Australian Government
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Consultation Paper: Respect@Work – Options to progress further legislative recommendations

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Overview

1. In 2018, the Government commissioned the National Inquiry into Sexual Harassment in Australian Workplaces, conducted by the Sex Discrimination Commissioner, Kate Jenkins. The product of this inquiry – the *Respect@Work: Sexual Harassment National Inquiry Report (2020)* (Respect@Work Report) – found that sexual harassment is a pervasive and widespread issue in Australian workplaces. According to the 2018 national survey, 39% of women and 26% of men had experienced sexual harassment at work in the past five years[1] but only 17% of these people had lodged a formal report or complaint[2] and only 2% these reports or complaints were finalised in court.[3]

2. The Respect@Work Report sets out 55 recommendations addressed to the Government, states and territories, employers and industry groups to prevent and address sexual harassment in Australian workplaces. The recommendations related to five key areas of focus: data and research, primary prevention, workplace prevention and response, support and advocacy, and legal and regulatory reform.

3. The Government released its response to the Respect@Work Report, titled *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (the Roadmap), on 8 April 2021. The Roadmap sets out the Government's long-term commitment to driving cultural change and building safer and more respectful workplaces. The Government agreed or noted all 55 recommendations of the Respect@Work Report. No recommendations have been rejected by the Government.

4. The Government is taking action to deliver on all its commitments in the Roadmap and has invested more than $66 million in funding for its implementation in the 2020-21 and 2021-22 Budget, including establishment of the Respect@Work Council and legal assistance for those who have experienced workplace sexual harassment. As of February 2022, the Government has fully implemented or fully funded 42 of the 55 recommendations of the Respect@Work Report, and progress continues on remaining recommendations.

5. The Government is aware that some of the states and territories are also looking to progress changes to their legal frameworks relevant to sexual harassment, and will

[1] Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (Survey report, 2018) 8 *('Fourth National Survey')*.
[2] Ibid 79.
[3] Ibid 71.

continue to work with them through the Meeting of Attorneys-General forum to support alignment of laws wherever this would be practically beneficial.[4]

Legislative reform to date

6. The Respect@Work Report made 13 recommendations that related to amending Commonwealth legislation.[5] The Respect at Work Act commenced on 11 September 2021 and implemented six of these recommendations.[6] The Government prioritised these legislative reforms as they could be implemented quickly and immediately strengthened the overarching legal framework with respect to sex discrimination and harassment.

7. This Respect At Work 2021 simplified and enhanced protections to better prevent and respond to workplace discrimination and harassment by:

- introducing a clear definition for sex-based harassment
- extending the protection from sexual harassment to volunteers and interns
- extending the timeframe for which a complaint can be made to the AHRC
- clarifying that sexual harassment can constitute a valid reason for dismissal
- ensuring persons who aid and induce sexual harassment and sex-based harassment can be personally liable, and
- providing for stop sexual harassment orders.

8. In addition, the *Fair Work Amendment (Respect at Work) Regulations 2021* commenced on 10 July 2021 and implemented recommendation 31 by providing clarity that sexual harassment is conduct that can amount to serious misconduct warranting immediate removal from the workplace.

Scope of this consultation process

9. Consistent with its approach outlined in the Roapmap, the Government is now consulting on possible options to progress the remaining six recommendations related to the Sex Discrimination Act and the AHRC, to amend Commonwealth legislation. These include recommendations to:

[4] For example, the ACT Government is consulting on the modernisation of its discrimination law: ACT Government, *Discrimination Law Reform* (Web Page) <https://yoursayconversations.act.gov.au/discrimination-law-reform>.
[5] Recommendations 16-23, 25, 28-30, 43.
[6] Recommendations 16(a)(b)(d)(e), 20-22, 29, 30.

Recommendation 16(c) – provide that creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited[7]

Recommendations 17 and 18 – introduce a positive duty on employers to prevent sexual harassment from occurring and provide the AHRC with the function of assessing compliance with the positive duty, and for enforcement[8]

R**ecommendation 19** – provide the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination, including sexual harassment[9]

Recommendation 23 – allow unions and other representative groups to bring representative claims to court[10], and

Recommendation 25 – insert a cost provision into AHRC Act to provide that a party to proceedings may only be ordered to pay the other party's costs in limited circumstances.[11]

10. These recommendations raise complex policy issues and are more closely intertwined with existing legislative frameworks, such as WHS laws. It is important that any measures complement and do not complicate the existing legal frameworks. Therefore, further consideration and consultation is required to inform any next steps taken by the Government in relation to these recommendaitons.

11. The Government is seeking feedback on whether these six legislative recommendations can and should be implemented and, if so, options for implementation. The Government is interested in views from legal experts, legal practitioners, representative organisations, employers and businesses and, particularly, individuals who have experienced sexual harassment and engaged with the legal process.

12. This consultation process does not include consideration of recommendation 28 because in the Roadmap, the Government committed to consider implementing recommendation 28 (which is to review the FW Act to explicitly prohibit sexual harassment), once

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[7] Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (Report, 29 January 2020) 451-70 (*'Respect@Work Report')*. Note: all page number references to the Roadmap are taken from the pdf version of the Report.
[8] *Respect@Work Report* (n 31) 470-82
[9] *Respect@Work Report* (n 31) 482-85
[10] *Respect@Work Report* (n 31) 496-501
[11] *Respect@Work Report* (n 31) 507

recommendation 16 (amendments to the Sex Discrimination Act) has been implemented and its impact can be assessed.

13. The Government recently amended the Sex Discrimination Act to implement most aspects of recommendation 16 through the Respect at Work Act. The Government also made a number of amendments to the FW Act to clarify that sexual harassment can constitute a valid reason for dismissal and that the Fair Work Commission can make orders to stop sexual harassment at work. Taken together, these changes clarify that the FW Act can deal with sexual harassment in the workplace.

14. Commencing in November 2022, the Attorney-General's Department will conduct an assessment of the impacts of the Respect at Work Act amendments once they have been in operation for 12 months and provide further advice to the Government on recommendation 28.

15. This consultation process does not include consideration of recommendation 43, which relates to the amendment of the *Workplace Gender Equality Act 2012* (Cth). The Department of the Prime Minister and Cabinet is leading the implementation of recommendation 43. The Workplace Gender Equality Agency and the Australian Public Service Commission were allocated $6 million in funding to implement recommendations 42 and 43. These recommendations have also been considered by the recent Review of the *Workplace Gender Equality Act 2012* (Cth).

16. This scope of this consultation process is on the Respect@Work recommendations and does not seek feedback on options for uniform amendments to all anti-discrimination legislation or for broader anti-discrimination reform. These issues can be more appropriately considered in the context of the AHRC's recently released *Free and Equal: A reform agenda for federal discrimination laws (2021)* report,[12] as part of their *Free and Equal: A National Conversation on Human Rights* project.

17. Sexual violence including assault, abuse and harassment is also relevant to criminal law frameworks, including state and territory laws; these laws are beyond the scope of this consultation process.

[12] Australian Human Rights Commission, *Free and Equal: A reform agenda for federal discrimination laws* (Report, December 2021).

How can you engage with the consultation process?

18. Individuals and organisations are invited to complete a survey on Citizen Space. The survey is informed by the discussion and options set out in this paper. It is not necessary to complete every question in the survey. Individuals and organisations are welcome to only respond to those questions that are relevant to them or their organisation. It is also possible to save your progress on the survey and return at a later time if needed.

19. The survey will open on Monday 14 February 2022 and close on Friday 18 March 2022.

Seeking support

20. If you or someone you know needs support or advice, you can contact 1800RESPECT for free, national telephone advice. For information and referrals on discrimination issues, you can contact the Australian Human Rights Commission on 1800 656 419 or email infoservice@humanrights.gov.au or visit their website at https://humanrights.gov.au/complaints/make-complaint.

Issue 1: Recommendation 16(c) – Hostile work environment

Context

21. The Respect@Work Report recommended that the Sex Discrimination Act be amended to expressly prohibit creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex (recommendation 16(c)). The intent of recommendation 16(c) is to prohibit conduct that creates a hostile work environment in a general sense, rather than requiring conduct to be directed towards a particular person.

22. The Respect@Work Report noted that this issue could also be addressed through better education and guidance materials for workplaces, including good practice sexual harassment and discrimination workplace policies, procedures and practices for employers.

23. In the Roadmap, the Government agreed-in-principle to recommendation 16 as a whole, noting that it would amend the Sex Discrimination Act to ensure greater alignment with model WHS laws and to make the system for addressing sexual harassment in the workplace easier for employers and workers to understand and navigate.[13]

Current legal framework

Anti-Discrimination Framework

24. The Sex Discrimination Act provides that it is unlawful to discriminate against a person in specified areas of public life because of their sex (and other protected attributes).[14] It also makes it unlawful to engage in sexual or sex-based harassment in specified areas of public life.[15]

25. The Sex Discrimination Act also provides that an employer will be vicariously liable for sexual harassment (or other unlawful conduct under the Act) by an employee or agent, where the sexual harassment occurred 'in connection with' their employment or duties

[13] Attorney-General's Department, *A Roadmap for Respect: Addressing and Preventing Sexual Harassment in Australian Workplaces* (Australian Government response, 8 April 2021), 13 *('Roadmap')*. Note: all page number references to the Roadmap are taken from the pdf version of the Roadmap.

[14] *Sex Discrimination Act 1984* (Cth) ss 5 – 7A, 14 – 27.

[15] Ibid ss 28A – 28L; *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) s 28AA.

and the employer did not take 'all reasonable steps to prevent' the alleged discrimination or harassment from occurring.[16]

26. The Sex Discrimination Act does not expressly prohibit conduct that creates an intimidating, hostile, humiliating or offensive environment. However, Australian case law recognises the concept of a hostile work environment in relation to complaints of sexual harassment and sex discrimination.

27. Australian anti-discrimination case law recognises that subjecting an employee to a hostile work environment that is sexual in nature can constitute sex discrimination and/or sexual harassment.[17] A hostile work environment has been defined as 'conduct of a sexual nature in which another person, whether the intended target or not, who has not sought or invited the conduct, experiences offence, humiliation or intimidation and, in the circumstances, a reasonable person would have anticipated that reaction.'[18] The key difference between a hostile work environment and sexual harassment or bullying is that the conduct is not targeted at a particular person, but creates a generally hostile environment. The concept of a hostile work environment has also been found to apply where a pattern of behaviour is designed to exclude a person on the basis of sex and make them feel uncomfortable and unwelcome.[19]

28. Case law has found that conduct may amount to sex discrimination and sexual harassment even if the conduct is not necessarily directed at a particular person (although these cases do not specifically refer to a hostile work environment). Such conduct considered in this case law has included but is not limited to:

- foul language,[20]
- offensive or nuisance telephone calls[21]
- workplace culture that has a pre-occupation with sex and inappropriate behaviour with sexual connotations and sexual innuendos,[22]
- dirty jokes (including by email),[23]
- sexually explicit pranks,[24]

[16] *Sex Discrimination Act* (n 13) s 106.
[17] *O'Callaghan v Loder and the Commissioner for Main Roads* [1983] 3 NSWLR 89.
[18] *Johanson v Michael Blackledge Meats* [2001] FMCA 6, [89].
[19] See, eg, *Hill v Water Resources Commission* [1985] EOC 92-127.
[20] *GrainCorp Operations Limited* v *Markham* (2003) EOC 93-250.
[21] *Hill v Water Resources Commission* (1985) EOC 92-127.
[22] *Coughran v Public Employment Office/Attorney General's Department* [2003] NSWIRComm 181.
[23] *Torres v Commissioner of Police* (2017) 69 AILR 200-580 ('*Torres*').
[24] *Green v Queensland, Brooker and Keating* (2017) EOC 93-816.

- suggestions or innuendo,[25]
- showing pornography,[26]
- posting of pin-ups in the workplace,[27] and
- unwelcome remarks about a person's sex or private life,[28] and
- asking employees or co-workers questions about their sex lives or underwear.[29]

Work Health and Safety Laws

29. The model WHS laws require employers and other PCBUs to provide a safe working environment for workers, so far as is reasonably practicable.[30] This includes the obligation to take positive steps to prevent and, if necessary, address conduct that creates or facilitates an intimidating, hostile, humiliating or offensive work environment. This duty is owed to each individual worker and so PCBUs may need to consider the ways that a particular worker may be impacted by the work environment. In practice, this requires the implementation of measures by PCBUs such as having policies in place, conducting training and addressing incidents. The model WHS laws are predicated on a risk management approach, meaning that penalties can be applied for exposing workers and others in the workplace to risks (such as sexual harassment), rather than relying on an incident actually occurring.

30. In addition, the model WHS laws require workers to take reasonable care to ensure that their acts and omissions do not adversely affect the health and safety of others at the workplace.[31] This would capture acts which contribute to a hostile work environment (such as harassment and bullying) and in some circumstances omissions, such as being a passive bystander.

31. A number of actions have been taken since release of the Respect@Work Report to improve the understanding of WHS obligations in relation to sexual harassment and highlight its importance in creating and maintaining a safe and healthy working environment (see **Issue 2: Recommendation 17 – positive duty**).

32. As WHS in Australia is a shared responsibility, each jurisdiction is responsible for regulating and enforcing WHS laws in their own jurisdictions, and each jurisdiction has their own regulator. While each regulator has their own policies and procedures, WHS regulators

[25] *Taylor v Sciberras* (2004) EOC 93-337.
[26] *Wilkinson v Buchan* (2003) EOC 93-290.
[27] *Horne v Press Clough Joint Venture & Anor* (1994) EOC 92-556.
[28] *Torres* (n 22).
[29] *Dobrovsak v AR Jamieson Pty Ltd & Anor* (1996) EOC 92-794; *Smith* v *Buvet & Anor* (1996) EOC 92-840; Ibid.
[30] *Work Health and Safety Act 2011* (Cth) s 19.
[31] Ibid s 28.

recognise the need for a nationally consistent approach to compliance and enforcement of WHS laws.

33. WHS regulators inspect workplaces, and advise on and enforce laws, including to:

- provide advice about rights, duties and responsibilities, and complying with local laws
- assist PCBUs, workers and others to resolve WHS issues, and
- ensure compliance by issuing notices.

34. Regulators may also issue sanctions, including:

- giving infringement notices
- accepting enforceable undertakings, and
- commencing prosecutions.

Fair Work Act

35. The FW Act provides the Fair Work Commission with jurisdiction to make orders to stop bullying or sexual harassment at work. For the purposes of this jurisdiction, a worker is bullied at work if they are subject to repeated unreasonable behaviour by an individual or group of individuals that creates a risk to health and safety. Unreasonable behaviour includes behaviour that is victimising, humiliating, intimidating or threatening. This is in contrast to what it means for a person to be sexually harassed at work, where there is no requirement for unwelcome conduct of a sexual nature to be repeated.

36. These provisions provide an avenue of redress in relation to workplace conduct that is intimidating, hostile, humiliating or offensive in nature where the conduct is directed at a worker while they are in a workplace setting.

37. The jurisdiction is primarily intended to address conduct that poses a risk to the health and safety of a worker. This aligns with the jurisdiction being founded on work health and safety concepts.

Issues with the current legal framework

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

framework.[32] While individual cases have found sex discrimination and sexual harassment to be made out when elements of a hostile work environment have been present, these cases turned on their individual circumstances and how the particular work environment amounted to sexual harassment.[33] However, under WHS laws a hostile work environment is a health and safety risk that a PCBU is required to eliminate or minimise so far as is reasonably practicable.

39. The WHS and Sex Discrimination Act frameworks have different compliance and enforcement models. WHS laws are enforced by WHS regulators and non-compliance can constitute a criminal offence. Under the Sex Discrimination Act, complaints can be made by individuals to the AHRC. The purpose of any legislative amendment prohibiting this conduct under the Sex Discrimination Act would be to provide a complaints-based mechanism for dealing with hostile work environments and additional clarity that such conduct is unacceptable in the workplace.

Options to address the issues raised in the Respect@Work Report

40. Recommendation 16(c) seeks to prohibit conduct that creates a hostile work environment in a general sense, rather than requiring conduct be directed towards a particular person. There are complexities associated with this type of proposal, including the potential scope of any prohibition, and setting a suitable threshold to ensure only relevant conduct would be captured and the interaction with existing frameworks.

41. Non-legislative options could also be considered to increase awareness and to clarify that a hostile work environment on the basis of sex is a form of sexual harassment and/or sex discrimination. The AHRC, SWA and workplace regulators have extensive guidance material on their websites about meeting existing obligations to prevent sexual harassment. In addition, WHS regulators offer training about managing and addressing sexual harassment in the workplace. The development of further guidance materials and education programs specifically relating to hostile work environments could build on this foundation.

Who is responsible for ensuring an appropriate work environment?

42. A proposal implemented consistently with recommendation 16(c) may apply to any person who plays a role in creating or facilitating an intimidating, hostile, humiliating or

[32] *Respect@Work Report* (n 31) 460.
[33] *O'Callaghan v Loder and the Commissioner for Main Roads* [1983] 3 NSWLR 89; *Hill v Water Resources Commission* [1985] EOC 92-127; *Horne v Press Clough Joint Venture* [1994] EOC 92, 92-591; *Carter v Linuki Pty Ltd trading as Aussie Hire & Fitzgerald (EOD)* [2005] NSWADTAP 40, 11-18.

offensive work environment on the basis of sex, such as a person who puts up an offensive poster in a workplace or someone who witnesses this conduct and decides not to act to address it. This approach would need to be considered carefully, particularly in relation to implications for bystanders or people with little control over the workplace environment.

43. A legislative response to address recommendation 16(c) would overlap with existing WHS laws. In this context, under WHS laws, workplaces already have a duty to ensure workplaces are not hostile, humiliating or offensive. Further, workers already have a duty under WHS laws to take reasonable care not to engage in conduct that harms the health of others. Given this overlap and existing legal obligations, any legislative proposal would need to reflect the interactions with the existing WHS framework and the Sex Discrimination Act to ensure that complexity is minimised for employees, employers and victims and to achieve the outcomes identified in the Respect@Work Report.

44. A prohibition against creating or facilitating a hostile work environment would likely be consistent with other prohibitions in the Sex Discrimination Act where an applicant can only bring a complaint after an incident has occurred. It is possible that hostile work environments could be addressed more effectively and in a preventative way through work currently underway to strengthen and enhance the WHS framework or through consideration of introducing a positive duty into the Sex Discrimination Act (see **Issue 2: Recommendation 17 – positive duty**).

Issue 2: Recommendation 17 – Positive duty

Context

45. The Respect@Work Report observed that the current framework provided by the Sex Discrimination Act is not playing an effective role in preventing sexual harassment. To address this challenge, the Respect@Work Report recommended that a positive duty, requiring employers to 'take reasonable and proportionate measures to *eliminate* sex discrimination, sexual harassment and victimisation, as far as possible,' be introduced into the Sex Discrimination Act.

46. In the Roadmap, the Government noted the existing positive duty in the model WHS laws and its application to sexual harassment, noted the Respect@Work Report's findings that the current system for addressing workplace sexual harassment is complex and confusing for individuals and employers to navigate, and undertook to assess whether introducing a

positive duty in the Sex Discrimination Act would create further complexity, uncertainty or duplication in the overarching legal framework.[34]

47. The positive duty recommended by the Respect@Work Report is intended to operate alongside the existing vicarious liability provision in the Sex Discrimination Act, which relates to the liability of employers for unlawful acts done by their employees. Under this provision, an employer is not liable for the unlawful conduct of their employees, such as incidents of sexual harassment, if they have 'taken all reasonable steps' to prevent their employees from engaging in the conduct. This would mean that employers would need to be proactively preventing discrimination and harassment in order to manage their potential liability under the Sex Discrimination Act.

48. The Respect@Work Report proposed a positive duty on the basis it would shift the burden of addressing sexual harassment away from individuals making complaints and encourage a focus on prevention rather than remediation. Employers would be responsible for taking proactive steps to prevent sexual harassment, discrimination and victimisation from occurring in the first place.

49. The Respect@Work Report acknowledged the existing positive duty under the model WHS laws and the potential for duplication with the proposed positive duty in the Sex Discrimination Act. The Respect@Work Report view was that introducing a positive duty into the Sex Discrimination Act would complement, rather than duplicate, the overarching legal framework. The Respect@Work Report did not explore how this would operate in practice.

50. The enforcement aspects of a positive duty are separately addressed in the discussion of **Issue 3: Recommendation 18 – Enforcement**.

Current legal framework

Anti-Discrimination Framework

51. The Sex Discrimination Act makes it unlawful to discriminate against a person in specified areas of public life, such as employment, because of their sex (and other protected attributes).[35] It also makes it unlawful for a person to engage in sexual or sex-based harassment in specified areas of public life.[36]

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[34] *Roadmap* (n 12) 14.
[35] *Sex Discrimination Act* (n 13) ss 5 – 7A, 14 – 27.
[36] Ibid ss 28A – 28L; *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) s 28AA.

52. The Sex Discrimination Act also provides that an employer will be vicariously liable for unlawful conduct by an employee or agent, including sexual harassment, if the conduct occurred 'in connection with' their employment or duties.[37] However, an employer will not be held vicariously liable if they can establish that they took 'all reasonable steps' to prevent the alleged acts from taking place. This provision applies to all businesses – regardless of their size.

53. This provision means that a person who has experienced unlawful discrimination 'in connection with' their employment can initiate action against their employer *in addition to* the alleged perpetrator. If a complaint progresses to litigation in the federal courts, an employer could ultimately be liable for damages. To avoid liability, the employer would need to establish that they 'took all reasonable steps' to prevent the alleged conduct from occurring. Therefore, in practice, this provision requires employers to take proactive and preventative action in order to avoid liability under the Sex Discrimination Act. These steps are likely to be consistent with steps taken to implement other workplace obligations of employers or PCBUs under the WHS framework.

54. The meaning of 'all reasonable steps' is determined on a case-by-case basis as it is not defined in the Sex Discrimination Act. However, there is substantial case law discussing and interpreting the term,[38] including consideration of preventative action required by employers based on the size and particular circumstances of their business. For example, larger organisations are generally required to take more steps than smaller businesses due to their comparative size, structure and resources.

55. The AHRC currently issues guidance to assist businesses of all sizes to understand the meaning of 'all reasonable steps' in their particular circumstances and ensure they are equipped to prevent sexual harassment. For example, it is recommended that businesses write and implement a sexual harassment policy, establish an appropriate complaints handling process, and provide regular training on sexual harassment to all staff and management.

56. The existing vicarious liability provision in the Sex Discrimination Act highlights that the prevention of unlawful discrimination, including sexual harassment, should be an integrated part of an employer's risk management approach. Rather than being viewed as

[37] *Sex Discrimination Act* (n 13) s 106.

[38] *Respect@Work Report* (n 31) 485-6; Courts have indicated a number of factors will be taken into account in determining if an employer has taken all reasonable steps to prevent the conduct occurring, including whether proactive steps were taken prior to the act of discrimination and the size of the employer and the prevention measures taken relative to their circumstances (see, eg, *Boyle v Ishan Ozden* (1986) EOC 92-165 at 76,614, *Johanson v Blackledge* [2001] FMCA 6, [101]).

an additional burden or responsibility on employers, 'taking all reasonable steps' should be an inherent and non-negotiable part of doing business.

Work Health and Safety Framework

57. Under the model WHS laws, sexual harassment in the workplace is recognised as a hazard and risk to health and safety. The positive duty in the model WHS laws require PCBUs to ensure, so far as reasonably practicable, the health and safety of workers and other persons to ensure they are not put at risk from work carried out as part of the business or undertaking.[39] The model WHS laws provide that 'reasonably practicable' means that which is, or was at a particular time, reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up relevant matters.[40] Failure of duty holders to meet obligations under WHS laws can result in prosecution and severe penalties for individuals and body corporates.

58. The Respect@Work Report considered the operation of the model WHS laws and made a number of findings in relation to their effectiveness with respect to sexual harassment.

59. In accordance with its commitments in the Roadmap, the Government has already taken substantial steps to address failings in the WHS framework in its management of sexual harassment matters, to the extent that they fall within its jurisdiction, and is supporting other jurisdictions in relation to the recommendations that extend across jurisdictions.

60. Since the Respect@Work Report was released, a number of steps have been taken by Government to strengthen the WHS framework:

- The model WHS Regulations are being amended to deal with how to identify and manage psychosocial risks
- A WHS model Code of Practice is being developed on managing psychosocial hazards
- SWA has released guidance on preventing workplace sexual harassment and workplace violence and aggression, including specific guidance for small business and advice for workers
- Comcare convened a virtual Workplace Sexual Harassment National Forum on 11 and 12 November 2021, which included a day for jurisdictional WHS regulators on workplace sexual harassment. The Forum was developed in collaboration with SWA and WHS regulators, and sought to ensure inspectors are equipped to assist businesses and workers to understand their responsibilities in relation to sexual harassment under WHS laws, and

[39] *Work Health and Safety Act 2011* (n 29) s 19.
[40] Ibid s 18.

- Comcare has hosted webinars for relevant employers and managers to help them better understand and meet their obligations in relation to sexual harassment and has released practical guides for workers, supervisors and employers on how to prevent and respond to workplace sexual harassment.

Issues with the current legal framework

61. The Respect@Work Report observed that the current anti-discrimination law framework is largely remedial and responsive in nature. A person who has experienced unlawful discrimination must make a complaint in order for the alleged perpetrator (and potentially their employer) to be held responsible. This means that the onus of addressing discrimination and upholding the framework generally falls to individuals.

62. This complaint-based model also means that the framework is inherently focused on responding to discrimination that has already occurred. The AHRC has also observed that dealing with discrimination 'after the fact' is one reason why anti-discrimination laws have been unable to address entrenched and systemic issues.[41]

63. The Respect@Work and Free and Equal reports both said that establishing a positive duty in the Sex Discrimination Act would represent a symbolic change in the way employers understand their obligations. This is on the basis that a positive duty would focus an employer's attention on *prevention* and risk management, rather than responding to past events. In addition, a positive duty would signal to the community that employers have a responsibility to provide a safe work environment and the burden of addressing discrimination should not fall on individuals.

64. For example, this normative shift was an objective of the Victorian positive duty model, which requires employers to take reasonable and proportionate measures to *eliminate* discrimination, sexual harassment and victimisation in their workplaces as far as possible.[42] The Explanatory Memorandum for the legislation states that 'the duty will mean that duty holders need to think proactively about their compliance obligations rather than waiting for a dispute to be brought to elicit a response … it is intended that, by stating the existing obligations in a positive and explicit way that does not rely on an individual dispute being brought, this duty will promote compliance with the Bill …'[43]

[41] *Free and Equal Report* 58.
[42] *Equal Opportunity Act 2010* (Vic) s 15.
[43] Explanatory Memorandum, Equal Opportunity Bill 2010, 17.

Victorian Legal Aid has observed that this positive duty may have had a normative impact on workplace cultures, however it is largely symbolic as it is not currently enforceable.[44]

65. It is important to note that the vicarious liability provisions in the Sex Discrimination Act already mean that an employer should be 'taking all reasonable steps' to prevent unlawful discrimination from occurring. In practice, this provision already requires employers to take preventative action in their day-to-day operations to avoid potential liability should an incident occur.

66. In addition, the positive duty in the model WHS laws means that employers are already required to ensure, so far as reasonably practicable, the health and safety of their workers. The Respect@Work Report said that the model WHS laws were underutilised and did not adequately address sexual harassment[45] and that some Australian WHS regulators were not actively regulating sexual harassment themselves, instead referring the matters to the relevant human rights and anti-discrimination agencies.[46]

67. Since the Respect@Work Report was released, there have been significant efforts underway to raise awareness of how the WHS frameworks already requires PCBUs to prevent sexual harassment and build regulator and employer expertise in identifying, preventing and managing psychosocial hazards. In light of these existing obligations on businesses to prevent unlawful conduct, there may be merit in considering the effect of including an *express* positive duty in the Sex Discrimination Act that clarifies the existing law to better prevent sexual harassment. Significantly, it is important to understand whether an express positive duty would achieve a better outcome than strengthening and promoting the existing frameworks. For example, undertaking further work to educate employers on their existing obligations and building existing expertise.

68. Further, it is important to assess whether including an express positive duty in the Sex Discrimination Act would create further complexity, uncertainty or duplication in the overarching legal framework, given the Respect@Work Report's observation that the current system for addressing workplace sexual harassment is complex and confusing for both individuals and employers to navigate. It is also important to explore the potential regulatory impact of various overlapping and similar obligations on employers, particularly on small and medium size businesses.

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[44] Victorian Legal Aid, Appearance before the Senate Education and Employment Legislation Committee, Monday 19th July 2021.
[45] *Respect@Work Report* (n 31) 538–552.
[46] *Respect@Work Report* (n 31) 545.

69. The Respect@Work Report acknowledged that employers already have responsibilities to prevent workplace sexual harassment to ensure they are not held vicariously liable, as well as positive duties under WHS laws. Consequently, the AHRC argued that an express positive duty would not create a substantially new or increased burden for employers.[47]

Features of a proposed positive duty

70. If a positive duty was included in the Sex Discrimination Act, there are several technical and practical challenges to work through to ensure that co-existing duties in the different legal frameworks operate alongside one another effectively. It is also important to consider the roles of the different regulators involved in enforcing these frameworks.

71. This challenge may have negative impacts on both duty holders and those seeking to enforce and rely on the duty. While this risk could be managed through the framing and scope of a positive duty in the Sex Discrimination Act, it may not be possible to fully mitigate it.

Framing and scope of a positive duty in the Sex Discrimination Act

72. The Respect@Work Report recommended that 'employers' be required to take 'reasonable and proportionate measures' to 'eliminate' certain conduct (sex discrimination, sexual harassment and victimisation) as far as possible. This approach is modelled on the Victorian Equal Opportunity Act.[48]

73. As the existing provisions in the Sex Discrimination Act and the model WHS laws are framed differently they may require slightly different actions to be taken by duty holders. Notably, the existing vicarious liability provision in the Sex Discrimination Act requires employers to 'take all reasonable steps' to *prevent* their employee from doing the unlawful act.

74. The Respect@Work Report does not detail what practical steps an employer would need to take to 'eliminate' sexual harassment under a new positive duty provision in addition to what they are currently required to do to 'prevent' unlawful conduct and avoid being found vicariously liable for the action of another in their workplace.

75. To provide clarity for employers, it may be beneficial for the standards to be consistent between a potential positive duty and the existing vicarious liability provisions. This may

[47] *Respect@Work Report* (n 31) 480.
[48] *Equal Opportunity Act 2010* (n 37) s 15.

ensure that an employer clearly understands the actions required to comply with both the positive duty and avoid vicarious liability under the Sex Discrimination Act.

76. The scope of the duty should also have regard to a number of factors, including those people within an organisation who should bear responsibility for taking steps to prevent sexual harassment in the workplace, and also when and in what circumstances the duty would apply.

Who should the duty apply to?

77. While everyone has a role in preventing and addressing sexual harassment in the workplace, the intention of a positive duty would be to address organisational culture and shift the burden of initiating action away from individuals and onto those in a position to prevent sexual harassment from occurring in the first place – generally employers or responsible persons.

78. The Sex Discrimination Act currently prohibits 'employers' from engaging in discrimination on the grounds of sex and a range of other protected attributes. The Act also prohibits a range of persons including employers, employees, responsible persons and persons generally in some circumstances from sexually harassing others or harassing them on the basis of sex (noting that some of this language was updated through the Respect at Work Act implementing recommendation 16(d) of the Respect@Work Report). Alignment with the language currently in the Sex Discrimination Act would be preferable wherever possible to prevent confusion for both employers and individuals.

79. Another relevant consideration is how to best ensure that any duty imposed is only what is reasonable and proportionate for each individual business, which is similar to how the existing vicarious liability provisions have been applied in practice. In this context, the Respect@Work Report recommended that the following non-exhaustive factors should be considered when determining if measures taken were reasonable and proportionate:

- the nature and size of the business or operations
- business resources
- business operational priorities
- the practicability and costs of the measure, and
- any other relevant facts or circumstances.[49]

80. The Respect@Work Report indicated that 'any other relevant facts or circumstances' could include, for example, consideration of any 'systemic issues within that industry or

[49] *Respect@Work Report* (n 31) 481.

workplace,' and that in considering these factors, the impact on both employers and workers should be assessed.[50]

81. It is also relevant to consider whether any category of employer should be exempt from the operation of a positive duty. While not recommending any particular exemptions, the Respect@Work Report suggested considering whether micro-businesses should be exempt.[51] As defined by the Australian Bureau of Statistics, a small business is a business employing fewer than 20 people, with micro-businesses employing between 1 and 4 people.[52] It may also be appropriate to exempt some types of volunteer associations and other small community groups from the operation of any positive duty, where this would be consistent with existing frameworks and policy settings. However, it is relevant to note that all employers – regardless of the size of their business – are already subject to existing vicarious liability provisions in the Sex Discrimination Act.

Does there need to be a limit on scope of a positive duty?

82. The Respect@Work Report did not recommend including a limit on the scope of the operation of a positive duty – for example, whether the positive duty would only apply 'in a workplace' or 'in connection with work.' It may not be necessary to legislatively prescribe this aspect of a duty, as a sufficient connection to the workplace may be inferred by who the duty applies to (employers and responsible persons for example). However, a potential limit on the scope of a positive duty could be informed by existing standards in the Sex Discrimination Act, the clarifications made by the Respect at Work Act, or other legal frameworks.

83. The Respect at Work Act clarified that the prohibitions on sexual and sex-based harassment apply to a range of different workplace relationships regardless of where and when the conduct occurs, as well as to other relationships where the conduct is engaged **'***in connection with'* the person's status as some form of employer, PCBU or worker. In addition, persons will be vicariously liable under the Sex Discrimination Act for the conduct of their employees or agents where that conduct is engaged in *'in connection with the employment of the employee or with the duties of the agent as an agent'*. 'In connection with' has been interpreted broadly by the courts in recognition of the various places work can be undertaken and the places persons can be located by virtue of their

[50] Ibid.
[51] Ibid.
[52] The Australian Taxation Office (ATO) uses a different definition for small business. According to the ATO, a micro-business has total business income of less than $2 million while a small business has business income of between $2 and $10 million per annum.

work or work functions (for example, modes of transport and accommodation for work-related trips).[53]

84. Under the model WHS laws, the requirement for PCBUs to ensure, so far as reasonably practicable, the health and safety of workers applies while workers are *'at work'*. 'Workplace' is defined as a place 'where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work'.[54] This is capable of being adapted to a variety of circumstances and would cover places wherever work is performed, regardless of the physical location.[55] It has also been found to cover situations that are closely connected to work activities, for example coffee breaks with colleagues.[56]

What conduct should the duty apply to?

85. The Respect@Work Report recommended that a positive duty be introduced in relation to sex discrimination, sexual harassment and victimisation. It is not proposed that a positive duty would operate beyond those circumstances proposed in the Respect@Work Report. However, the Government has since introduced a prohibition on sex-based harassment into the Sex Discrimination Act, implementing recommendation 16(b) of the Respect@Work Report. It may be appropriate for any positive duty to also apply to sex-based harassment.

[53] Ibid 464-5, 486.
[54] *Work Health and Safety Act* (n 29) ss 8, 19.
[55] *Bowker and Others v DP World Melbourne Ltd; Maritime Union of Australia, Victorian Branch and others* [2014] FWCFB 9227.
[56] *Rizwan Nasir Sheikh v Civil Aviation Safety Authority; Peter Marsh; Owen Richards* [2016] FWC 7039.

Issue 3: Recommendation 18 – Enforcement powers for the Australian Human Rights Commission

Context

86. The Respect@Work Report recommended that a positive duty be introduced into the Sex Discrimination Act to require employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation in Australian workplaces, as far as possible (see **Issue 2: Recommendation 17 – Positive Duty**).

87. The Respect@Work Report advised that for such a duty to be effective, it must be accompanied by an appropriate enforcement mechanism. The Respect@Work Report recommended that the AHRC be given the function of assessing compliance with and enforcing a positive duty in the Sex Discrimination Act, including the power to:

- 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
- enter into agreements/enforceable undertakings with the organisation, and
- apply to the Court for an order requiring compliance with the duty.

88. In the Roadmap, the Government noted this recommendation and advised that the creation of new powers for the AHRC to assess compliance with a potential positive duty in the Sex Discrimination Act would be subject to the outcome of its assessment of recommendation 17.[57]

Current legal framework

Anti-discrimination law

89. Under the AHRC Act, the AHRC has the power to investigate and conciliate complaints of unlawful discrimination and breaches of human rights. For a complaint to be valid, it must be reasonably arguable that the alleged conduct amounts to unlawful discrimination.[58] If a valid complaint of unlawful discrimination (including sexual harassment) is lodged, the President must inquire into the complaint and attempt to conciliate it, unless the

[57] *Roadmap* (n 12) 14.
[58] *Australian Human Rights Commission Act 1986* (Cth) s 46P(1A).

President is of the opinion that the complaint should be terminated on one of a number of other grounds.[59]

90. Conciliation is largely a voluntary process which relies on both parties being willing to negotiate a resolution in good faith.[60]

91. The outcomes available if parties can reach an agreement during conciliation will vary depending on the nature of the complaint. Resolutions could include an apology or statement of regret, reinstatement to a job, compensation, agreement to undertake training, or policy change. If the parties agree on how to resolve the complaint, this will usually be finalised in a conciliation agreement. However, there are limited consequences for a failure to comply with this agreement as the AHRC has no powers to monitor or enforce compliance with a conciliation agreement. If an alleged contravention occurs, a party can only initiate proceedings in court for breach of contract.

92. Conversely, if a complaint is terminated on the basis that there is no reasonable prospect of the matter being resolved by conciliation, or is terminated for some other reason, an applicant may make an application to the FCA or the FCFCA for the matter to be heard and determined.[61]

93. The AHRC also has powers to conduct inquiries in relation to possible breaches of human rights and in relation to acts or practices that may constitute discrimination in employment or occupation under the ILO 111 Convention (see **Issue 4 – Recommendation 19: Inquiry powers**).

WHS Framework

94. WHS laws provide for compliance, enforcement and inquiry functions to be exercised by jurisdictional WHS regulators. Compliance activities may include inspections, audits and other verification activities. WHS inspectors have specific powers to require the production of documents, information and answers to questions and can issues notices where they reasonably believe there is a contravention of the WHS laws that apply in their jurisdiction. Failure of duty holders to meet obligations under WHS laws can result in prosecution and severe penalties.

95. In considering the WHS framework, the Respect@Work Report noted the generality of the WHS framework and further noted that given historically WHS had focussed on physical

[59] Ibid s 46PF.
[60] Whilst the AHRC can compel attendance at a conciliation conference under section 46PJ(3) of the AHRC Act, this is rarely used in practice given that a resolution can only be reached by the parties themselves through agreement.
[61] *Australian Human Rights Commission Act* (n 59) s 46PO(1).

injuries it would take time for WHS regulators to develop a detailed understanding of the dynamics and drivers of sexual harassment. However, there has been significant work since the release of the Respect@Work Report to build regulator and PCBU knowledge and capability in sexual harassment matters and psychosocial risks and injuries more broadly.

96. In the Commonwealth jurisdiction this includes the establishment of a psychosocial inspectorate within Comcare to support employers to provide mentally healthy and safe workplaces by delivering specialist information and advice, awareness and compliance activities. In November 2021, Comcare held the Workplace Sexual Harassment National Forum, where WHS regulatory organisations from all jurisdictions shared knowledge and contributed to development of a nationally consistent approach to workplace sexual harassment regulation.

97. Model WHS Regulations are currently being developed by Safe Work Australia to deal with how to identify and manage psychosocial risks, and a supporting model WHS Code of Practice on managing psychosocial hazards. The regulations and model code are designed to raise the profile of psychosocial risks; lead to greater compliance with, and understanding of, existing duties to manage psychosocial hazards; assist WHS regulators and inspectors with education of duty holders; and support compliance and enforcement activities.

98. Safe Work Australia has published several pieces of guidance on sexual harassment including:

- *Preventing workplace sexual harassment*
- *Preventing workplace sexual harassment – guidance for small business*
- *Workplace sexual harassment – advice for workers*
- *Work-related psychological health and safety: A systematic approach to meeting your duties,* and
- a number of related infographics.

99. Comcare has also produced a number of relevant resources to be read in conjunction with the SWA guidance; these include:

- *Workplace sexual harassment: Practical guidance for workers*
- *Workplace sexual harassment: Practical guidance for managers*
- *Workplace sexual harassment: Practical guidance for employers,* and
- *Regulatory guidance for employers on their work health and safety responsibilities.*

100. The 2018 Review of the model WHS Laws found that businesses, particularly small businesses, have limited understanding of their duties in relation to psychological health and safety in the workplace and sought practical guidance to help them identify and manage risks to psychological health. Lack of understanding can lead to PCBUs not acting to address psychosocial risks and expending resources inefficiently on actions that do not assist with meeting their duties.

Options to address the issues raised in the Respect@Work Report through the introduction of a positive duty

101. This consultation paper outlines three options to insert an enforceable duty in the Sex Discrimination Act. These options provide different mechanisms for enabling enforcement, each with separate advantages and disadvantages.

Option 1: A positive duty in the Sex Discrimination Act, enforced by individuals making complaints to the AHRC through existing complaints mechanisms

102. One option is to introduce a standalone positive duty in the Sex Discrimination Act that is enforceable through the existing complaints mechanisms in the AHRC Act (outlined above). This option would not involve changes to the AHRC's existing enforcement powers.

103. A positive duty that utilises the existing complaints mechanism could complement the existing risk-based WHS positive duty. It would allow each framework to focus on a different approach to addressing workplace sexual harassment.

104. A positive duty in the Sex Discrimination Act, in and of itself, encourages employers to promote a proactive and preventative workplace culture, whereby businesses put in place appropriate measures to prevent sexual harassment from occurring in the first place. It also clearly indicates to employers that they play an essential role in preventing and addressing workplace sexual harassment.

105. Introduction of a standalone positive duty could be further supported by the AHRC, and others, undertaking education and capacity-building activities with employers to increase their understanding of their obligations under this duty. This would build on the work of the Respect@Work Council to increase the understanding of workplace sexual harassment.

106. The existence of a positive duty, enforced through the current complaints process, may also highlight existing obligations on employers and motivate best-practice organisations

to take preventative systemic action. As noted previously, employers should already be taking proactive steps to prevent sexual harassment to fulfil their existing obligations under model WHS laws and to avoid vicarious liability. The concept of vicarious liability appears to be understood by most employers, noting that a substantial number of court actions involving workplace sexual harassment include a complaint that the employer is vicariously liable.

107. The existing complaints based framework does require individuals to commence proceedings. However, the extent to which a standalone positive duty would, in and of itself, reduce the burden on applicants is unclear. Enforcing a positive duty through the current complaints process would continue to place the burden of ensuring compliance on individuals who have experienced sexual harassment rather than on employers. The impact on an individual may be exacerbated where the person who experienced sexual harassment is vulnerable or disadvantaged. A positive duty that does not require a complaint to undertake compliance activity, such as the positive duty in the WHS framework, or that in the *Equal Opprtunity Act 2010* (Vic), is designed to reduce the burden on individuals.

108. That said, no regulator can successfully commence proceedings for non-compliance without the co-operation of individuals who are willing to put their allegations on record and provide evidence in court; this process can still be stressful for complainants.

Option 2: Positive duty modelled on the Equal Opportunity Act 2010 (Vic)

109. A positive duty could be inserted into the Sex Discrimination Act that is modelled on section 15 of the *Equal Opportunity Act 2010* (Vic) (Equal Opportunity Act). The Victorian model places a positive duty on employers to take reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible in their workplaces.

110. Under this model, individuals cannot make a complaint about a contravention of the positive duty to the Victorian Equal Opportunity and Human Rights Commission (VEOHRC), nor can they bring a direct action to the Victorian Civil and Administrative Tribunal (VCAT). Rather, the VEOHRC can investigate a suspected contravention of the positive duty that is serious in nature, relates to a class or group of persons and cannot reasonably be expected to be resolved by dispute resolution or at VCAT, in circumstances where the investigation would advance the objectives of the Victorian Equal Opportunity Act.

111. After investigating, the VEOHRC can enter into an agreement with a person about action required to comply with the Equal Opportunity Act (which can be registered with VCAT and enforced as an order of VCAT), refer a matter to VCAT, or produce a report for the

Attorney-General or Parliament. However, the VEOHRC lacks the enforcement powers to issue compliance notices, compel attendance, information and documents for the purposes of an investigation (without the need for an order from VCAT), or seek enforceable undertakings.

112. Whilst submitting to the Respect@Work Inquiry that the positive duty in the Equal Opportunity Act 'affect[s] broad cultural reform', the VEOHRC asserted that enhanced enforceability mechanisms 'would allow it to achieve greater systemic change and help alleviate the burden on individuals'.[62] Its submission argued that while having a positive duty is important, its efficacy is limited without a greater range of enforcement mechanisms.[63]

113. However, like option 1, this model could have norm-signalling impacts to reinforce the importance of preventing sexual harassment and discrimination in workplaces. This option may also more effectively shift the burden of enforcement away from individuals as it is not enforced through normal complaints mechanisms. This option would also sit more readily within the AHRC's existing functions, without the significant reforms to the AHRC's enforcement powers. Without an enforcement mechanism, the existing WHS positive duty would continue to operate to regulate workplace sexual harassment, as would the existing complaints-based regulation of the Sex Discrimination Act.

114. There may be value in considering an option where the relevant regulator has limited enforcement powers in specific circumstances. This may ensure that enforcement powers are reserved for specific circumstances, such as cases of potential systemic or widespread unlawful discrimination in a workplace. Such parameters may reduce the potential regulatory burden of a positive duty on employers, particularly micro and small businesses.

Option 3: A positive duty in the Sex Discrimination Act that is enforceable by the AHRC

115. The Respect@Work Report recommended that the proposed positive duty be accompanied by a range of enforcement powers, including the ability for the AHRC to apply to the court for an order requiring compliance with the duty.

116. There are three categories of powers which may be required for the AHRC to effectively enforce a positive duty:

[62] 476 R@W Report
[63] 477 R@W Report

- **Compliance and co-regulatory powers:** These powers would enable the AHRC to work with an employer to facilitate compliance with the positive duty. It could include powers to request that employers develop an action plan for complying with the positive duty and register it with the AHRC, and monitor and conduct assessments of the steps taken by employers to comply with the positive duty. Action plans are provided for under the *Disability Discrimination Act 1992* and must include policies and programs to achieve the objects of the Act, communication of the policies and programs, review of practices with a view to identify any discriminatory practices, the setting of goals and targets, evaluation processes and an appointment of persons to implement the plan.[64]

- **Investigation powers:** These would enable the AHRC to request and compel information and documents, the ability to hold a hearing, examine witnesses and compel them to appear/give evidence. Penalties could also be available for non-compliance with these inquiry powers. These powers are similar to the existing powers of the AHRC when conducting an inquiry into alleged breaches of human rights under section 11(1)(f) of the AHRC Act.

- **Enforcement powers:** These powers would enable the AHRC to issue compliance notices when required, accept enforceable undertakings from an employer and/or initiate proceedings to enforce enforceable undertakings or enforce non-compliance with a compliance notice in the court. An additional option may be to enable the AHRC to make determinations and bring proceedings to enforce determinations in court (where a fresh hearing will be conducted).

117. The AHRC facilitates conciliation between employers and applicants to encourage both parties to resolve their complaint, without advocating for either party. In light of this, expanding the AHRC's powers to include investigative and enforcement powers may undermine perceptions of impartiality and could discourage employers from engaging with conciliatory processes. It may also create an actual or perceived conflict of interest between its conciliatory and enforcement functions.

118. However, there are regulators, such as the OAIC and ASIC, which have processes and procedures to manage any real or perceived conflicts of interest. For example, regulators may use separate teams and impose firewalls to distinguish functions within their organisation. These processes ensure that the use of investigative or enforcement powers are used appropriately and within legislative constraints. It is important to consider how

[64] *Disability Discrimination Act 1992* (Cth) Part 3 ss 59-64.

providing the AHRC with additional powers could impact its current role in the anti-discrimination space.

119. While the AHRC has significant expertise in conciliating sexual harassment matters and dealing sensitively with individuals who have experienced sexual harassment, the need to structure the AHRC to avoid real or perceived conflicts of interest may mean that the new enforcement arm of the organisation is unable to fully leverage this existing expertise. Additionally, if the AHRC were to have new compliance and enforcement powers for this function, there would be a likely lag in capacity as the AHRC's regulatory expertise are built over time.

120. The proposed AHRC compliance and enforcement mechanisms would overlap with existing employer WHS obligations for managing sexual harassment. The WHS framework already has clear monitoring, investigation and enforcement mechanisms for managing employer obligations. The duplication of jurisdiction could potentially create regulatory complexity and uncertainty for employers and other PCBUs. This may result in confusion for duty holders and workers regarding meeting their obligations in relation to sexual harassment. It will be important to further work through any complexity or duplication.

Issue 4: Recommendation 19 – Inquiry powers for the AHRC

Context

121. The Respect@Work Report recommended that the AHRC Act be amended to provide the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment. Unlawful discrimination includes any conduct that is unlawful under the Commonwealth anti-discrimination laws. The Respect@Work Report recommended that the AHRC be given the powers to require:

a. the giving of information
b. the production of documents
c. the examination of witnesses

with penalties applying for non-compliance, when conducting such an inquiry.

122. In the Roadmap, the Government agreed-in-part to this recommendation and noted that the AHRC has a series of existing functions to conduct investigations and generally works cooperatively with organisations on such inquiries. The Government observed that there is a risk to the effectiveness of this cooperative model if the AHRC was to adopt the role of investigator as a general practice. However, the Government observed that in referred cases, there are advantages to the AHRC having a broader suite of powers to be exercised upon the referral of a matter for investigation by Government.[65]

123. The AHRC's existing inquiry functions and powers are set out in the AHRC Act. A table providing an overview of the AHRC's inquiry powers in relation to human rights inquiries, inquiries into discrimination in employment under ILO Convention 111 and inquiries into unlawful discrimination under the four Commonwealth anti-discrimination Acts is provided at **Appendix A**. Given these existing functions, the key issue is whether there is a need to expand its powers to enable it to also inquire into systemic unlawful discrimination.

Current legal framework

124. The AHRC currently has the power to inquire into 'any act or practice that may be inconsistent with or contrary to any human right' (under section 11(1)(f) of the AHRC Act).

[65] *Roadmap* (n 12) 14.

This includes powers to obtain information and documents, and examine witnesses, with penalties applying for non-compliance with any of these inquiry powers, when undertaking an inquiry under this section.[66] However, such inquiries are limited to acts or practices engaged in by or on behalf of the Government that may be in breach of 'human rights' (as defined in section 3 of the AHRC Act).[67]

125. The AHRC can also inquire into any act or practice within a state or under state laws that may constitute 'discrimination' (under section 31 of the AHRC Act). The definition of 'discrimination' comes from the ILO 111 Convention so is confined to workplace discrimination. This is distinguished in the AHRC Act from 'unlawful discrimination', for example discrimination contrary to the Sex Discrimination Act. The AHRC primarily uses the powers under section 31 of the AHRC Act to inquire into complaints about acts that would not otherwise be 'unlawful' but may be contrary to the ILO 111 Convention, such as discrimination in employment on the basis of criminal record.[68] Whilst this section allows the AHRC to inquire into alleged acts of discrimination by employers, the AHRC does not have investigatory powers to obtain information and documents, or examine witnesses, unless the complaint is against the Government.[69]

126. The AHRC also has a number of broad education and public awareness functions (under section 11(1) of the AHRC Act). The AHRC does not have any investigatory powers in relation to these functions. The resulting reports do not inquire into individual cases or a systemic pattern of behaviour that may be unlawful, but rather identify broader issues such as the Respect@Work Inquiry.

Options to address the issues raised in the Respect@Work Report

127. The Respect@Work Report found that there are significant cultural and systemic factors driving sexual harassment in the workplace.[70] However, addressing the systemic drivers of unlawful discrimination and harassment through individual complaints mechanisms (which focus on discrete acts or practices engaged in against an individual) can be challenging, given the difficulties with linking an individual's treatment to organisational culture. These challenges mean that the current individual complaint mechanisms for both

[66] *Australian Human Rights Commission Act* (n 59) ss 21-23.
[67] This includes the rights under the *International Covenant on Civil and Political Rights* (at Sch 2 of the AHRC Act), the *Convention on the Rights of the Child* and the *Convention on the Rights of Persons with Disabilities* (both of which are subject to a declaration made under s 47 of the AHRC Act).
[68] *Australian Human Rights Commission Act* (n 59) s 32(1)(b).
[69] Ibid s 33(c).
[70] *Respect@Work Report* (n 31) 18.

unlawful discrimination and human rights complaints may not be easily relied upon to tackle systemic issues.

128. Whilst the AHRC does not face these same challenges when conducting thematic or sectoral work under its broad education and public awareness functions in section 11(1) of the AHRC Act, as outlined above, this work is not accompanied by any investigatory powers and the AHRC does not make any findings about whether particular individual or systemic conduct amounts to discrimination. This public awareness work may be commenced on the AHRC's own motion, or requested of the AHRC by the Government or sectors of the community. The resulting reports identify limitations of the law, policy and practice, and make recommendations to address these issues.

129. Despite an absence of investigatory powers accompanying the AHRC's broad education and public awareness functions, the outcomes of this work reflect the AHRC's success in engaging with stakeholders and the community on a voluntary basis to effect change. The apparent success of this cooperative model raises the question about the additional value that broad investigatory powers would have on the AHRC's ability to address workplace sexual harassment.

130. Providing the AHRC with broad powers to request people, such as employers, to give information and produce documents, as well as examine witnesses, would shift the AHRC's inquiry function from one focused on cooperative engagement, to a more formal system of fact-finding. Consideration must be given to the organisational impact of such a shift and particularly whether an investigatory role would undermine its conciliation functions. Furthermore, as indicated by the Respect@Work Report, any proposal for a broad inquiry power including investigatory powers and applying to acts or practices of states and territories requires extensive consultation between all Australian governments.[71]

[71] Ibid 484.

Issue 5: Recommendation 23 – Representative actions

Context

131. The Respect@Work Report recommended that the AHRC Act be amended to allow unions and other representative groups to bring representative claims to court *on behalf of others*. This would be consistent with the existing provisions in the AHRC Act that allow unions and other representative groups to bring a representative complaint to the AHRC on behalf of one or more people aggrieved by conduct amounting to unlawful discrimination.[72]

132. The Respect@Work Report observed that it can be difficult and costly for individuals to engage with the court system. Therefore, the Respect@Work Report considered that enabling representative bodies to bring actions on behalf of people who have experienced unlawful discrimination may allow genuine cases, particularly those with a public interest element, to be heard in court.

133. In the Roadmap, the Government observed that while this approach may be appropriate for conciliation in the AHRC, different considerations apply in the context of proceedings before a court. The Government also noted that there is an existing mechanism to enable representative actions in the FCA under Part IVA of the FCA Act.[73]

134. Relatedly, the Government is currently considering and implementing reforms to class actions procedures and litigation funding arrangements in the FCA in line with its response[74] to the reports by the Parliamentary Joint Committee on Corporations and Financial Services,[75] and the Australian Law Reform Commission.[76] Such reforms largely focus on regulating litigation funders and do not affect the standing of representative bodies.

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[72] *Respect@Work Report* (n 31) 500-501.
[73] *Roadmap* (n 12) 13.
[74] Department of Prime Minister and Cabinet, *Australian Government response to the Parliamentary Joint Committee on Corporations and Financial Services report: Litigation Funding and the Regulation of the Class Action Industry and The Australian Law Reform Commission report: Integrity, Fairness and Efficiency- An inquiry into Class Action Proceedings and Third-Party Litigation Funders* (Government response, 29 October 2021).
[75] Parliamentary Joint Committee on Corporations and Financial Services, *Litigation funding and the regulation of the class action industry report* (Government response, 21 December 2020).
[76] Australian Law Reform Commission, *Integrity, Fairness and Efficiency-An Inquiry into Class Action Proceedings and Third-Party Litigation Funders: ALRC Report 134* (Final report, December 2018).

Current legal framework

Representative complaints

135. Under the AHRC Act, a person or a representative body such as a trade union may lodge a representative complaint with the AHRC on behalf of one or more people aggrieved by conduct amounting to unlawful discrimination.[77]

136. Standing to lodge a complaint under the Sex Discrimination Act and, if a complaint is terminated, to commence proceedings in the FCA or FCFCA derives from the AHRC Act.[78]

137. Under the AHRC Act, only an 'affected person' has standing to commence proceedings in the FCA or FCFCA.[79] An 'affected person' is defined as a person on whose behalf the complaint was lodged.[80] The use of the term 'affected person' means that representative bodies, including unions, are prevented from pursuing representative complaints alleging unlawful discrimination in the federal courts.

Representative proceedings

138. The FCA Act allows representative proceedings to be commenced in the FCA only in certain circumstances. An applicant may commence a representative action in the FCA if:

a) they are a group of seven or more people with claims against the same person, and
b) the claim relates to similar circumstances, and
c) the claim gives rise to a common issue of law or fact.[81]

139. A person can only bring a representative proceeding if they would also have a sufficient interest to commence a proceeding on their own behalf against another person.[82] This threshold for standing ensures that representative proceedings can only be initiated to protect the rights of the representative plaintiff and other affected individuals.

[77] *Australian Human Rights Commission Act* (n 59) s 46P(2)(c).
[78] *Respect@Work Report* (n 31) 499.
[79] Ibid.
[80] *Australian Human Rights Commission Act* (n 59) s 3.
[81] *Federal Court of Australia Act 1976* (Cth) s 33C(1).
[82] Ibid s 33D(1).

Fair Work Act

140. Under the Fair Work Act, a union can make an application to the FCA, the FCFCA or an eligible state or territory court in relation to a contravention of a civil remedy provision on behalf of an identified employee or employees.[83]

141. For example, a union could make a court application in relation to a contravention of the general protections provisions of the Fair Work Act *on behalf of* an employee who believes their employer has taken adverse action against them because of their sex.[84]

142. An application made by a union under the Fair Work Act on behalf of an employee or employees is not usually referred to as a 'representative' or 'class' action as this term is generally reserved only for actions brought in accordance with the specific process available under the FCA.

Issues with the current legal framework

143. The Respect@Work Report observed that the ability to commence court proceedings under Commonwealth anti-discrimination law is currently more constrained than the ability to bring representative complaints to the AHRC.[85] A representative body can lodge a complaint with the AHRC on behalf of an aggrieved person or group of people. However, if the matter is terminated because it could not be resolved by conciliation, the representative body cannot then take the complaint to the FCA, as this can only be done by an affected person/s.

144. The Australian Discrimination Law Experts Group noted that 'representative actions can overcome the barriers associated with navigating the cost and complexity of court proceedings for complainants and they provide a vehicle by which genuine cases, cases of systemic discrimination or harassment, and cases with a public interest element, can proceed to court.'[86] Representative bodies are generally better resourced and, depending on the arrangement, may be able to absorb the costs associated with pursuing litigation, including upfront costs (for example, legal fees) and the risk of an adverse cost order. This is similar to the role of third-party litigation funders in Australia, which have enabled claims to be pursued that may otherwise not have proceeded.

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[83] *Fair Work Act 2009* s 539.
[84] *Fair Work Act 2009* s 539(2) table item 11.
[85] *Respect@Work Report* (n 31) 499.
[86] Australian Discrimination Law Experts Group (ADLEG), Submission No 35 to Senate Education, Employment and Workplace Relations Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (9 July 2021) 8.

Options to address the issues raised in the Respect@Work Report

145. As noted in the Roadmap, the FCA Act already provides a mechanism for a group of people to bring representative proceedings, commonly referred to as 'class actions', in the FCA.

146. The representative proceedings commenced using this FCA Act mechanism are generally supported by plaintiff law firms or third-party litigation funders. Thus, while representative bodies do not have standing to file a representative proceeding *on behalf of* other people under the FCA Act, they are still able to support representative proceedings initiated by others by providing financial, legal and other support.

147. Therefore, it is important to consider how allowing representative bodies to commence representative proceedings on behalf of others would provide any additional practical benefits to applicants in anti-discrimination matters. For example, whether enabling a representative body to lead a representative action would reduce the burden on individual applicants. It may be the case that there are more effective ways for representative bodies to support applicants under the existing framework.

148. There is also contention about whether representative proceedings are the appropriate mechanism for resolving workplace anti-discrimination matters, particularly sexual harassment, given the factual complexities and differences in employment relationships. For example, separate incidents of sexual harassment experienced by different employees could be more difficult to adjudicate on a group level given their individual nature compared to an employer consistently applying incorrect entitlements to a class of employees. However, representative complaints may allow for more systemic issues of discrimination and harassment affecting a class of persons to be addressed and so there may be a benefit in supporting them more explicitly.[87]

149. As recommended in the Respect@Work Report, the AHRC Act could be amended to allow representative bodies to bring representative complaints to the FCA. This may involve amending section 46PO of the AHRC Act so that a person does not need to be an 'affected person' to have standing to make an application to the FCA.

150. However, given the existing standing rules for representative bodies in the FCA, consideration must be given to what makes anti-discrimination matters so distinct that they warrant a different approach. A clear rationale about why representative bodies should be able to bring representative proceedings (extending their role beyond

[87] *Respect@Work Report* (n 31) 500.

supporting class members) and what rights this would confer onto representative bodies is required.

151. Enabling representative bodies to play an increased role in representative proceedings in the anti-discrimination space could impose an unreasonable burden on respondents. For example, it may result in targeted or vexatious campaigns against particular individuals or employers. While it is unlikely that the proposed changes would lead to a significant increase in the number of representative proceedings, the existing test for standing is intended to ensure that proceedings can only be initiated by those affected by the conduct. This is designed to prevent the misuse of the class action mechanism, including the potential exploitation of applicants by third parties with no genuine interest in the dispute.

152. There is also a risk that allowing representative bodies to commence representative actions on behalf of others could heighten the existing risk of conflict of interest in class actions in circumstances where the interests of the representative applicant, lawyers, litigation funders and other members of the class may not align. For example, a representative body may be motivated by advocacy objectives that do not align with the particular financial interests of the affected applicants.

153. In light of these issues, it may be appropriate to consider limiting the proposal to apply only to claims involving sexual harassment, given the focus on these issues in the Respect@Work Report. This may reduce complexity and ensure that the unique challenges and harm caused by sexual harassment can be addressed as a priority.

Issue 6: Recommendation 25 – Costs protections

Context

154. The Respect@Work Report was concerned that the current laws relating to cost orders can deter a person from initiating civil proceedings under anti-discrimination law as they may be ordered to pay the costs of all parties if they are ultimately unsuccessful. To address this challenge, the Respect@Work Report recommended that the Government amend the AHRC Act to insert a cost protection provision consistent with section 570 of the FW Act.[88]

155. Section 570 of the FW Act provides that a party to proceedings under the FW Act may only be ordered to pay the other party's costs if the court is satisfied that the party initiated the proceedings vexatiously or without reasonable cause; or an unreasonable act or omission by one party caused the other party to incur the costs.

156. In the Roadmap, the Government agreed-in-principle to this recommendation and stated that it would review cost procedures in sexual harassment matters to ensure they are fit for purpose, taking into account the issues raised by the Respect@Work Report.[89]

157. Following the release of the Roadmap, the Attorney-General wrote to the federal courts to draw their attention to the findings of the Respect@Work Report. The Government also engaged, through a procurement process, a team of academics from the Australian National University, led by Emerita Professor Margaret Thornton FASSA, FAAL, to undertake research and collect data on cost procedures and damages in sexual harassment matters. This data, case research and analysis will inform this consultation process and broader consideration of this recommendation.

Current legal framework

158. All complaints of discrimination and harassment under the Sex Discrimination Act must first be made to the AHRC. The AHRC's complaint process is outlined above (see **Issue 3: Recommendation 18 – Enforcement**). If a complaint is terminated by the AHRC on the basis that it cannot be resolved by conciliation, or is terminated for another reason, an

[88] *Respect@Work Report* (n 31) 507.
[89] *Roadmap* (n 12) 15.

applicant may then initiate civil proceedings in the FCA or FCFCA, noting that in some circumstances the leave of the court must first be sought.[90]

159. There are currently no specific provisions related to costs in unlawful discrimination proceedings in the FCA and the FCFCA. Instead, subsection 46PO(4) of the AHRC Act provides a broad discretion to the FCA and FCFCA to make orders 'as it thinks fit' if it finds that the respondent has engaged in unlawful discrimination or harassment.

160. The Respect@Work Report observed that despite courts having a broad discretion to award costs at any stage and in any manner, the courts generally follow the practice of awarding costs after the event according to who was successful. This means that the unsuccessful party, whether the applicant or respondent, would be required to pay the costs of all parties.[91]

Issues with the current legal framework

161. Submissions from legal practitioners to the Senate Inquiry on the Respect at Work Act advised that the current costs regime, where costs follow the event, operates as a disincentive for people to pursue a sexual harassment matter, even if the person has a strong claim.[92] This is due to the risk that the applicant would be ordered to pay all legal costs, including the costs of the respondent, if they are unsuccessful. The wide discretion provided for in the AHRC Act for courts to order costs 'as it thinks fit' also contributes to uncertainty for applicants.

162. Given that the other party in a proceeding is often the applicant's employer or former employer – which may be an organisation with greater resources and the ability to hire external lawyers[93] – the costs accumulated by a respondent can far exceed the amount

[90] For further information on the different complaint pathways for a person who experiences discrimination in the workplace, see: Attorney-General's Department, Submission No. 32 to Senate Education, Employment and Workplace Relations Committee, *Sex Discrimination and Fair Work Amendment (Respect at Work) Bill 2021* (9 July 2021).
[91] *Respect@Work Report* (n 31) 507.
[92] Women's Legal Centre ACT, Submission No 3 to Senate Education, Employment and Workplace Relations Committee, *Sex Discrimination and Fair Work Amendment (Respect at Work) Bill 2021* (7 July 2021); Circle Green Community Legal Centre, Submission No 41 to Senate Education, Employment and Workplace Relations Committee, *Sex Discrimination and Fair Work Amendment (Respect at Work) Bill 2021* (13 July 2021); Kingsford Legal Centre, Submission No 42 to Senate Education, Employment and Workplace Relations Committee, *Sex Discrimination and Fair Work Amendment (Respect at Work) Bill 2021* (13 July 2021); Victoria Legal Aid, Submission No 27 to Senate Education, Employment and Workplace Relations Committee, *Sex Discrimination and Fair Work Amendment (Respect at Work) Bill 2021* (9 July 2021).
[93] Women's Legal Centre ACT, Submission No 3 to Senate Education, Employment and Workplace Relations Committee, *Sex Discrimination and Fair Work Amendment (Respect at Work) Bill 2021* (7 July 2021) 7; Australian Discrimination Law Experts Group (ADLEG), Submission No 35 to Senate Education, Employment and Workplace Relations Committee, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (9 July 2021) 21-22.

that an applicant could afford to repay. The barrier presented by costs is particularly challenging for members of the community who may be more vulnerable due to limited financial resources.

163. The FCA itself has reported that the costs associated with litigation can be substantial, advising that 'in most matters in the Federal Court, the unsuccessful party is ordered to pay part of the legal costs of the successful party. The amounts involved can be many thousands of dollars, sometimes tens of thousands.'[94]

164. The Respect@Work Report also remarked that the issue of costs is further exacerbated by the fact that damages awarded by the courts in sexual harassment matters are low, especially when compared with other causes of action, such as defamation.[95] The Respect@Work Report highlighted that applicants often bear a significant financial burden even if they are successful given the limited remedies available to them.[96]

165. This is an access to justice issue that has a number of downstream implications, including a lack of jurisprudence in many areas of anti-discrimination law. As noted in the Respect@Work Report, only 2% of sexual harassment matters are finalised in court.[97] This lack of jurisprudence may mean that people with strong claims are further deterred from initiating proceedings because it is difficult to assess the merits of their case and the likelihood of costs being awarded against them.

Options to address the issues raised in the Respect@Work Report

166. There may be merit to an approach where each party pays their own costs unless a party has acted vexatiously or unreasonably, in which case a cost order will be made against them (consistent with recommendation 25 of the Respect@Work Report). This approach may provide potential applicants with confidence that they would not be ordered to pay the other parties costs so long as they conduct themselves reasonably. This model also affords respondents with protection from frivolous, vexatious or unmeritorious claims.

167. However, this approach may still deter potential applicants from commencing proceedings as they may face a situation where they are unable or unsure if they would be able to cover their own costs. This model would also prevent a successful respondent from

[94] Federal Court of Australia, *Legal Costs* (Web Page) <https://www.fedcourt.gov.au/going-to-court/i-am-a-party/court-processes/legal-costs>.
[95] *Respect@Work Report* (n 31) 506-507.
[96] Ibid 768.
[97] *Fourth National Survey* (n 1) 71.

recouping their costs. This gives weight to the argument that a successful party should not be financially disadvantaged from initiating or defending the claim.

168. This model also has implications for legal practitioners who may be less likely to take on a strong case on a cost recovery basis, as there is no guarantee of recovering costs if their client, whether an applicant or respondent, is successful. This model may also have an impact on applicants with limited financial resources or lack of access to community legal services.

169. Instead, costs could be awarded in accordance with the principle of cost neutrality whereby each party bears their own costs in the first instance, but the courts may make exemptions in the interests of justice. This is the position in some state and territory tribunals that hear anti-discrimination matters under state and territory legislation. There may be a range of circumstances that justify the court making a cost order in the interests of justice, such as the financial circumstances of the party, where a party has been wholly unsuccessful in the proceedings, and/or whether a party made an offer in writing earlier to settle the matter.

170. This approach may be advantageous because it provides potential applicants with greater certainty and clarity around the amount of costs that they would be required to pay if they commence legal proceedings. Yet, unlike the above approach, this approach would also provide a mechanism for the successful party to recoup their legal costs.

171. As an alternative, the cost issue could also be resolved through the use of cost capping methods. Protective cost orders can be made by a court at the beginning of a proceeding, capping the parties' potential liability to pay their opponent's costs in the event they are unsuccessful in the matter.

172. The federal courts already have the ability to specify the maximum costs that may be recovered against a party in certain circumstances.[98] The *Central Practice Note* encourages parties to consider whether the capping of the amount of costs to be recoverable may be relevant and appropriate in any particular case.[99]

173. The FCA's *Costs Practice Note* states that parties may suggest a cost capping order to the court, or the court can consider an order on its own motion. In determining whether an order is appropriate, the court will consider a range of matters, including the consequences of making such an order from the perspective of all parties, the timing of

[98] *Federal Court of Australia Act* (n 89) s 43(3)(h)(iii).
[99] Federal Court of Australia, *Central Practice Note: National Court Framework and Case Management (CPN-1)*, 20 December 2019.

the application, the complexity of the factual or legal issues raised, the amount of damages raised, the nature of the remedies sought, the impact on the parties of making such an order and whether there is a public interest element to the case.[100]

174. While cost capping orders limit the cost liability for applicants who have already initiated proceedings, they do not provide certainty to potential applicants about the potential risk of an adverse cost order should they proceed. This suggests that 'cost capping,' while effective for protecting applicants, may not reduce the deterrent effect associated with cost orders.

175. In addition, the courts have been cautious to award costs at an early stage in the proceedings on the basis that parties should be given a reasonable opportunity to get their case in order or otherwise they may be deterred from taking action.[101] Given this caution, cost capping orders are rarely made by the courts and appear to be limited to cases where the court must determine an important public interest issue, with an impact extending beyond the dispute between the parties in question.[102] Unless the issue is a pressing one and has otherwise not been resolved, it appears unlikely that a cost capping order would be granted.

[100] Federal Court of Australia, *Costs Practice Note (GPN-COSTS),* 25 October 2016.
[101] See, for example, *Low v Australian Tax Office* [2000] CMCA 6, 11; *Hinchliffe v University of Sydney* (No 2) [2004] CMCA 640, 8.
[102] See, for example, *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCAA 2008.

Abbreviations

AHRC	Australian Human Rights Commission
AHRC Act	*Australian Human Rights Commission Act 1986* (Cth)
Equal Opportunity Act	*Equal Opportunity Act 2010* (Vic)
FCA	Federal Court of Australia
FCFCA	Federal Circuit and Family Court of Australia
FCA Act	*Federal Court of Australia Act 1976* (Cth)
FW Act	*Fair Work Act 2009* (Cth)
ILO 111 Convention	Discrimination (Employment and Occupation) Convention 1958
Model WHS laws	The basis for the nationally consistent WHS Acts that have been implemented in most jurisdictions
PCBU	A person conducting a business or undertaking under the WHS framework
Respect@Work Report	Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020) Report
Respect at Work Act	*Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*
Roadmap	A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces (2021)
Sex Discrimination Act	*Sex Discrimination Act 1984* (Cth)
SWA	Safe Work Australia
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
WHS	Work Health and Safety

Glossary

The language used in this paper is set out below.

Applicant	This paper refers to a 'person who has experienced sexual harassment' or an 'applicant'. Given that the terms used to describe a person's experiences following sexual harassment are personal, this language has been chosen to ensure the paper is inclusive of different experiences and preferences.
Affected person	As defined by section 3 of the AHRC Act, an affected person, in relation to a complaint, means a person on whose behalf a complaint was lodged.
A person conducting a business or undertaking (PCBU)	'A person conducting a business or undertaking', as defined by section 5 of the model WHS laws. This term includes employers.
Employment	Under section 4 of the Sex Discrimination Act, employment (and similar concepts, such as employer/employee) includes: a. part-time and temporary employment b. work under a contract for services c. work as a Commonwealth employee, and d. work as a state employee. It also explicitly includes Members of Parliament and the judiciary (and state and territory employees) following the Respect at Work Act.
Government	When referring to 'the Government', this paper is referring to the Commonwealth Government.
Representative proceedings	Legal claims where one party is a group of people represented collectively by a member or members of that group. This paper uses the term 'representative proceedings' in relation to section 33(C) of the FCA Act.
Representative body	Persons or union bodies who lodge complaints with the AHRC on behalf of one or more persons who have experienced sexual harassment.
Representative complaint	A complaint which is lodged by a representative body with the AHRC on behalf of one or more persons who have experienced discrimination or harassment.

Sexual harassment	This paper refers to the term 'sexual harassment,' which is defined in section 28A of the Sex Discrimination Act.
Sex discrimination	This paper refers to the term 'sex discrimination,' which is defined in section 5 of the Sex Discrimination Act.
Sex-based harassment	This paper refers to the term 'sex-based harassment,' which is defined in section 28AA of the Sex Discrimination Act.
Stop bullying provisions	This paper refers to the term 'stop bullying provisions', which refers to Part 6-4B, Division 2 of the FW Act.
Vicarious liability	This paper refers to the term 'vicarious liability,' which is defined in section 106 of the Sex Discrimination Act.
Victimisation	This paper refers to the term 'victimisation,' which is defined in section 47A and 94 of the Sex Discrimination Act.

Appendix A

Comparison of the AHRC Inquiry Powers

	Functions relating to human rights – section 11(1)(f) AHRC Act	Functions relating to equal opportunity – section 31(b) AHRC Act	Functions relating to unlawful discrimination – Part IIB AHRC Act
Overview	Section 11(1)(f) of the AHRC Act gives the Commission power to inquire into 'acts or practices' that may be contrary to human rights. This may include the International Covenant on Civil and Political Rights (ICCPR), but not the Convention on the Elimination of Discrimination Against Women.[103] 'Act' or 'practice' is defined as acts done or practices engaged in: (a) by or on behalf of the Commonwealth or an authority of the Commonwealth; (b) under a Commonwealth enactment; (c) wholly within a Territory; or (d) partly within a Territory, to the extent to which the act was done within a Territory.[104]	The AHRC has a similar inquiry function under section 31(b) of the AHRC Act to inquire into any 'act or practice (including a systemic practice) that may constitute discrimination.' The definition of 'discrimination' comes from the ILO 111 Convention so is confined to workplace discrimination. 'Act' or 'practice' is defined to include acts done or practices engaged in: (a) by or on behalf of a State or an authority of a State; (b) under a law of a State; (c) wholly within a State; or (d) partly within a State, to the extent to which the act was done within a State.[105]	The AHRC can inquire into a complaint of unlawful discrimination and attempt to conciliate it.
When can these functions be performed?	The AHRC can perform the functions referred to in section 11(1)(f) when: (a) the Commission is requested to do so by the Minister; or	The AHRC can perform the functions referred to in section s 31(b) when: (b) the Commission is requested to do so by the Minister; or	The AHRC can perform its investigation and conciliation functions when a valid complaint is lodged pursuant to the requirements in section 46P of the AHRC Act (unless the

[103] *Australian Human Rights Commission Act* (n 59) ss 3, 47.
[104] Ibid s 3.
[105] Ibid s 30.

	(b) a complaint is made in writing to the Commission; or (c) it appears to the Commission to be desirable to do so.[106]	(c) a complaint is made in writing to the Commission; or (d) it appears to the Commission to be desirable to do so.[107]	President terminates the complaint under sections 46PF(1)(b) or 46PH of the AHRC Act).
Investigation powers?	The AHRC has powers to obtain information and documents,[108] and the examination of witnesses,[109] with penalties applying for non-compliance with any of these inquiry powers.[110]	The AHRC lacks investigatory powers to obtain information and documents, or examine witnesses, unless the complaint is against the Commonwealth.[111]	The President has the power to obtain information and documents[112] and hold conciliation conferences.[113]
Outcome of inquiry	If the AHRC is of the opinion that the act or practice is inconsistent with or contrary to any human right, it may report to the Minister in relation to the inquiry.[114] The AHRC must include in this report any recommendations made. The requirement that these reports be tabled in Parliament was removed in 2017. No enforcement mechanism is available, and neither the Minister nor the party who engaged in the act or practice is required to act on the AHRC's recommendations.	If the AHRC is of the opinion that the act or practice (whether a systemic practice or otherwise) constitutes discrimination, they may report to the Minister in relation to the inquiry.[115] The AHRC must include in this report any recommendations made. The requirement that these reports be tabled in Parliament was removed in 2017. No enforcement mechanism is available, and neither the Minister nor the party who engaged in the act or practice is required to act on the AHRC's recommendations.	The AHRC cannot make any determinations that discrimination has occurred or order that the respondent provide a remedy. If a complaint is terminated because the President is satisfied that there is no reasonable prospect of the matter being settled by conciliation (or it is terminated for some other reason), then an affected person may make an application to the FCA or FCFCA for the matter to be heard and determined. In some circumstances an application must not be made unless the court grants leave.[116]

[106] Ibid s 20.
[107] Ibid s 32(1).
[108] Ibid s 21.
[109] bid s 22.
[110] Ibid s 23.
[111] Ibid s 33(c).
[112] Ibid s 46PI.
[113] Ibid s 46PJ.
[114] Ibid ss 20A, 29.
[115] Ibid ss 32A, 35.
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