposed section 35H does not provide any set period for a person to seek review of a compliance notice issued by the President in the federal courts. In the interests of clarity and finality, the Commission considers that it is important to include an explicit timeframe for seeking review in proposed section 35H. This will assist the Commission in explaining to a person who has been issued with a compliance notice their reconsideration and review rights. It will also ensure that a person has a set time in which to decide either to comply with the Commission's notice or seek review. A person must file an application for judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) within 28 days from notification of the decision or the reasons for decision (whichever is the later). The Commission considers that this is an appropriate period to include.

70. Pursuant to proposed section 35J, the Commission is empowered, in certain circumstances, to apply to the FCA or the FCFCA to seek an order directing that a person comply with the notice.

71. As discussed above, the President's power to issue a compliance notice is only enlivened following an inquiry into a person's compliance with the positive duty in relation to sex discrimination, the consideration of submissions, and once the Commission has made a finding of non-compliance. This means that a breach of the positive duty must have occurred to result in a compliance notice.

72. As the Commission found in the Respect@Work report, transparency about the existence of misconduct and actions which are taken to prevent and respond to misconduct can be an 'effective, relatively low-cost mechanism for engineering positive change'.[20] The Commission considers that the inclusion of an explicit statutory discretion to publish compliance notices on its website will increase transparency around how the Commission is monitoring compliance with the positive duty and serve an important educative function for duty holders and the community.

73. Additionally, providing the Commission with statutory authority to publish enforceable undertakings on its website — but not compliance notices — may create an undesirable incentive for employers and PCBUs to avoid entering into enforceable undertakings with the Commission because of the associated publicity. As enforceable undertakings require discussion and agreement between a regulator and the person suspected of breaching the law, they are often an effective cooperative tool for regulators and a very good mechanism for achieving organisational change and systemic reform. Unlike a compliance notice, which directs a person to take specified action, or refrain from taking specified action, enforceable undertakings are entered into voluntarily. The effectiveness of the introduction of enforceable undertakings relating to the positive duty in relation to sex discrimination may be undermined if a person elects to proceed down the compliance notice path instead because it is private and offers less potential for reputational impacts.

74. In the absence of explicit statutory authority to publish compliance notices on its website, the Commission is concerned that section 49 of the AHRC Act (or its SDA equivalent) may operate to keep significant parts of its functions, relating to assessing and monitoring compliance with the positive duty in relation to sex discrimination, hidden from public view.

(c) Section 49 of the AHRC Act

75. The Commission is constrained by strict privacy or 'non-disclosure' obligations set out in section 49 of the AHRC Act. A similar secrecy provision exists in section 112 of the SDA, and the *Privacy Act 1988* (Cth) also imposes obligations on the Commission in relation to the handling of personal information.

76. Section 49 of the AHRC Act imposes secrecy obligations on members of the Commission and Commission staff in relation to the handling of information relating to the 'affairs of another person'.

77. The prohibitions in section 49 are broad and proscribe the acts of communicating, divulging and producing information/documents to 'any person'. The penalty for non-compliance with section 49 is up to 50 penalty units ($11,000), imprisonment for 1 year, or both. This is one of the harshest penalties in AHRC Act. By way of comparison, most penalties in the AHRC Act, and indeed the penalty for an employer failing to comply with a notice from the Commission to provide information or produce a document in an inquiry relating to the new positive duty is up to 10 penalty units ($2,200).

78. There is an exception in subsection 49(4B) of the AHRC Act that provides that the secrecy provision does not prevent Commission members and staff from making a record of, divulging, communicating or making use of information, or producing a document, that relates to the affairs of another person, if the person does so:

    (a) in the performance of a duty under or in connection with the AHRC Act; or

    (b) in the course of acting for or on behalf of the Commission.

79. While conciliation conferences in unlawful discrimination matters at the Commission are confidential and conducted in private, there are a number of sections in the AHRC Act that do authorise the Commission to make information relating to its functions public, including information that may relate to the affairs of another person.

80. For example, the Commission has functions in relation to 'human rights', including inquiring into complaints alleging that an act or practice done by or on behalf of the Commonwealth is inconsistent with, or contrary to, any human right.'[21]

81. Pursuant to section 20A of the AHRC Act, the Commission may report to the Minister in relation to such inquiries where they are not settled by conciliation

and where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right.

82. The Commission has the power to make recommendations in its report in the event that it finds a breach of human rights, including for the payment of compensation,[22] but these recommendations are not enforceable.

83. Before changes implemented to the AHRC Act by the *Human Rights Legislation Amendment Act 2017* (Cth) in 2017, if the Commission formed the view that a particular act or practice was inconsistent with, or contrary to, any human right, and conciliation was inappropriate or unsuccessful, it was obliged to prepare a report for the Minister. The Minster was then obliged to table the report in the Australian Parliament. As complaints received under the Commission's 'human rights' jurisdiction cannot proceed to the federal courts for determination, and any recommendations made by the Commission in its report are unenforceable, the public nature of a finding of a breach of human rights is often the primary vindication for complainants in these matters.

84. Presently, the Minister has a discretion about whether to table reports received by the Commission under section 20A of the AHRC Act. In the Explanatory Memorandum to the Human Rights Legislation Amendment Bill 2017, it stated:

> It is intended that the President [of the Commission] will publish any reports provided to the Minister as he or she sees fit. This amendment is not intended to reduce public scrutiny of Commission reports.[23]

85. Consequently, the Commission now publishes a copy of its reports to the Minister following human rights inquiries on its website.[24]

86. A similar process involving the preparation and publication of reports to the Minister exists in the Commission's 'equal opportunity in employment' complaint jurisdiction which gives effect to Australia's obligations under the *International Labour Organisation Convention (No 111) concerning Discrimination in respect of Employment and Occupation*.

87. The present Bill also provides explicit statutory authority in the proposed section 35Q for the Commission to report to the Minister and/or publish a report in relation to an inquiry involving its new systemic unlawful discrimination jurisdiction.

88. For the reasons set out above, the Commission recommends that the Bill be amended to grant the Commission discretion to publish compliance notices on its website once any time periods for reconsideration or review have expired.

Recommendation 3

The Commission recommends that an explicit timeframe of 28 days be inserted into proposed section 35H of the *Australian Human Rights Commission Act 1986* (Cth) to clarify the period in which a person can seek review of a compliance notice in the Federal Court or the Federal Circuit and Family Court of Australia.

Recommendation 4

The Commission recommends that proposed section 35G of the *Australian Human Rights Commission Act 1986* (Cth) be amended to provide the Commission with express statutory authority to publish compliance notices on its website once any periods for reconsideration or review have expired.

5.2 Notification requirement relating to the positive duty

89. Proposed subsection 35C(1) of the AHRC Act provides that the Commission must give a person a written notice stating the grounds on which the Commission has commenced an inquiry into the person's compliance with the positive duty 'as soon as practicable' after commencing the inquiry.

90. The Commission has notification requirements in other parts of the AHRC Act, including subsections 46PF(7)(a) and 46PF(7)(c). These subsections provide that the President must notify the respondent to a complaint of unlawful discrimination, or any person who is subject to an adverse allegation arising out of a complaint of unlawful discrimination, as soon as the President has decided to inquire into the complaint or formed the opinion that the person is the subject of an adverse allegation. Both notification requirements are subject to the qualification that notification is not required on that timeline if the President is satisfied that notification 'would be likely to prejudice the safety of a person.'

91. Complaints of sex discrimination, sexual harassment and sex-based harassment cover a range of conduct which can include serious offences such as sexual assault, indecent exposure and stalking. It is not unusual for complainants at the Commission to be concerned about the effect of notification of their complaint on their safety and wellbeing.

92. While the Commission acknowledges that its new notification requirement in proposed subsection 35C(1) is conditioned by the phrase 'as soon as practicable' — which may extend to issues of safety — it recommends that this is made explicit in either the text of section 35C itself or by way of express clarification in the Explanatory Memorandum to the Bill.

Recommendation 5

The Commission recommends that proposed section 35C of the *Australian Human Rights Commission Act 1986* (Cth) be amended to make clear that the term 'as soon as practicable' in subsection 35C(1) extends to issues of safety, or that express clarification to this effect is included in the Explanatory Memorandum to the Bill.

5.3 Inquiries into systemic unlawful discrimination

93. The Bill would confer a new inquiry power on the Commission to enable it to inquire into, and report on, issues of systemic unlawful discrimination or suspected systemic unlawful discrimination.

94. This amendment would implement Recommendation 19 of the Respect@Work report, which proposed that the Commission be provided with an enhanced inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment, on its own motion. The Commission welcomes this new function and considers that it will assist in shifting the burden away from individuals to address systemic problems.

95. Under the Bill, once the Commission has inquired into a matter under this proposed own-motion inquiry power, it may report to the Minister in relation to the inquiry and, if appropriate, make recommendations for addressing the matter.

96. The Commission notes that, unlike the new positive duty in relation to sex discrimination, this new function does not come with associated powers such as the ability to issue compliance notices or enter into enforceable undertakings. The Commission looks forward to further discussions with the Australian Government about expanding the Commission's regulatory powers into this new function, as recommended in the Commission's Free and Equal position paper on reform of the federal discrimination laws.[25]

5.4 Cost provisions

97. In the Inquiry, the Commission heard that the current costs regime in the federal courts operates as a disincentive for complainants to pursue sexual harassment matters under the SDA, particularly for vulnerable members of the community.[26]

98. There are presently no specific provisions relating to costs in unlawful discrimination proceedings before the FCA or the FCFCA. These courts have a general discretion to order costs under the provisions of their establishing acts[27] and generally exercise these powers according to the guiding principle that 'costs follow the event'. Under this principle, an unsuccessful party to litigation is ordinarily ordered to pay the costs of the successful party.

99. While the courts have the discretion to depart from this approach in certain circumstances – and also the power to make cost-capping orders – concerns have been raised that the threat of an adverse costs order discourages the pursuit of legitimate discrimination claims in the courts.

100. In Recommendation 25 of the Respect@Work report, the Commission proposed that the AHRC Act be amended to include a cost protection provision consistent with section 570 of the *Fair Work Act 2009* (Cth) (Fair Work Act). Section 570 of the Fair Work Act provides that costs may only be ordered against a party by the court if satisfied that the party instituted the proceedings vexatiously or without reasonable cause, or if the court is satisfied that a party's unreasonable act or omission caused the other party to incur costs, or if the court is satisfied that the party unreasonably refused to participate in a matter before the Fair Work Commission and the matter arose from the same facts as the court proceedings.

101. The Commission consulted widely on the issue of costs in unlawful discrimination matters during its more recent consultations for the Free and Equal project. As a result of these discussions, and reflecting the complex nature of the question of costs, the Commission's recommendation regarding costs in unlawful discrimination matters has evolved. The reasons for this evolution are set out comprehensively in the Commission's Free and Equal position paper,[28] but include concerns expressed by stakeholders that inserting a provision consistent with section 570 of the Fair Work Act might have the unintended consequence of reducing the willingness of lawyers to take on unlawful discrimination matters for clients who are unable to pay their legal costs.

102. In its Free and Equal position paper, the Commission ultimately recommended that the default position in unlawful discrimination matters should be that parties bear their own costs, with the court retaining a discretion to award costs in the interests of justice. The Commission further recommended that clarity be provided in the AHRC Act by way of mandatory criteria to be considered by the courts in determining whether to award costs in the interests of justice.[29] This is the model adopted in the present Bill and the Commission, including the Sex Discrimination Commissioner, supports it.

103. The new costs provision in proposed section 46PSA of the AHRC Act will provide that, as a default, each party will bear their own costs in unlawful discrimination matters in the federal courts, including in appeals pursued in the High Court of Australia.

104. If the relevant court considers that there are circumstances justifying it, the court may make an order as to costs that it considers just. In considering whether there are circumstances justifying the making of such a costs order, the court must have regard to the following matters:

- the financial circumstances of each of the parties to the proceeding
- the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission)
- whether any party to the proceedings has been wholly unsuccessful in the proceedings
- whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle the proceedings, or the matter the subject of the terminated complaint, and if so the terms of the offer
- whether the subject matter of the proceedings involves an issue of public importance
- any other matters that the court considers relevant.

105. This provision departs from the approach under section 570 of the Fair Work Act because it directs the court to consider matters broader than the conduct of the parties, such as the financial circumstances of the parties, the outcome of the proceedings and the public importance of the matter. The Commission, including the Sex Discrimination Commissioner, considers that this allows for a more nuanced and flexible assessment of costs and the interests of justice in individual matters.

5.5 Termination of complaints

106. When a complaint of unlawful discrimination is made to the Commission, the President of the Commission has the function of inquiring into the complaint and attempting to resolve it by conciliation.[30]

107. Other than being resolved by conciliation, there are a number of grounds on which a complaint may be terminated and the inquiry into the complaint brought to an end. It is only once a complaint has been terminated that a complainant has a right to initiate proceedings in a court alleging unlawful discrimination.[31]

108. The AHRC Act contains both mandatory termination grounds[32] and discretionary termination grounds.[33] One of the discretionary termination grounds relates to the period of time since the relevant conduct complained of occurred. The present subsection 46PH(1)(b) provides that the President has discretion to terminate a complaint on the ground that it was lodged more than 24 months after the alleged acts, omissions or practices took place if the complaint relates to the SDA, or 6 months in a complaint relating to the other federal discrimination laws.

109. The amendment in the present Bill would extend the period of time in subsection 46PH(1)(b) to 24 months for complaints initiated in relation to all the federal discrimination Acts. This amendment implements a recommendation made by the Commission in its First Respect@Work submission, as well as its Free and Equal position paper,[34] and is welcomed.

6 Amendments to other federal discrimination laws

6.1 Victimisation

110. Victimisation involves retaliatory action, or the threat of such action, against a person because they sought to assert their rights under discrimination law or because they took action in support of a complaint. For example, a casual employee who is refused overtime shifts because they made a complaint of sexual harassment against their manager would be entitled to make a claim of victimisation.

111. Victimisation of complainants is a criminal offence under each of the federal anti-discrimination laws.[35] Doubt has arisen in cases since 2011, as to whether the federal courts have jurisdiction to hear an application under section 46PO of the AHRC Act as a civil claim.[36]

112. In the Respect@Work report, the Commission recommended that the AHRC Act be amended to make explicit that any conduct that is an offence under section 94 of the SDA can form the basis of a civil action for unlawful discrimination.[37] The Government accepted this recommendation, and relevant changes to both the AHRC Act and the SDA were subsequently incorporated into the First Respect@Work Amendment Act.[38]

113. In its First Respect@Work Amendment submission, the Commission noted that while these amendments created certainty in relation to victimisation under the SDA, without equivalent amendments being made in relation to the

Disability Discrimination Act 1992 (Cth), *Racial Discrimination Act 1975* (Cth) and the *Age Discrimination Act* 2004 (Cth), they had the potential to create further uncertainty in relation to victimisation under those other Acts.[39] The Committee subsequently made the same recommendation in its report.[40]

114. The Commission welcomes the legislative changes in the Bill which clarify that victimisation under all four federal discrimination Acts can form the basis of a civil action for unlawful discrimination.

7 Promoting consistency within the SDA and across federal discrimination law

7.1 Protection for unpaid workplace participants

115. In its First Respect@Work submission, the Commission recommended that protections for unpaid workplace participants, including volunteers, interns and students, against sexual harassment and sex-based harassment also be extended to protect these groups against sex discrimination and discrimination on each of the grounds set out in the SDA, *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth). This recommendation was not implemented in the First Respect@Work Amendment Act.

116. The Commission acknowledges that this recommendation goes beyond the one that it made in the Respect@Work report, which focused only on sexual harassment. However, given its significance, and the intersectional issues that it raises, the Commission considers that there are further opportunities to build on these amendments for unpaid workplace participants. The Commission has long advocated to expand the coverage of discrimination laws to protect volunteers and interns who, at present, are not covered by the definition of employment.[41]

117. As the Commission has previously noted, the nature of work has fundamentally transformed since the introduction of the SDA. Traditional definitions of employment and other employment-like relationships have failed to keep pace with the evolving nature of work and work arrangements.[42]

118. Following the enactment of the First Respect@Work Amendment Act in 2021, the SDA now includes definitions of 'worker' and 'person conducting a business or undertaking' that are taken from the *Work Health and Safety Act 2011* (Cth) (WHS Act). These definitions appear in subsections 28B(3)–(7) of the

SDA and had the effect of simplifying and expanding the range of work-related environments in which sexual harassment and sex-based harassment is prohibited.

119. The newer definitions of 'worker' and 'person conducting a business or undertaking' replaced a range of specific work relationships in the SDA, that were not employer/employee relationships, in which harassment was prohibited. These included commission agents, contract workers, partners in a partnership, or people seeking to become a worker of that kind. The effect of the amended definition was to simplify the prohibitions, ensure consistency with the WHS Act, and ensure protection for people engaged in work who were not previously protected.

120. For the first time, following the enactment of the First Respect@Work Amendment Act, the SDA clearly protects unpaid workplace participants like volunteers, interns and students, as well as people who are self-employed, from harassment.

121. While the SDA provides volunteers and interns with protection against sexual harassment, sex-based harassment and, if the present Bill is passed, hostile workplace environments on the basis of sex, they are not able to make a claim of sex discrimination. This is problematic because many claims of sexual harassment also include a claim of sex discrimination.

122. The Respect@Work report emphasised that framing an appropriate regulatory response to sexual harassment required examining the problem through an intersectional lens.[43] The concept of 'intersectional' discrimination refers to the fact that people often experience multiple overlapping forms of discrimination and harassment, for example on the basis of gender, race, disability or sexuality.[44]

123. The intersectional nature of discrimination means that it is not only important to have consistency between the coverage of sexual harassment and sex discrimination provisions, but also that there is consistency between the coverage of discrimination on different grounds. The experience of the Commission is that many people who make complaints under the SDA also make related complaints under the *Disability Discrimination Act 1992* (Cth) or *Racial Discrimination Act 1975* (Cth) in relation to the same conduct.

124. Each of the four federal discrimination Acts contains specific prohibitions on discrimination in the workplace, but none of them extend to unpaid workplace participants.[45] Instead, in addition to protections for employees, they all refer to the particular kinds of relationships (commission agents, contract workers, partners in a partnership).

125. For consistency, the protections against harassment that the SDA provides to volunteers and interns through its new definition of 'worker' should be extended to protection against discrimination under the SDA and discrimination under the other three federal discrimination laws.

126. There are many people who participate in public life as volunteers and they should have the benefit of protection from discrimination. Similarly, internships are commonly part of higher education courses and can be critically important for young people seeking to enter the workforce. Protecting this vulnerable cohort of people from sexual harassment and sex-based harassment was a welcome reform. The Commission invites the Australian Government to build on this important amendment and include unpaid workplace participants within the protections against sex discrimination and other prohibited forms of discriminatory conduct.

Recommendation 6

The Commission recommends that protections in the *Sex Discrimination Act 1984* (Cth) for unpaid workplace participants, including volunteers, interns and students, against sexual harassment and sex-based harassment, also be extended to protect these groups against sex discrimination and discrimination on each of the grounds set out in the *Sex Discrimination Act 1984* (Cth), *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

7.2 The need for a comprehensive review of federal discrimination laws

127. The Respect@Work report highlighted the pressing need for reform of the federal laws relating to sex discrimination, sexual harassment and sex-based harassment in Australia. The Commission welcomes the legislative response to the Respect@Work report and looks forward to further collaboration with the Australian Government. As set out in the Commission's Free and Equal position paper, there are other areas of federal discrimination law that require urgent attention and reform.

128. Concerns underpinning recommendations in the Respect@Work report — namely that the current legislative framework in relation to unlawful discrimination remains largely remedial in nature, because it requires a 'person aggrieved' (the victim) to make a complaint and tends to focus on discrimination that has already happened — also apply to discrimination matters involving other protected attributes.

129. The introduction of a positive duty into the SDA is an excellent reform, and the Commission considers that there is a place for a positive duty (with appropriate enforcement powers for the Commission) in all federal discrimination laws as a foundation for reshaping the understanding and operation of these laws to prevent discrimination.

130. There is also the need for greater consistency of protection across protected attributes in federal discrimination laws to avoid issues relating to intersectionality and the creation of a hierarchy of rights. For example, as discussed above, the proposed provision in this Bill relating to section 28M makes it unlawful for a person to subject another person to a workplace environment that is hostile on the ground of sex. This change directly implements Recommendation 16(c) of the Respect@Work report which was tightly focused on sexual harassment in the workplace. The Commission considers that protections against hostile work environments could also extend to other protected attributes in the SDA such as sexual orientation, gender identity, intersex status and pregnancy, as well as to the protected attributes of race, age and disability.

131. As the Commission articulated in its Free and Equal position paper, reform of discrimination law in Australia needs consideration on several levels:

- to address known deficiencies in the operation of existing provisions
- to be simpler, and easier to understand
- to provide better support to the business community, so that businesses have the confidence to take actions to prevent or address discrimination
- to re-balance the legislative scheme so that it is less heavily reliant on individuals needing to take remedial action when discrimination has occurred.[46]

132. The Commission urges the Australian Government to undertake a comprehensive review of its federal discrimination laws as a matter of priority and implement the unaddressed reforms in the Commission's Free and Equal position paper.

Endnotes

[1] Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018) 8, at https://humanrights.gov.au/our-work/sex-discrimination/publications/everyones-business-fourth-national-survey-sexual. The Commission notes that the survey results of the 2022 National Survey on Sexual Harassment in Australian Workplaces will be released in November 2022.

[2] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) (Respect@Work report) at https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020.

[3] Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination law — Position Paper* (2021) (Free and Equal position paper) at https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws.

[4] Respect@Work report, recommendation 16(c).

[5] Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, at [33].

[6] Respect@Work report, recommendation 16(a).

[7] *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), article 4.

[8] Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, at [57]–[63].

[9] *Racial Discrimination Act 1975* (Cth), s 6A(1); *Sex Discrimination Act 1984* (Cth) (SDA), ss 10(1)–(3) and 11(1)–(3); *Disability Discrimination Act 1992* (Cth) (DDA), ss 13(1)–(3); *Age Discrimination Act 2004* (Cth), ss 12(1)–(3).

[10] Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, at [65].

[11] Respect@Work report, recommendation 17.

[12] Respect@Work report, 75, 197 and 411.

[13] Respect@Work report, 182 and 703.

[14] Respect@Work report, 190.

[15] Respect@Work report, 185–186.

[16] Australian Human Rights Commission, *Everyone's Business: Fourth national survey on sexual harassment in Australian workplaces* (2018), 67.

[17] Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at [141].

[18] Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, at [160].

[19] Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022, at 203.

[20] Respect@Work report, 628.

[21] *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act), s 11(1)(f)(i).

[22] AHRC Act, s 29(2)(c)(i).

[23] Explanatory Memorandum, Human Rights Legislation Amendment Bill 2017, at [67].

[24] The Commission's reports to the Minister in the exercise of this function can be found at: https://www.humanrights.gov.au/our-work/legal/projects/human-rights-reports.
[25] Free and Equal position paper, 154–161.
[26] Respect@Work report, 507.
[27] *Federal Court Act 1976* (Cth), s 43; *Federal Circuit and Family Court Act 2021* (Cth), s 214.
[28] Free and Equal position paper, 191–201.
[29] Free and Equal position paper, 201.
[30] AHRC Act, ss 8(6) and 11(1)(aa).
[31] AHRC Act, s 46PO.
[32] AHRC Act, ss 46PH(1B) and (1C).
[33] AHRC Act, s 46PH(1)(a)–(h).
[34] Free and Equal position paper, 219.
[35] *Age Discrimination Act 2004* (Cth), s 51; *Racial Discrimination Act* 1975 (Cth), s 27(2); *Sex Discrimination Act* (Cth) s 94; *Disability Discrimination Act* 1992 (Cth), s 42.
[36] See Australian Human Rights Commission, *Federal Discrimination Law* (2016), 159, referring to: *Walker v Cormack* (2011) 196 FCR 574, [37]-[41]; *Walker v State of Victoria* [2012] FCAFC 38, [98]-[100] (Gray J); *Chen v Monash University* [2016] FCAFC 66, [119]-[124] (Barker, Davies and Markovic JJ). Cf *Dye v Commonwealth Securities Limited (No 2)* [2010] FCAFC 118, [71] (Marshall, Rares and Flick JJ) where the Full Court of the Federal Court previously reached a different view.
[37] Respect@Work report, recommendation 21.
[38] Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (8 April 2021) 12.
[39] Australian Human Rights Commission, submission no 19 to the Senate Education and Employment Legislation Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (July 2021) [79-88].
[40] Senate Education and Employment Legislation Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (August 2021), recommendation 2.
[41] Free and Equal position paper, 252–255.
[42] Respect@Work report, 74–78.
[43] Respect@Work report, 10.
[44] Respect@Work report, 19.
[45] *Sex Discrimination Act 1984* (Cth), Part II, Div 1; *Racial Discrimination Act 1975* (Cth), s 15; *Disability Discrimination Act 1992* (Cth), Part 2, Div 1; and *Age Discrimination Act 2004* (Cth), Part 4, Div 2.
[46] Free and Equal position paper, 21.