



Australian
Human Rights
Commission

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

Submission to the Senate Education and Employment Legislation Committee

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Education and Employment Legislation Committee in relation to its inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (Bill) introduced by the Australian Government.

2 Summary

2. Sexual harassment is prevalent in workplaces throughout Australia. The most recent national survey conducted by the Commission found that a 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 that 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, recommended a new model to improve the coordination, consistency and clarity between anti-discrimination, employment and work health and safety laws.
5. The present Bill adopts many of the recommendations from the Respect@Work report. The Commission congratulates the Government on the Bill and its commitment to take action to strengthen, simplify and streamline the laws that protect workers from sexual harassment and discrimination in the workplace.
6. The Bill explicitly provides that not only sexual harassment but also other sex-based harassment is prohibited. It expands the coverage of the 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 expands the protection against sexual harassment *and* sex discrimination to State public servants. It clarifies that all of the provisions of the *Sex Discrimination Act 1984* (Cth) (SDA) extend to Members of Parliament, their staff and judges throughout Australia.

7. In keeping with the need for coordination across anti-discrimination, employment and work health and safety laws, the Bill will allow the Fair Work Commission to issue a ‘stop sexual harassment order’ in the same way that it can currently issue a ‘stop bullying order’. The *Fair Work Act 2009* (Cth) (Fair Work Act) will also be amended to provide certainty to employers that engaging in sexual harassment is a valid reason for the termination of a person’s employment.
8. In addition to the specific measures set out in the Bill, the Government has published a ‘Roadmap for Respect’ in which it commits to consider a number of reforms recommended in the Respect@Work report that are not included in the Bill.² The Commission welcomes that commitment and looks forward to continuing engagement with the Government and the Respect@Work Council to meet those goals.
9. While full implementation of all of the Respect@Work recommendations may take some time, the Commission considers that there are additional amendments that can, and should, be made now to further strengthen, simplify and streamline the laws dealt with by the Bill.
10. In particular, the Commission considers that the SDA should be amended to confirm that its objects include the achievement of substantive equality between women and men. The threshold for the new sex-based harassment provision—conduct that is ‘seriously demeaning’—should be amended to ensure that it does not set the bar too high for a finding of harassment to be made. There should also be an explicit prohibition on the creation of a hostile work environment on the basis of sex.
11. The welcome inclusion of protection for unpaid workplace participants and the self-employed against sexual harassment and sex-based harassment should be extended consistently throughout the SDA. Interns and volunteers should have protection against sex discrimination, not just sexual harassment, as well as discrimination on the other grounds already prohibited under federal discrimination laws.
12. The Commission reiterates its recommendation from the Respect@Work report that the SDA include a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. This would be a powerful tool to promote broad

systemic and cultural change that sits outside of the current adversarial framework of discrimination law. The Commission also recommends the introduction of measures to allow for the assessment and enforcement of this positive duty.

13. The important changes in the Bill to the Fair Work Act (and regulations) in relation to sexual harassment should also encompass the new legislative concept of sex-based harassment. That is, the Fair Work Commission should be able to issue a 'stop sex-based harassment order' and employers should be given the confidence that if an employee engages in sex-based harassment this will be a valid reason for the termination of their employment.
14. The Commission welcomes the clarification that victimisation under the SDA can form the basis of a civil action for unlawful discrimination. In order to fulfil the Government's intention in relation to victimisation generally, it is important that equivalent changes are made at the same time to clarify the position under the three other federal discrimination laws.
15. Finally, the Commission recommends that a consistent position be taken with respect to termination of complaints of unlawful discrimination under each of the federal discrimination laws so that the President has the discretion to terminate any complaint that was lodged more than 24 months after the alleged acts, omissions or practices took place.
16. The changes proposed in this Bill will have a significant impact on the effectiveness of the law in relation to sexual harassment. The improved access to remedies for victims of sexual harassment will also require additional resources for the Commission in order to efficiently manage an increased number of complaints. While that is not a primary matter of inquiry for this Committee, which is focused on the provisions of the Bill, it will be a matter that needs to be addressed in relation to the Bill's implementation.
17. Subject to the specific recommendations detailed in this submission to further improve the Bill, the Commission recommends that the Bill be passed.

3 Recommendations

18. The Commission makes the following recommendations.

Recommendation 1

The Commission recommends that clause 31 of the Bill be amended to provide that it is an object of the *Sex Discrimination Act 1984* (Cth) ‘to achieve substantive equality between women and men’.

Recommendation 2

The Commission recommends that proposed s 28AA of the Bill be amended to change the threshold for sex-based harassment from unwelcome conduct of a ‘seriously demeaning’ nature to unwelcome conduct of a ‘demeaning’ nature.

Recommendation 3

The Commission recommends that the *Sex Discrimination Act 1984* (Cth) be amended to ensure that creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited.

Recommendation 4

The Commission recommends that the protection in the Bill 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 5

The Commission recommends that the *Sex Discrimination Act 1984* (Cth) be amended to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered, including, but not limited to:

- (a) the size of the person’s business or operations

- (b) the nature and circumstances of the person's business or operations
- (c) the person's resources
- (d) the person's business and operational priorities
- (e) the practicability and the cost of the measures
- (f) all other relevant facts and circumstances.

Recommendation 6

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

- (a) undertake assessments of the extent to which an organisation has complied with the duty, and issue compliance notices if it considers that an organisation has failed to comply
- (b) enter into agreements/enforceable undertakings with the organisation
- (c) apply to the Court for an order requiring compliance with the duty.

Recommendation 7

The Commission recommends that the *Fair Work Act 2009* (Cth) be amended to allow the Fair Work Commission to make a stop sex-based harassment order.

Recommendation 8

The Commission recommends that clause 10 of the Bill be amended to clarify that sex-based harassment can be conduct amounting to a valid reason for dismissal, in determining whether a dismissal was harsh, unjust or unreasonable.

Recommendation 9

The Commission recommends that the definition of 'serious misconduct' in the Fair Work Regulations 2009 (Cth) be amended to include sex-based harassment.

Recommendation 10

The Commission recommends that necessary legislative amendments be made to clarify that victimisation under all four federal discrimination Acts can form the basis of a civil action for unlawful discrimination.

Recommendation 11

The Commission recommends that s 46PH(1)(b) of the AHRC Act be amended to provide that the President may terminate any complaint that was lodged more than 24 months after the alleged acts, omissions or practices took place.

Recommendation 12

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

4 Amendments to the Sex Discrimination Act

4.1 Objects clause

19. The objects clause of an Act is the mission statement setting out 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.
20. The Respect@Work report recommended that s 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'.³
21. 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.
22. 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.
23. Clause 31 of the Bill proposes an amendment to the objects clause, but one that is different from that recommended in the Respect@Work report. The Bill proposes to amend s 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'.
24. The Commission's view is that this is 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.⁴ Further, unlike the concept of ‘substantive equality’, the concept of ‘equality of opportunity’ is not otherwise contained in the SDA.

25. The Commission considers that the proposed object in recommendation 16(a) of the Respect@Work report is preferable and is more in accordance with standard legislative drafting practice because it reflects the existing content of the SDA.

Recommendation 1

The Commission recommends that clause 31 of the Bill be amended to provide that it is an object of the *Sex Discrimination Act 1984* (Cth) ‘to achieve substantive equality between women and men’.

4.2 Sex-based harassment

26. 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. In some cases, courts have found that this kind of conduct may amount to sex discrimination. However, it would improve both the awareness about, and availability of, a remedy in these circumstances for sex-based harassment to be a separate, clearly identified category of unlawful conduct in the SDA.
27. The Commission welcomes proposed s 28AA which would prohibit sex-based harassment, in line with recommendation 16(b) of the Respect@Work report. The new provision 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.
28. The second of those criteria is substantially the same as the current sexual harassment provision. In addition to the (non-exhaustive) list of relevant circumstances for the sexual harassment prohibition, the new sex-based harassment prohibition also identifies the following additional circumstances as relevant:

- any power imbalance in the relationship between the two people
 - the seriousness of the conduct
 - whether the conduct has been repeated.
29. The Commission considers that there is value in using the language from the existing sexual harassment provision in order to frame the new sex-based harassment provision. This will have the advantage of creating some certainty about the application of the new provision because there is existing caselaw dealing with how the terms in the existing provision should be interpreted. Improved consistency and clarity were objectives repeatedly identified by stakeholders throughout the Inquiry.⁵
30. The key difference between the two provisions is that:
- for sexual harassment, the conduct must be an unwelcome sexual advance, an unwelcome request for sexual favours, or other unwelcome conduct of a sexual nature
 - for sex-based harassment, the conduct must be conduct of a seriously demeaning nature.
31. The Explanatory Memorandum says that the intention of the new sex-based harassment provision is that it would capture conduct of an equivalent degree of significance as the existing sexual harassment provision.⁶ However, the Commission is concerned that the threshold of ‘seriously demeaning’ for the new provision sets the bar too high. The Explanatory Memorandum says:
- By definition, to ‘demean’ is to debase or degrade another person. The inclusion of this term is intended to provide an appropriate limit on the scope of conduct captured under this provision.⁷
32. The Commission’s view is 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.
33. By comparison, the concept of ‘unwelcome conduct of a sexual nature’, has been defined as conduct of a sexual nature that is not solicited or invited, and that the person on the receiving end regards as undesirable, disagreeable or offensive.⁸

34. In order to achieve the objective of ensuring parity between the harassment provisions, the Commission recommends that the phrase ‘seriously demeaning’ be replaced with ‘demeaning’.

Recommendation 2

The Commission recommends that proposed s 28AA of the Bill be amended to change the threshold for sex-based harassment from unwelcome conduct of a ‘seriously demeaning’ nature to unwelcome conduct of a ‘demeaning’ nature.

4.3 Hostile work environment

35. 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.
36. 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 a 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.⁹
37. This issue was not directly addressed in the Government’s ‘Roadmap for Respect’ or in the Bill. The Commission maintains that an amendment of the SDA to this effect would be appropriate.

Recommendation 3

The Commission recommends that the *Sex Discrimination Act 1984* (Cth) be amended to ensure that creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited.

4.4 Protection for unpaid workplace participants

38. 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.¹⁰

39. The Bill includes new 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 are then used in proposed ss 28B(3)–(7) to both simplify and expand the range of work-related environments in which sexual harassment and sex-based harassment will be prohibited.
40. The new inclusive definitions will replace a range of specific work relationships, that are not employer/employee relationships, in which harassment is currently prohibited. At present, the SDA prohibits harassment of commission agents, contract workers, partners in a partnership, or people seeking to become a worker of that kind. The new definitions of ‘worker’ and ‘person conducting a business or undertaking’ will replace these specific relationships. The effect will be to simplify the prohibitions, ensure consistency with the WHS Act, and ensure protection for people engaged in work who were not previously protected.
41. Crucially, for the first time, the law will clearly protect unpaid workplace participants like volunteers, interns and students, as well as people who are self-employed, from harassment.
42. The Commission welcomes these amendments which implement recommendation 16(d) of the Respect@Work report. The amendments also fit neatly into the model proposed by the Sex Discrimination Commissioner of improving the coordination, consistency and clarity between anti-discrimination, employment and work health and safety legislative schemes.
43. While the Respect@Work report was focused on issues of sexual harassment in the workplace, there are further opportunities to build on this improved consistency between discrimination and workplace laws. One aspect of this that the Commission has long advocated for is to expand the coverage of discrimination laws to protect volunteers and interns who, at present, are not covered by the definition of employment.¹¹
44. While the Bill provides volunteers and interns with protection against sexual harassment and sex-based harassment, they will not be able to make a claim of sex discrimination. This is problematic because many claims of sexual harassment also include a claim of sex discrimination.

45. The Respect@Work report emphasised that framing an appropriate regulatory response to sexual harassment required examining the problem through an intersectional lens.¹² 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.¹³
46. 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, it is also important 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 DDA or RDA in relation to the same conduct.
47. Each of the four federal discrimination Acts contains specific prohibitions on discrimination in the workplace, but none of them extend to unpaid workplace participants.¹⁴ Instead, in addition to protections for employees, they all refer to the particular kinds of relationships (commission agents, contract workers, partners in a partnership) that are replaced in the Bill with protection for ‘workers’ against sexual harassment.
48. For consistency, the protections against harassment that the Bill provides to volunteers and interns through this new definition of ‘worker’ should be extended to protection against discrimination under the SDA and discrimination under the other three federal discrimination laws. It appears that this could most effectively be done by replacing the various prohibitions on discriminating against commission agents, contract workers and partners with simplified prohibitions on discriminating against ‘workers’ as defined in the WHS Act.
49. 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 is a welcome reform. The Commission urges the Government to now also include them within the protections against sex discrimination and other prohibited forms of discriminatory conduct.

Recommendation 4

The Commission recommends that the protection in the Bill 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).

4.5 Protection for State public servants and others

50. The Bill removes a long-standing anomalous exemption that prevented State public servants from making claims of discrimination or harassment under the SDA. No such exemption exists in other federal discrimination laws and this is another example of increased consistency in the federal discrimination law framework. Again, this is a welcome reform and implements recommendation 16(e) of the Respect@Work report.
51. The Bill also provides additional clarity that the provisions of the SDA extend to Members of Parliament, their staff and judges in all jurisdictions.

4.6 Ancillary liability

52. The Bill amends s 105 of the SDA to ensure that there is ancillary liability for sexual harassment and sex-based harassment. This will ensure that those who cause, instruct, induce, aid or permit another person to engage in unlawful sexual harassment or sex-based harassment will also be liable for the conduct.
53. This amendment implements recommendation 20 of the Respect@Work report and will provide greater responsibility and accountability for preventing sexual harassment and sex-based harassment.

4.7 Positive duty to eliminate sex discrimination, harassment and victimisation

(a) Introduction of a positive duty

54. 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.¹⁵ While the Government noted this reform in its 'Roadmap for Respect', the Commission's recommendation has not been adopted in the Bill.
55. The vicarious liability provisions in the SDA provide some incentive for employers to take proactive steps to prevent discrimination and harassment in the workplace. If a complaint of discrimination or harassment is made, an employer will not be vicariously liable if they can show that they took all reasonable steps to prevent the conduct.¹⁶ The Commission has published guidelines to assist employers to develop policies to prevent workplace discrimination and harassment and to respond appropriately to incidents if they occur.¹⁷
56. However, there are limitations on the current framework as a result of its remedial and reactive focus. The question of whether an employer has taken reasonable steps to prevent sexual discrimination or harassment will only be asked in the context of a complaint. 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;¹⁸ a fear that they will not be believed;¹⁹ a fear that employers may retaliate and claim they had not complied with the terms of their visas;²⁰ as well as a range of other cultural and language barriers.²¹ The most recent 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.²²
57. By contrast, a positive duty would be forward looking and immediately applicable to all employers. It would require them to take proactive and preventative measures to ensure compliance. In the Commission's view, this would be a powerful tool to promote broad systemic and cultural change.

58. The idea of a positive duty is not new. Section 15 of the *Equal Opportunity Act 2010* (Vic) provides that people who have duties to comply with anti-discrimination law, including employers, must take reasonable and proportionate measures to eliminate that discrimination, sexual harassment or victimisation as far as possible. In determining whether a measure is reasonable and proportionate, a range of factors must be considered that go to the ability of the employer to take steps. For example, any assessment will take into account the size of the business, the resources available to it and the practicability and cost of the relevant measures. The legislation provides two examples of proportionate responses:
 - A small, not-for-profit community organisation takes steps to ensure that its staff are aware of the organisation's commitment to treating staff with dignity, fairness and respect and makes a clear statement about how complaints from staff will be managed.
 - A large company undertakes an assessment of its compliance with this Act. As a result of the assessment, the company develops a compliance strategy that includes regular monitoring and provides for continuous improvement of the strategy.
59. This positive duty has successfully operated in Victoria for more than a decade. The Commission's recommendation is modelled on the Victorian provision.
60. The Inquiry heard concerns from some business groups about the potential for an increased regulatory burden if a positive duty were introduced.²³ However, businesses that operate in Victoria will already be familiar with positive duties in relation to anti-discrimination law, and similar positive duties already exist nationally under work, health and safety laws.
61. The positive duty on a person conducting a business or undertaking to ensure the health and safety of their workers includes protecting them from risks to their psychological health.²⁴ As a result, there are good arguments that this would extend to a duty to prevent sexual harassment. For example, a guideline released by Safe Work Australia dealing with work-related psychological health and safety mentioned sexual harassment as a factor that can contribute to poor workplace relationships and as an area that requires clear administrative controls.²⁵ However, as the Inquiry found, despite this duty there is no express prohibition on sexual harassment in the WHS regime and

sexual harassment has not been adequately understood and treated as a health and safety hazard and risk in the workplace.²⁶

62. A key advantage of introducing a specific positive duty into the SDA is one of clarity. Far from increasing the burden on employers, a new positive duty under the SDA would clarify existing obligations and encourage better practice on the part of employers to meet those obligations.
63. To ensure that there is broad understanding of the actions required as a result of a positive duty in discrimination law, and to enable organisations time to assess their current business practices, the Commission considers that it would be appropriate to stage the introduction of a positive duty by providing a 12 month period of time before it came into legal effect.

Recommendation 5

The Commission recommends that the *Sex Discrimination Act 1984* (Cth) be amended to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered, including, but not limited to:

- (a) the size of the person's business or operations
- (b) the nature and circumstances of the person's business or operations
- (c) the person's resources
- (d) the person's business and operational priorities
- (e) the practicability and the cost of the measures
- (f) all other relevant facts and circumstances.

(b) Enforcement of a positive duty

64. The Inquiry heard from the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) that in order for a positive duty to be most effective, it should be accompanied by powers of enforcement.²⁷
65. In the Respect@Work report, the Commission recommended that it be given the function of assessing compliance with a positive duty and for

enforcement. It made a number of suggestions as to how this enforcement function could be carried out which were based on similar existing regulatory models.

66. VEOHRC has a number of existing enforcement powers including conducting inquiries into compliance with positive duties, and entering into an agreement with a person about action required to comply with a positive duty which can then be registered with the Victorian Civil and Administrative Tribunal (VCAT) and enforced as an order of VCAT.
67. The UK Equality and Human Rights Commission is responsible for regulating the public sector equality duty and has the power to issue a compliance notice if it considers that an organisation has failed to comply. It may also apply to the courts for an order requiring compliance with the equality duty.
68. It would be appropriate for equivalent functions to be given to the Commission in relation to a positive duty included in the SDA.

Recommendation 6

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

- (a) undertake assessments of the extent to which an organisation has complied with the duty, and issue compliance notices if it considers that an organisation has failed to comply
- (b) enter into agreements/enforceable undertakings with the organisation
- (c) apply to the Court for an order requiring compliance with the duty.

5 Amendments to the Fair Work Act

5.1 Stop sexual harassment orders

69. An important part of integrating protections against sexual harassment across discrimination and workplace laws is the introduction of 'stop sexual harassment orders' which will be able to be issued by the Fair Work Commission.
70. The 'stop sexual harassment orders' in proposed new s 789FF(1) of the *Fair Work Act 2009 (Cth)* (Fair Work Act) are based on the existing 'stop

bullying orders' and implement recommendation 29 of the Respect@Work report.

71. A worker will be able to apply to the Fair Work Commission for an order. If the Fair Work Commission is satisfied that the worker has been sexually harassed at work by one or more individuals, and that there is a risk that this conduct will be repeated, it may make an appropriate order to prevent the worker from being sexually harassed in the future. Importantly, unlike the existing stop bullying orders, a worker will be able to apply for a stop sexual harassment order after a single instance of sexual harassment and it will not be necessary for the worker to separately demonstrate that the sexual harassment is a risk to health and safety. This is because, as the Government has identified in the Explanatory Memorandum, sexual harassment is a known and accepted work health and safety risk.²⁸ Breach of a stop bullying order or a stop sexual harassment order gives rise to civil remedies.
72. These kinds of orders provide a quick, inexpensive and flexible way to deal with workplace misconduct where the ultimate aim of both the worker and the business is to restore the working relationship. The introduction of a specific stop sexual harassment order will provide an alternative, and less adversarial, way for victims of sexual harassment to have their concerns addressed.
73. When the Commission made its recommendations in the Respect@Work report dealing with the introduction of a stop sexual harassment order, sexual harassment was the only kind of harassment then prohibited in the SDA. As noted above, the Bill will now introduce a separate prohibition against sex-based harassment. The Government's aim in delineating the scope of sex-based harassment has been to prohibit harassment that is different in kind but of the same degree of significance as sexual harassment (see [31] above). It is clear that sex-based harassment is also a work health and safety issue.
74. The Commission considers that it is appropriate for the Fair Work Commission to also have the ability to make orders that may be necessary to stop sex-based harassment from occurring. Such an amendment is consistent with the Government's objectives in introducing the Bill and with the way in which its reforms in this area have been structured.

75. The Bill treats sexual harassment and sex-based harassment in the same way throughout the SDA, for example in relation to the availability of ancillary liability or vicarious liability. It is appropriate that they are also treated the same way in the Fair Work Act. This will improve the coordination, consistency and clarity between the anti-discrimination and work health and safety legislative schemes. It will also ensure, appropriately, that there is a range of graduated alternatives available to respond to sex-based harassment.

Recommendation 7

The Commission recommends that the *Fair Work Act 2009* (Cth) be amended to allow the Fair Work Commission to make a stop sex-based harassment order.

5.2 Termination of employment for sexual harassment

76. In response to concerns raised by employers, the Commission recommended in the Respect@Work report that s 387 of the Fair Work Act be amended to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal, in determining whether a dismissal was harsh, unjust or unreasonable.²⁹
77. The Bill would insert a legislative Note to s 387 in the following form:

Note: For the purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:

 - (a) the person sexually harasses another person; and
 - (b) the person does so in connection with the person's employment.
78. Legislative Notes form part of the Act and may be referred to for interpretative purposes.³⁰
79. Separately, the Government has confirmed that it will also implement recommendation 31 from the Respect@Work report and amend the definition of 'serious misconduct' in the Fair Work Regulations to include sexual harassment.³¹
80. For the reasons set out in section 5.1 above, these reforms should also be extended to the new prohibition on sex-based harassment introduced by this Bill.

Recommendation 8

The Commission recommends that clause 10 of the Bill be amended to clarify that sex-based harassment can be conduct amounting to a valid reason for dismissal, in determining whether a dismissal was harsh, unjust or unreasonable.

Recommendation 9

The Commission recommends that the definition of ‘serious misconduct’ in the Fair Work Regulations 2009 (Cth) be amended to include sex-based harassment.

5.3 Further review of the Fair Work system

81. Section 5.5 of the Respect@Work report examined a number of ways in which sexual harassment is indirectly regulated through the Fair Work system but noted that there was no express prohibition on sexual harassment. The Commission recommended that the Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the Sex Discrimination Act, is expressly prohibited.³²
82. The Government agreed with this recommendation in principle in its ‘Roadmap for Respect’ and committed to reviewing the Fair Work system for this purpose once these initial amendments have been implemented and their impact assessed.
83. The Commission looks forward to working with the Government and the Respect@Work Council on this review.

5.4 Miscarriage leave

84. In addition to implementing a range of recommendations from the Respect@Work report, the Bill would also make an amendment to the Fair Work Act to provide that national system employees are entitled to take up to two days compassionate leave if they, or their spouse or de facto partner, has a miscarriage.
85. This builds on amendments to the Fair Work Act made by the *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020* (Cth). That Act introduced improved access to unpaid parental leave and compassionate leave for families dealing with the trauma of stillbirths, infant deaths and premature births.

86. The Commission supports the new provisions.

6 Amendments to the Australian Human Rights Commission Act

87. The Bill proposes two sets of amendments to the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). Both sets of amendments are welcome and implement important recommendations from the Respect@Work report. However, because the AHRC Act deals with complaints of unlawful discrimination under all federal discrimination laws, and not just the SDA, some further amendments are required in order to ensure clarity and operational consistency.

6.1 Victimisation

88. Victimisation involves retaliatory action, or the threat of such action, against a person because they sought to rely on 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 she made a complaint of sexual harassment against her manager would be entitled to make a claim of victimisation.
89. In the Respect@Work report, the Commission noted that prior to 2011 courts had held that victimisation provisions under each of the federal discrimination laws could give rise to both civil and criminal proceedings.³³ This is because:
- the AHRC Act permits complaints to be made to the Commission of ‘unlawful discrimination’ (s 46P)
 - the definition of ‘unlawful discrimination’ in s 3 of the AHRC Act includes conduct that would be an offence under the victimisation provisions in each of the four federal discrimination Acts
 - once a complaint of unlawful discrimination is terminated by the Commission, a person on whose behalf the complaint was lodged may bring proceedings in the Federal Court alleging unlawful discrimination by the respondent to the terminated complaint.
90. However, since 2011, there have been three cases dealing with victimisation provisions under both the SDA and the *Disability Discrimination Act 1992* (Cth) (DDA) which have cast doubt on whether

the Federal Circuit Court and the Federal Court have jurisdiction to determine a complaint of victimisation as part of a civil proceeding. This is because victimisation under s 94 of the SDA and s 42 of the DDA (and also under s 27(2) of the *Racial Discrimination Act 1975* (Cth) (RDA) and s 51 of the *Age Discrimination Act 2004* (Cth) (ADA)) is a criminal offence.

91. The Explanatory Memorandum makes clear that the Government's intention has always been that the provisions in relation to victimisation in all four of these Acts can form the basis of two causes of action: one civil and one criminal.³⁴
92. In order to remedy the legal uncertainty created by the recent court decisions, and to clarify that victimisation is unlawful discrimination that can form the basis of a civil proceeding, the Bill will make two amendments:
 - s 3 of the AHRC Act will be amended to remove the criminal victimisation provision (s 94 of the SDA) from the definition of 'unlawful discrimination'
 - a new s 47A, comprising a separate civil prohibition of victimisation in substantially the same terms, will be inserted into Part II of the SDA.
93. The effect of these two amendments will be that, going forward, the criminal prohibition on victimisation in the SDA (s 94) will no longer fall within the definition of 'unlawful discrimination' but the new civil prohibition on victimisation in the SDA (s 47A) will. All new complaints to the Commission of victimisation under the SDA will be made under the new s 47A and, if the complaint cannot be conciliated, the complainant will have the right to bring civil proceedings in the Federal Circuit Court or the Federal Court. Transitional provisions have been inserted into the Bill to deal with complaints that have already been made under s 94 of the SDA.
94. While these amendments will create certainty in relation to victimisation under the SDA, without equivalent amendments being made in relation to the DDA, RDA and ADA, they have the potential to create further uncertainty in relation to victimisation under those other Acts.
95. The Explanatory Memorandum says that it is not the Government's intention to create uncertainty by amending only one of the four victimisation provisions,³⁵ but this may well be the outcome. This is

because the Explanatory Memorandum for this Bill is likely to carry little interpretive weight when seeking to construe the meaning of provisions in other Acts that are already on the statute books.

96. The Commission considers that the most appropriate course is to amend the victimisation provisions in the DDA, RDA and ADA in the same way as proposed for the SDA. This will create real certainty that the Government's intention will be met.

Recommendation 10

97. The Commission recommends that necessary legislative amendments be made to clarify that victimisation under all four federal discrimination Acts can form the basis of a civil action for unlawful discrimination.

6.2 Termination of complaints

98. 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.³⁶
99. 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 bring proceedings in a court alleging unlawful discrimination.³⁷
100. The AHRC Act contains both mandatory termination grounds³⁸ and discretionary termination grounds.³⁹ One of the discretionary termination grounds relates to the period of time since the relevant conduct complained of occurred. Section 46PH(1)(b) provides that the President has discretion to terminate a complaint on the ground that it was lodged more than 6 months after the alleged acts, omissions or practices took place.
101. Prior to 13 April 2017, the President had discretion to terminate a complaint on the ground that it was lodged more than 12 months after the alleged acts, omissions or practices took place.
102. The period referred to in s 46PH(1)(b) is not a fixed time limit within which complaints must be lodged. Because it is a discretionary ground, the President may take into account a range of relevant circumstances in determining whether termination on this ground is

appropriate. For example, the President may have regard to the following factors:

- length of delay
 - reasons for the delay
 - prejudice to respondent or complainant
 - whether other remedies have been sought and/or achieved in relation to the subject matter of the claim
 - whether steps were taken to try to resolve the matter internally or through criminal proceedings
 - the arguable merits of the complaint
 - whether the complainant was and/or is legally represented
 - adverse health and family circumstances
 - any other specific factors relevant in an individual case.
103. The Inquiry received a large number of submissions that supported extending the time period before which the President of the Commission can terminate a complaint. These submissions argued that the current six-month timeframe fails to recognise the complex reasons for an applicant's delay in making a complaint immediately after an alleged incident of sexual harassment, which can include the impact of the harassment on their well-being, fear of victimisation, lack of awareness of their legal rights, or where they are awaiting the outcome of an internal workplace investigation.
104. The Commission considered that at a minimum, the President's discretion to terminate a complaint should be restored to the previous timeframe, which means it would not arise unless it has been more than 12 months since the alleged unlawful discrimination took place.
105. However, in light of the strong feedback received from stakeholders through the course of the Inquiry, the Commission ultimately recommended that the timeframe be extended to two years, to address the above concerns regarding the complex reasons for the delay in bringing a sexual harassment complaint.
106. Given the focus of the Inquiry, recommendation 22 of the Respect@Work report was expressed in terms of the termination of complaints under the SDA. It recommended that the President's discretion to terminate a complaint under the SDA on the grounds of

time not arise until it has been 24 months since the alleged unlawful discrimination took place. This recommendation has been reflected in clause 3 of the Bill. That clause provides that:

- if a complaint relates to the SDA, the President's discretion to terminate the complaint arises if it has been more than 24 months since the alleged conduct took place; but
 - in any other case, the President's discretion to terminate the complaint arises if it has been more than 6 months since the alleged conduct took place.
107. If the Bill is passed in this form, this will be the only termination ground in the AHRC Act that has a different effect depending on the Act under which the complaint was made. Stakeholders to the Inquiry, both duty holders and rights bearers emphasised the need for clarity and consistency in the regulatory framework. For the following reasons, the Commission considers that a differential operation of termination provisions has the potential to create confusion and is undesirable.
108. As noted in [45] above, the Respect@Work report emphasised that framing an appropriate regulatory response to sexual harassment required examining the problem through an intersectional lens.⁴⁰
109. The experience of the Commission is that many people who make complaints under the SDA also make related complaints under the DDA or RDA in relation to the same conduct. If the conduct occurred between 6 months and 24 months previously, the President would not have the discretion to terminate the complaint in so far as it related to the SDA, but would be able to terminate the complaint in so far as it related to the DDA or RDA. This is an undesirable result.
110. Further, the differences in time frames may also give rise to arguments that complaints under the DDA, RDA or ADA *should* be terminated if the conduct fell within this intermediate period because the legislation draws a distinction between different kinds of complaints.
111. The Commission notes that the factors referred to in the Respect@Work report which explained why there may be a delay in an applicant bringing a complaint of sexual harassment also apply to a range of other complaints including discrimination on the grounds of disability or race. In these cases, too, an applicant's delay in making a complaint immediately after an alleged incident can be affected by the impact of the conduct on their well-being, fear of victimisation, lack of

awareness of their legal rights, or where they are awaiting the outcome of an internal workplace investigation.

112. The Commission’s strong preference is for the period of time in s 46PH(1)(b) to apply consistently regardless of the Act that the complaint relates to.
113. Consistently with the position taken in the Respect@Work report, the Commission submits that this period should be 24 months.

Recommendation 11

The Commission recommends that s 46PH(1)(b) of the AHRC Act be amended to provide that the President may terminate any complaint that was lodged more than 24 months after the alleged acts, omissions or practices took place.

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>.
- ² Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (2021), at <https://www.ag.gov.au/rights-and-protections/publications/roadmap-for-respect>.
- ³ Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020) (Respect@Work report), recommendation 16(a).
- ⁴ *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.
- ⁵ Respect@Work report, 444–447.
- ⁶ Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at [156].
- ⁷ Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at [141].
- ⁸ Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at [140].
- ⁹ Respect@Work report, recommendation 16(c).
- ¹⁰ Respect@Work report, 74–78.
- ¹¹ Australian Human Rights Commission, *Discussion paper: Priorities for federal discrimination law reform*, October 2019, 9–10, at <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/discussion-paper-priorities-federal-discrimination-law>.
- ¹² Respect@Work report, 10.
- ¹³ Respect@Work report, 19.
- ¹⁴ SDA, 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.
- ¹⁵ Respect@Work report, recommendation 17.
- ¹⁶ SDA, s 106.
- ¹⁷ Australian Human Rights Commission, *Ending Workplace Sexual Harassment: A Resource for Small, Medium and Large Employers* (2014), at <https://humanrights.gov.au/our-work/sex-discrimination/publications/ending-workplace-sexual-harassment-resource-small-medium>.
- ¹⁸ Respect@Work report, 75, 197 and 411.
- ¹⁹ Respect@Work report, 182 and 703.
- ²⁰ Respect@Work report, 190.
- ²¹ Respect@Work report, 185–186.
- ²² Australian Human Rights Commission, *Everyone's Business: Fourth national survey on sexual harassment in Australian workplaces* (2018), 67.
- ²³ Respect@Work report, 478.
- ²⁴ *Work Health and Safety Act 2011* (Cth), ss 4 (definition of 'health') and 19.
- ²⁵ Safe Work Australia, *Work-related psychological health and safety: A systematic approach to meeting your duties* (National Guidance Material, January 2019), 10 and 20, at <https://www.safeworkaustralia.gov.au/doc/work-related-psychological-health-and-safety-systematic-approach-meeting-your-duties>.

²⁶ Respect@Work report, 538 and 543–544.

²⁷ Respect@Work report, 476–477.

²⁸ Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at [38].

²⁹ Respect@Work report, recommendation 30 and 532–533.

³⁰ *Acts Interpretation Act 1901* (Cth), s 13.

³¹ Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (2021), 15–16.

³² Respect@Work report, recommendation 28.

³³ Respect@Work report, 488–490; see also Australian Human Rights Commission, *Federal Discrimination Law* (2016), 159–161.

³⁴ Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at [4] and [197].

³⁵ Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, at [4] and [197].

³⁶ AHRC Act, ss 8(6) and 11(1)(aa).

³⁷ AHRC Act, s 46PO.

³⁸ AHRC Act, ss 46PH(1B) and (1C).

³⁹ AHRC Act, s 46PH(1)(a)–(h).

⁴⁰ Respect@Work report, 10.