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

Attorney-General's Department

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About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council effectively acts on behalf of more than 90,000[1] lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2022 Executive as at 1 January 2022 are:

- Mr Tass Liveris, President
- Mr Luke Murphy, President-elect
- Mr Greg McIntyre SC, Treasurer
- Ms Juliana Warner, Executive Member
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member

The Acting Chief Executive Officer of the Law Council is Ms Margery Nicoll. The Secretariat serves the Law Council nationally and is based in Canberra.

1 Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

Acknowledgement

The Law Council of Australia is grateful to its Equal Opportunity Committee, National Human Rights Committee, the Law Society of New South Wales, Queensland Law Society, and Law Society of South Australia, for assistance in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**the Law Council**) appreciates the opportunity to respond to the Attorney-General's Department (**the AGD**) regarding its *Consultation Paper: Respect@Work – Options to progress further legislative recommendations* (**the Consultation Paper**)[2] and related survey of 42 questions titled *Respect@Work – consultation on remaining legislative recommendations* (**the Survey**).[3]

2. Behaviour constituting harassment and discrimination in the workplace is unacceptable but remains unfortunately commonplace. The Law Council is strongly supportive of the Australian Government's efforts to drive necessary change through responding to and implementing the recommendations of the Sex Discrimination Commissioner's *Respect@Work: Sexual Harassment National Inquiry Report* (**the Respect@Work Report**).[4]

3. It is pleased to provide the following comments and suggestions in response to the current consultation, which is focused on recommendations 16(c), 17, 18, 19, 23 and 25 of the Respect@Work Report. In doing so, the Law Council pays close regard to the internal consistency and efficacy of the legal and policy framework as a whole, and the importance of cultural change as well as legislative reform in ensuring all people are free from discrimination and harassment.

    - While the Law Council has indicated its general support for implementation of Recommendation 16, it suggests that the underlying intent of Recommendation 16(c) might be realised through policy rather than statutory reform. The case law has interpreted and applied the existing provisions in the *Sex Discrimination Act 1984* (Cth) (**SDA**) in such a way as to make unlawful much of the behaviour anticipated under Recommendation 16(c). Introducing an express statutory prohibition against 'creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex' is likely to give rise to complex definitional issues. The Law Council suggests that at this stage of the response, it may be that education on the interpretation and application of the current provisions is required, rather than the introduction of an express prohibition, which could in its scope have unintended consequences for the legislative regime. There will be multiple elements required in recognising the impact of a hostile environment on providing a workplace free from discrimination and harassment, including guidance, training and model policies to support changes to workplace culture, and concurrent implementation of the amendments anticipated under Recommendations 17 and 18 below. The Law Council is concerned to ensure that legislation is not rushed into where it may not be most effective.
    - The Law Council generally supports implementation of Recommendation 17 to introduce into the SDA a positive duty to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment, harassment on the ground of sex, and victimisation, as far as possible. However, it suggests that this positive duty apply to all persons with obligations under the SDA,

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[2] Attorney-General's Department, *Consultation Paper: Respect@Work – Options to progress further legislative recommendations* (online, February 2022) <https://consultations.ag.gov.au/rights-and-protections/respect-at-work/user_uploads/consultation-paper-respect-at-work.pdf> (**the Consultation Paper**).

[3] Attorney-General's Department, *Respect@Work – consultation on remaining legislative recommendations* (website, February 2022) <https://consultations.ag.gov.au/rights-and-protections/respect-at-work/consultation/> (**the Survey**).

[4] Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (2020) <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020> (**the Respect@Work Report**).

rather than be limited only to employers, in order to avoid introducing imbalance in the objects of the SDA as a whole, or signalling that preventing unlawful behaviour is somehow less necessary or important in other areas of public life.

- The Law Council supports the full range of enforcement powers anticipated under Recommendation 18, including to issue compliance notices, enter into enforceable undertakings or seek court orders, being available to the Australian Human Rights Commission (**AHRC**). However, the Law Council emphasises that increasing the AHRC's functions in this manner will require a significant injection of resources and expertise, and urges the Australian Government to urgently review and increase the level of funding available to the AHRC.
- In supporting the implementation of Recommendation 19 to enable the AHRC to conduct own-motion inquiries into systemic patterns of behaviour that may be unlawful, the Law Council notes the importance of ensuring that the circumstances in which such inquiries may be conducted are clearly outlined, to avoid as far as possible leaving open the operation of these powers to legal challenge.
- With regard to Recommendation 23, which is directed at facilitating representative actions in relation to discrimination law, the Law Council raises for consideration whether a preferable approach may be to permit representative groups to commence such actions in court in the first instance, rather than having to first seek conciliation. This may reduce the complexity, duration and costs of the overall process. The Law Council considers this a complex area that requires further expert consultation, noting that these types of actions are more likely to arise outside the sex discrimination framework, such as in relation to race discrimination.
- Finally, with respect to Recommendation 25, the Law Council notes there are multiple options for costs protections in relation to claims made under the sex discrimination framework. It is currently in a broader process of receiving views on this issue and has not finalised a consolidated position.

4. The Law Council would be pleased to consult further on these issues should it assist the AGD.

Preliminary Remarks and Background

5. The AGD has stated that the current consultation is 'focused on understanding whether legislative changes are necessary, and if so, determining the appropriate amendments to implement the relevant recommendation'.[5] The Law Council questions the value of revisiting the case for legislative reform, given that strong support has already been communicated to the Australian Government, including through: the original stakeholder responses to the National Inquiry into Sexual Harassment in Australian Workplaces (**NISHAW**) of the AHRC;[6] the resulting recommendations set out in the Respect@Work Report;[7] and the submissions made in response to the Senate Education and Employment Legislation Committee's

[5] Attorney-General's Department, *Respect@Work – consultation on remaining legislative recommendations* (website, February 2022), 'Content'.
[6] See, eg, Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) <https://www.lawcouncil.asn.au/publicassets/1bde0b80-d23e-e911-93fc-005056be13b5/3587%20-%20AHRC%20NISHAW%20Submission.pdf> (**NISHAW submission**).
[7] Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (2020).

inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021,[8] since passed into law.[9]

6. It is important that the drafting of any proposed legislative change is carefully considered to address existing ambiguities and regulatory gaps, give proper effect to the intent of the Respect@Work Report's recommendations, avoid unintended adverse consequences, promote simplicity and clarity in the legislative regime, and be consistent with broader legal frameworks and fundamental legal principles.

7. When the Australian Government released its original response to the Respect@Work Report, titled *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (**the Roadmap Response to Respect@Work**),[10] the Law Council welcomed its 'broad support' of the 55 recommendations, either in full, in-principle, or in-part, but noted the response was 'lacking in some detail' regarding the development of legislative amendments.[11] The opportunity for the Law Council and other experts to be involved in a consultative process on the resulting Bill was important, providing an opportunity to highlight concerns over the drafting of key provisions such as the new meaning of harassment on the ground of sex, and in particular its proposed threshold.[12]

8. At the time, the Law Council also noted that this process did not address all the Respect@Work Report's recommendations related to the amendment of Commonwealth legislation, or otherwise directed at the Australian Government.[13] It welcomes the AGD's effort to address that implementation gap now through consideration of recommendations 16(c), 17, 18, 19, 23 and 25. The Law Council recommends that expert stakeholders be given the opportunity to consult on any proposed legislative change that results from the current consultation, through circulation of a draft exposure bill with a reasonable timeframe for comment.

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

9. Previously, the Law Council has indicated its general support for implementation of Recommendation 16.[14] It has noted, however, the importance of giving 'careful

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[8] See, eg, Law Council of Australia, Submission to the Senate Education and Employment Legislation Committee*, Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (16 July 2021) <https://www.lawcouncil.asn.au/publicassets/509a87ab-06f0-eb11-943f-005056be13b5/4046%20-%20Sex%20Discrimination%20and%20Fair%20Work%20%20Respect%20at%20Work%20%20Amendment%20Bill%202021.pdf>; Law Council of Australia, Supplementary Submission (Responses to Questions on Notice) to the Senate Education and Employment Legislation Committee*, Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (30 July 2021) <https://www.lawcouncil.asn.au/publicassets/c52a9df3-2cfb-eb11-943f-005056be13b5/4057%20-%20SS%20Sex%20Discrimination%20and%20Fair%20Work%20%20Respect%20at%20Work%20%20Amendment%20Bill%202021.pdf>.

[9] *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).

[10] Australian Government, *A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces* (online, 2021) <https://www.ag.gov.au/sites/default/files/2021-04/roadmap-respect-preventing-addressing-sexual-harassment-australian-workplaces.pdf> (**the Roadmap Response to Respect@Work**).

[11] Law Council of Australia, *Government recognises need for cultural change to sexual harassment laws* (media release, 8 April 2021) <https://www.lawcouncil.asn.au/media/media-statements/government-recognises-need-for-cultural-change-to-sexual-harassment-laws>.

[12] Law Council of Australia, Submission to the Senate Education and Employment Legislation Committee*, Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (16 July 2021) 10-11.

[13] Ibid, 5.

[14] Ibid,12. Recommendation 16 refers to amending the SDA to ensure that: (a) the objects include 'to achieve substantive equality between women and men'; (b) sex-based harassment is expressly prohibited; (c) creating

consideration' to the specific task of framing the prohibition anticipated by Recommendation 16(c).[15]

10. The Australian Government agreed-in-principle to Recommendation 16(c) that it amend the *Sex Discrimination Act 1984* (Cth) (**SDA**) to ensure creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited.

11. As noted in the Consultation Paper and the Respect@Work Report, Australian case law has recognised that the creation of a hostile work environment can constitute sex discrimination or sexual harassment.

12. Recommendation 16(c) is directed toward making express legislative provision for the concept of a hostile environment on the basis of sex, as opposed to the current state of affairs where instances of a hostile environment may be argued as sex discrimination under section 14, sexual harassment under section 28A, or harassment on the ground of sex under new section 28AA of the SDA.

13. It has been suggested that implementing Recommendation 16(c) may have the advantage of ensuring that the law is certain and clear on its face, offering additional clarity both as to the unacceptableness of creating a hostile environment and the existence of an avenue for complaints to the AHRC under the SDA regarding such an environment.

14. A key issue is how such an express prohibition in the SDA would align with the provisions already in existence in the SDA and in work health and safety (**WHS**) laws such as the *Workplace Health and Safety Act 2011* (Cth), as well as in the *Fair Work Act 2009* (Cth) (**the FWA**), including more broadly those provisions relating to bullying and reasonable management action.

SDA provisions

15. With the advent of the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth), the 'meaning of sexual harassment' is contained in section 28A of the SDA and the 'meaning of harassment on the ground of sex' in new section 28AA. Both these provisions are cast in similar terms, being directed at conduct characterised in a certain manner and requiring a specific nexus between the person accused of engaging in the conduct and the person bringing the complaint about the conduct. That is:

    - section 28A requires that a person engages in unwelcome conduct of a sexual nature in relation to the person harassed; and
    - section 28AA requires that a person engages in conduct of a seriously demeaning nature in relation to the person harassed, by reason of their sex or a characteristic pertaining or imputed to their sex.

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or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex is expressly prohibited; (d) the definition of 'workplace participant' and 'workplace' covers all persons in the world of work, including paid and unpaid workers, and those who are self-employed; and (e) the current exemption of state public servants is removed.

[15] Law Council of Australia, Submission to the Senate Education and Employment Legislation Committee, *Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (16 July 2021) 12.

Harassment

Section 28A

16. As the Law Council has previously recognised, the term 'conduct of a sexual nature' in section 28A is not defined in the SDA and assistance must be sought from the case law.[16] The courts have recognised that sexual conduct can be both a single, isolated incident as well as ongoing persistent behaviour.[17] There is past authority that conduct that does not appear sexual when considered in isolation may nevertheless amount to sexual conduct due to surrounding or associated circumstances. It was held in *Shiels v James*, for example, that 'incidents relating to the [flicking of] elastic bands [at the applicant] were of a "sexual nature" forming part of a broader pattern of inappropriate sexual conduct'.[18] Accordingly, practices that on their own do not constitute sexual harassment may if taken as part of a cumulative pattern of behaviour. More recently, the New South Wales Court of Appeal in the case of *Vitality Works Australia Pty Ltd v Yelda (No 2)* recognised that sexual conduct does not need to be sexually explicit conduct in order to constitute sexual harassment.[19] Subtler behaviours such as 'innuendo, insinuation, implication, overtone, undertone, horseplay, a hint, a wink or a nod', often passed off as "jokes" or "misunderstandings", are all capable of being considered sexual conduct and unwelcome.[20] Legal commentators have characterised this decision as an example of the ability for case law to absorb changes in the meaning of language over time, and in line with changing societal norms.[21] These developments provide an indication of the scope of section 28A, and how certain hostile environments constitute sexual harassment.

Section 28AA

17. Section 28AA was introduced in response to Recommendation 16(b) of the Respect@Work Report, which recommended that sex-based harassment be expressly prohibited. It has only been in operation since September 2021, and consequently there has been little opportunity for it to be considered in the case law.

18. The stated purpose of introducing new section 28AA was to clarify that harassment that is sex-based rather than sexual in nature can be sex discrimination under the existing terms of the legislation if it amounts to less favourable treatment on the basis of sex.[22] As with section 28A, this overlaps the idea of a hostile environment on the basis of sex. Several of the sex discrimination cases considering such

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[16] Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 12-14.
[17] See, eg, *Hall v Sheiban* (1989) 20 FCR 217; *Cooke v Plauen Holdings Pty Ltd* [2001] FMCA 91; *Leslie v Graham* [2002] FCA 32.
[18] *Shiels v James* [2000] FMCA 2, [72].
[19] *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147.
[20] Ibid.
[21] See, eg, Belinda Winter, Sandra Barry and Megan Cheng, 'Workplace advertising gone wrong – a case of 'unwelcome conduct of a sexual nature'', *Cooper Grace Ward Lawyers* (online, 22 September 2021) <https://cgw.com.au/publication/workplace-advertising-gone-wrong-a-case-of-unwelcome-conduct-of-a-sexual-nature/#:~:text=In%20Vitality%20Works%20Australia%20Pty,being%20characterised%20as%20sexual%20harassment.>.
[22] Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, 37-40. See also Law Council of Australia, Submission to the Senate Education and Employment Legislation Committee, *Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (16 July 2021) 10.

behaviour in the workplace have used, or have been described by commentators using, the term 'hostile work environment'.[23]

19. The Law Council remains concerned, however, that the intended operation of section 28AA has been curtailed by the provision's application only to conduct that is 'seriously demeaning'. The Law Council has previously considered this wording 'a high threshold that will likely be difficult to interpret and apply in practice' and recommended its 'deletion' from section 28AA.[24] Prima facie, 'seriously demeaning' conduct is likely to be a harder standard to meet than that contemplated in Recommendation 16(c) of 'an intimidating, hostile, humiliating or offensive environment', including by virtue of the fact that it is both more specific and is overlaid as an additional threshold in section 28AA on top of the requirement that a reasonable person would be offended, humiliated or intimidated. The Explanatory Memorandum relevant to section 28AA stated that the new provision 'would not capture' conduct 'not of a sufficiently serious nature to meet the threshold of offensive, humiliating or intimidating, as well as seriously demeaning'.[25] The Law Council previously outlined the resulting concerns of its constituent bodies that this drafting had the potential to undermine the stated purpose of the provision, which is to implement Recommendation 16(b) of Respect@Work to ensure sex-based harassment is expressly prohibited.[26] It recommends that the SDA be amended to delete the words 'seriously demeaning' from section 28AA.

Discrimination

20. The application of sections 28A and 28AA to instances of a hostile environment on the basis of sex is necessarily limited by the words 'in relation to the person harassed'.

21. The Law Council has previously noted advice from legal practitioners that certain clients have difficulty in fitting behaviour they have been exposed to in the workplace inside these parameters.[27] The case of *A v B and C* provides an earlier published example of this difficulty, whereby the complainant was a nurse and the only female

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[23] Legal Section of the Human Rights and Equal Opportunity Commission, *The Right to a Discrimination-Free Workplace* (online, July 2008) <https://humanrights.gov.au/our-work/right-discrimination-free-workplace#5>.

[24] Law Council of Australia, Submission to the Senate Education and Employment Legislation Committee, *Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (16 July 2021) 11-12.

[25] Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, 4, [10]. See also Law Council of Australia, Submission to the Senate Education and Employment Legislation Committee, *Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (16 July 2021) 11.

[26] Law Council of Australia, Submission to the Senate Education and Employment Legislation Committee, *Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (16 July 2021) 11. The small number of examples of conduct described as 'demeaning' in the case law tend to be sexually overt. These include: an offer to pay a female fellow-employee money for sexual intercourse being 'grossly demeaning' in *Beamish v Zheng* [2004] FMCA 60, [16], as well as a 'superior offering a reward to the first of [a female employee's] teammates who ascertained if her breasts were real or not, making repeated comments about her anatomy, … [and] showing her explicit images on his iPhone, including in the presence of other team members, and asking whether she liked those' being described as both 'thoroughly humiliating' and 'demeaning and degrading' in obiter dicta in *Friend v Comcare* [2021] FCA 837.

[27] Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 13-14. See also Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (online, 2020) 454, citing *Carter v Linuki Pty Ltd t/as Aussie Hire & Anor* [2004] NSWADT 287, [24] and *Carter v Linuki Pty Ltd trading as Aussie Hire & Fitzgerald* [2005] NSWADTAP 40, [15].

employee at a boarding house.[28] In this case, in relation to 'innuendo and sexual comments', the Commissioner found that:

> *the evidence does not support a finding that such conduct, although sexual in nature and possibly unwelcome, was engaged in "in relation to" the complainant. Rather it appears to have been part of the general work environment and there was no evidence that it was directed to or accentuated by the presence of the complainant.*[29]

22. The Consultation Paper characterises Recommendation 16(c) as directed at addressing this particular concern with the current harassment provisions in the SDA, stating that it 'seeks to prohibit conduct that creates a hostile work environment in a general sense, rather than requiring conduct be directed towards a particular person'.[30]

23. However, in such cases, a complaint may be brought under the general sex discrimination provisions in addition to the harassment provisions of the SDA.[31] The definition of and prohibition against sex discrimination raises different legal elements, tests and case law understandings that the complainant would need to argue and satisfy.[32] Subsection 14(2)(d), which is commonly used, does not require conduct to have been deployed in relation to the harassed employer. Instead, it applies a different nexus, requiring that the employee – to have been discriminated against by their employer on the ground of sex – must have been subject to 'detriment', which has been held to include a hostile environment. The Law Council notes that while past judicial decisions illustrate that some courts have been less willing to extend the concept of sex discrimination to the conduct of one employee against another employee, as opposed to the conduct of an employer against an employee, section 14 has in general been interpreted broadly.[33]

Potential application of proposed prohibition

24. Given the above, the Law Council queries what types of hostile environments on the basis of sex remain that would not constitute sexual harassment (section 28A), harassment on ground of sex (section 28AA) or sex discrimination (section 14), and whether it is appropriate to address these environments through an express legislative provision of the type and scope proposed by Recommendation 16(c).

25. Recommendation 16(c) refers to 'creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex'. The Law Council is concerned that this concept of 'hostile work environment' lacks definition. It is more generalised in its nexus and terms than the provisions presently in the SDA; it does not, for example, refer to a specific type of behaviour that must be present (eg,

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[28] *A v B and C* [1991] HREOCA 6 <http://www7.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HREOCA/1991/6.html>.

[29] Ibid. See also Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and Its Critiques' (2003) 31 *Federal Law Review* 195 <http://classic.austlii.edu.au/au/journals/FedLawRw/2003/6.html#Heading230>; University of Queensland, TC Beirne School of Law, 'Sexual Harassment' (Australian Feminist Judgments Project, January 2016) <https://law.uq.edu.au/files/5957/Sexual-harassment.pdf>.

[30] Attorney-General's Department, *Consultation Paper: Respect@Work – Options to progress further legislative recommendations* (online, February 2022), 13.

[31] *Sex Discrimination Act 1984* (Cth), s 5, s 14. See also Gail Mason and Anna Chapman, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and Its Critiques' (2003) 31 *Federal Law Review* 195.

[32] *Sex Discrimination Act 1984* (Cth), s 5, s 14.

[33] Australian Human Rights Commission and LexisNexis, *Federal Discrimination Law* (2016) <https://humanrights.gov.au/our-work/legal/publications/federal-discrimination-law-2016> 148-151.

unwelcome sexual conduct in relation to the person harassed (section 28A)) or require specific harm to have occurred to a specific person (eg, discrimination on the basis of sex where the person suffers detriment (section 14)).

26. Importantly, the concept of 'hostile work environment' as expressed in this manner is highly subjective, which may create inconsistencies with other legislative frameworks, such as the concept of 'reasonable management action' under the FWA. Where there are subjective views in a workplace, one person's view of what is hostile may be viewed as reasonable management action by another. These are definitional issues, with the difficulty being in identifying where an uncomfortable work environment which does not meet someone's sense of expectation in the workplace can be characterised as hostile.

27. Currently, sections 28A and 28AA of the SDA incorporate both subjective elements and objective elements, the latter being that a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. In contrast, Recommendation 16(c) may lead to a more subjective threshold being applicable, making its scope broader and more uncertain.

28. In addition, there is the issue of to whom in the workplace an express prohibition on creating or facilitating a hostile work environment should apply, in terms of workplace roles and responsibilities. The Survey provides the following specific options: executive leadership (senior managers, leaders); middle management (managers, supervisors); junior staff; or all individuals who contribute towards creating or facilitating an intimidating, offensive, humiliating and hostile work environment.

29. The Consultation Paper notes that an approach that applies the proposed provision to a person who witnesses the unwelcome conduct and decides not to act to address it 'would need to be considered carefully, particularly in relation to implications for bystanders or people with little control over the workplace environment'.[34] The Law Council agrees. It has previously taken the position that bystanders should be supported in preventing and responding to workplace sexual harassment through education and training, supplemented by the existence of strong internal and external policies and complaints procedures, rather than through the imposition of legal obligations.[35]

30. As the Law Council noted in its submission to the NISHAW, imposing legal obligations on bystanders does not seem to recognise that witnesses to sexual harassment are often constrained by the same fears as the targets of the harassment when it comes to reporting, particularly around issues of reputation and perceived futility.[36] This position draws upon the AHRC's *Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace*, authored by academics Paula McDonald and Michael Flood, which outlined that:

> *The decision of an observer to express voice (such as reporting the injustice) through organisational channels is influenced by the extent to which the organisation is open to voice and will take the observer's views into account. … This is related to a person's expectations about psychological safety and the way they weigh up the potential benefits of*

[34] Attorney-General's Department, *Consultation Paper: Respect@Work – Options to progress further legislative recommendations* (online, February 2022) 14.
[35] Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 46.
[36] Ibid.

> *changing the … work environment, versus being seen as a troublemaker of feeling as though the attempt at change have been futile.*[37]

31. There is also the issue that bystanders can be defined more broadly than 'those who directly observe' sexual harassment:

> *Bystanders, as we define them here, may include co-workers who are informed of sexual harassment via the workplace grapevine, or via targets themselves who seek emotional support and advice.*[38]

32. Whether such people should be under a legal obligation to report what they have heard, even where they cannot independently verify its truth, or when they likely owe no duty of care under federal legislation to the victim, both being employees on the same level in the organisation, is a difficult issue.[39]

33. The Law Council recommends at this stage that legal obligations not extend to bystanders, and that the responsibilities of bystanders be reconsidered in a future review of the effectiveness of any legal or policy changes resulting from the present consultation process or other responses to the Respect@Work Report.

34. In this respect, the wording of 'facilitating' used in Recommendation 16(c) may be problematic. Given that the ordinary meaning of 'facilitate' is: 'to make easier or less difficult',[40] decisionmakers would likely be obliged to interpret 'facilitating' a hostile environment broadly, as extending to bystander acts or omissions.

35. It would also likely extend both the primary and secondary liability of employers. That is, the wording of 'facilitating' may include circumstances where an employer permitted a hostile environment to exist by failing to address it, as well as where an employer is vicariously liable because a bystander being their employee 'facilitated' a hostile environment.[41]

36. Extending the duty on employers in this manner begins to overlap with the positive duty on employers existing under WHS laws and proposed under Recommendation 17, which is discussed in further detail below. The Law Council suggests that the types of omissions by employers that might constitute 'facilitating' a hostile environment are better framed through the lens of a positive duty.

Recommended approach

37. The Law Council considers that recognising the impact of a hostile environment on providing people with a workplace free from discrimination remains a priority issue. There are multiple elements required in achieving this in practice, noting that there is already a complexity of legislation in this area. Beyond legislation these include education and guidance to reinforce cultural change. At this stage of the response, it may be that education on the interpretation and application of the current case law is required, rather than the introduction of an express prohibition, which could in its scope have the unintended consequence of introducing further complexity into the legislative regime. This education would occur along with supporting changes to

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[37] Paula McDonal and Michael Flood, *Encourage. Support. Act! Bystander Approaches to Sexual Harassment in the Workplace* (Australian Human Rights Commission, June 2012) 21.
[38] Ibid, 9.
[39] Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 46. The Law Council also previously noted in this submission the difficulty in situations where the target of the conduct might disclose it to a bystander in confidence, or otherwise not support the conduct being reported.
[40] Macquarie Dictionary, def 'facilitate'.
[41] Cf *Equality Act 2010* (UK) s 26, which includes only 'creating', not 'facilitating'.

workplace culture both through training, guidance and model policies and the legislative amendments proposed under the other recommendations discussed below.

Issue 2: Recommendation 17 – Positive duty

38. On the basis that the current legislative framework is focused on reacting to rather than preventing cases of sexual harassment in Australian workplaces, the Respect@Work Report recommended amending the SDA to 'introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible' (Recommendation 17).[42]

39. The Law Council has long supported the concept of positive duties in the area of discrimination law, including in policy statements dating back to 2011.[43] In adopting this view, it is giving effect to its endorsement of an approach, consistent with international law and practice, which recognises three types or levels of obligations: to respect, to protect and to fulfil human rights. The obligation to *respect* requires States to refrain from interfering directly or indirectly with or curtailing the enjoyment of human rights. The obligation to *protect* requires States to protect individuals and groups against human rights abuses. The obligation to *fulfil* requires States to adopt appropriate positive measures to facilitate the enjoyment of human rights. The third obligation is most relevant in this context.[44]

40. This position has been consistently advocated by the Law Council in the specific context of sexual harassment, at all stages of the various inquiries and responses outlined above under 'Preliminary Remarks and Background'.

41. Indeed, in its submission to the AHRC's NISHAW, the Law Council recommended the introduction of three positive duties into the SDA. These were that employers and 'other relevant duty holders' or 'other relevant persons, such as those providing accommodation, educational institutions, or services', ought to have a positive duty to take reasonable and proportionate measures to eliminate sexual harassment, with the Law Council referring to section 15 of the *Equal Opportunity Act 2010* (Vic) as an example of what such a positive duty might look like; to respond effectively to complaints of sexual harassment; and to report on numbers and outcomes of allegations on a regular basis to their corporate board and to an independent statutory body.[45] In making this recommendation, the Law Council noted the strong

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[42] Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (2020), Recommendation 17.
[43] Law Council of Australia, *Policy Statement: Consolidation of Commonwealth Anti-Discrimination Laws* (2011) <https://www.lawcouncil.asn.au/resources/policies-and-guidelines>: 'The Law Council supports consideration of enhancement of current protections by: … Incorporating positive duties to prevent or remove discrimination in relation to each ground protected under the consolidated Act.' In its more recent submission responding to the AHRC's *Discussion Paper: Priorities for Federal Discrimination Law Reform*, the Law Council reiterated its support, noting that a positive duty 'would ideally oblige employers to take all reasonable steps to prevent discrimination from occurring, and impose civil penalties for breaches of this positive obligation': Law Council of Australia, Submission to Australian Human Rights Commission*, Discussion Paper: Priorities for Federal Discrimination Law Reform* (20 December 2019) <https://www.lawcouncil.asn.au/resources/submissions/response-to-discussion-paper-priorities-for-federal-discrimination-law-reform> 33. It explained that, at present under Australia's federal discrimination laws, an organisation will not face scrutiny for its failure to implement internal policies or complaints procedures unless an individual makes a complaint engaging vicarious liability provisions.
[44] Law Council of Australia, *Policy Statement on Human Rights and the Legal Profession* (2017), [18].
[45] Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 37-45.

support it had received from its constituent bodies for the introduction of these positive duties.[46]

42. When the AHRC released its resulting Respect@Work Report, the Law Council committed to supporting Recommendation 17 in its *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession*, which was released in December 2020.[47] It noted, however, its intention to consider and consult further in respect of the specific wording of the provision being developed.[48]

Wording of the proposed positive duty

43. The Law Council notes that in full Recommendation 17 states:

> *Recommendation 17: Amend the Sex Discrimination Act to introduce a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. In determining whether a measure is reasonable and proportionate, the Act should prescribe the factors that must be considered including, but not limited to:*
>
> *a. the size of the person's business or operations*
>
> *b. the nature and circumstances of the person's business or operations*
>
> *c. the person's resources*
>
> *d. the person's business and operational priorities*
>
> *e. the practicability and the cost of the measures*
>
> *f. all other relevant facts and circumstances.*

'On all employers …'

44. The Law Council understands that Recommendation 17 was necessarily limited by the terms of reference of the NISHAW, this being an inquiry into Australian workplaces, rather than areas of public life more broadly. The Law Council queries, however, the appropriateness of the AGD extending this structural limitation of the NISHAW to any proposed amendment to the SDA.

45. The SDA is concerned with situations beyond the workplace, and it prohibits sex discrimination, sexual harassment, harassment on the ground of sex and victimisation, not only in relation to employment, but also in relation to other areas of public life, such as the provision of accommodation, educational institutions and services. The Law Council is concerned that introducing a positive duty 'on all employers', as contemplated by Recommendation 17, would produce inconsistency or imbalance in the objects of the SDA as a whole.

46. There is a risk that introducing a positive duty only in relation to employment would signal that taking positive action to prevent unlawful behaviour is not necessary in the broader areas of public life included in the SDA, or that the prohibitions against

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[46] Ibid.
[47] Law Council of Australia, *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession* (23 December 2020) <https://www.lawcouncil.asn.au/publicassets/4c3d5a37-b744-eb11-9437-005056be13b5/National%20Action%20Plan%20to%20Reduce%20Sexual%20Harassment%20in%20the%20Australian%20Legal%20Profession_FINAL.pdf>.
[48] Ibid, 28.

unlawful behaviour are somehow less important in these areas. In reality, such behaviour impacts people not only in their workplace but in all areas of their public life, including when they seek accommodation, use public transport, and access services.

47. The Law Council considers that the ideal path forward is to amend the SDA to include a positive duty on all persons who already have obligations under the legislation, as occurs under section 15 of the *Equal Opportunity Act 2010* (Vic).

'Reasonable and proportionate measures …'

48. Recommendation 17 reflects in several phrases the wording of section 15 of the *Equal Opportunity Act 2010* (Vic), which the Law Council had earlier raised as an example of a template for a federal provision.[49] This includes framing the duty as an obligation 'to take reasonable and proportionate measures to eliminate … as far as possible', and, 'in determining whether a measure is reasonable and proportionate', prescribing in the legislation the factors that 'must be considered' particularly as relates to the employer's size and resources and the cost of the measures.

49. The Law Council notes there is difficulty in framing a positive duty as being 'to take reasonable and proportionate measures to eliminate … as far as possible'. It can be difficult for both duty holders and regulators to evaluate the actions necessary to meet the positive duty if there is no further guidance as to the standard expected, or if this standard is set too low. This may lead duty holders to consider they will fulfill their positive duty if they are engaged in a continuous process of improvement, and in this sense the positive duty becomes aspirational in nature rather than a concrete standard that must be met. The Law Council has raised issues of minimum standards being set so low as to be ineffective in the similar context of the recent Review of the *Workplace Gender Equality Act 2012* (Cth).[50]

50. The Law Council has previously stated its position that positive duties should be required in proportion to the size, resources and capabilities of the duty holder, which is comparable to how judges have approached the 'all reasonable steps' defence to vicarious liability.[51] It addressed concerns that positive duties would place unnecessary regulatory burden on duty holders, submitting to the AHRC's NISHAW that:

> *Employers already have responsibilities assuming they do not wish to be held vicariously liable for sexual harassment as well as proactive duties under Australia's workplace health and safety laws. The positive duties suggested here would not significantly increase the burden of the existing responsibilities or proactive duties already faced by employers, agents and other duty holders, but would strengthen [ie, reinforce] them in regard to sexual harassment and provide duty holders with clarification as to best practice. … The high rate of sexual harassment, as well as the low rate of reporting sexual harassment, which is often explained by the low confidence the sexually harassed person has in the*

[49] Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 38-39.
[50] Law Council of Australia, Submission to the Department of Prime Minister and Cabinet, *Review of the Workplace Gender Equality Act 2012* (24 November 2021) <https://www.lawcouncil.asn.au/resources/submissions/review-of-the-workplace-gender-equality-act-2012>.
[51] Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 37.

response of their employer …, suggest that existing provisions need to be supplemented by heavier measures [ie, proactive duties].[52]

51. The Law Council appreciates that some employers may be concerned about a perceived cost and regulatory burden arising from the imposition of a positive duty in the SDA. However, the fact that employers can already be held vicariously liable for the actions of employees or agents in breach of discrimination law means that employers should already be taking proactive steps to prevent unlawful behaviour. The same undertakings of the employer can be used as evidence of reasonable steps in relation to vicarious liability, the WHS positive duty, and the SDA positive duty, meaning there should be minimal additional regulatory burden on employers. In addition, the positive duty can be framed to take into account the size and resources of the employer and the costs of the preventative measures.

52. As Recommendation 17 includes prescribing in the legislation the factors that should be considered in determining whether a measure is reasonable and proportionate, the Law Council does not at this stage consider it necessary to include a stronger exception for microbusinesses from the obligation.

53. The introduction of a positive duty in the SDA has the advantage that the focus shifts from an employer's response to a legal claim raising issues of vicarious liability to a culture of prevention, prompting the employer to take steps enabling sexual harassment issues to be better addressed, and will also help it avoid costly litigation.

Overlap with WHS Laws

54. The *Workplace Health and Safety Act 2011* (Cth) places a positive duty on persons to ensure health and safety so far as is reasonably practicable, with section 19 setting out the primary duty and section 18 explaining in further detail what is meant by 'reasonably practicable'.

55. On the issue of whether introducing a positive duty into the SDA would duplicate or confuse the WHS regime, the Law Council's submission to the AHRC's NISHAW stated:

    While a person failing to prevent sexual harassment may constitute a breach of this primary duty to ensure health and safety, the Workplace Health and Safety Act 2011 (Cth) does not explicitly refer to sexual harassment. For this reason, the Law Council supports including an express provision in the SDA in order to avoid uncertainty.[53]

56. In its submissions responding to the Senate Education and Employment Legislation Committee's Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, the Law Council acknowledged the Australian Government's concerns that implementing Recommendation 17 could create further complexity, uncertainty or duplication in the overarching legal framework, given the existing positive duty under WHS legislation.[54]It addressed these concerns through reference to the AHRC's reasoning in the Respect@Work Report that:

    Human rights frameworks and WHS frameworks have different foundations and advantages … In essence, the WHS positive duty, as it relates to sexual harassment, is focused on psychological health broadly

[52] Ibid.
[53] Ibid, 38.
[54] Law Council of Australia, Submission to the Senate Education and Employment Legislation Committee, *Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (16 July 2021) 25.

> *and frames sexual harassment as a safety risk and hazard. The [SDA] positive duty would have a more specific and targeted focus on sexual harassment, sex discrimination and victimisation, and would importantly operate within a human rights framework that takes into account the systemic and structural drivers and impacts of sexual harassment … Ultimately, with these differing but complementary approaches, the two positive duties would work in a mutually reinforcing way.*[55]

57. The Law Council noted that the introduction of a positive duty in the SDA would explicitly reinforce the focus on preventing sexual harassment in the workplace, complementing the broader role played by the existing positive duty under model WHS laws, and that, contrary to the concerns raised by the Australian Government, this mutual reinforcement will likely lead to less confusion and complexity for victims and employers to navigate.[56]

58. It may also shift the complacency toward addressing sexual harassment that some stakeholders have observed under the WHS laws. The Queensland Law Society (**QLS**), for example, has informed the Law Council that it does not consider the positive duty under the WHS laws is always being discharged in a manner that adequately deals with sexual harassment in the workplace. Further, it does not consider that breaches of this positive duty that involve sexual harassment are always readily investigated or pursued by the workplace duty holders, regulators or other enforcement bodies in all cases and in a manner consistent with obligations under the WHS laws.

59. As recognised in the Respect@Work Report, there is a predominant focus by WHS enforcement bodies on acts or omissions in the workplace that cause physical injuries, whereas sexual harassment more often results primarily in psychiatric or psychological injuries.[57] It has been the case in the past that such injuries are considered of less significance and therefore attract less resources in terms of compliance and enforcement. In addition, the introduction of a positive duty in the SDA will clearly outline to employers that prevention of sexual harassment is required irrespective of the likelihood of an incident being the subject of a claim.

60. Although the WHS laws have been in existence for over a decade, it is also clear that they have not been effective in addressing the high rate of sexual harassment faced in Australian workplaces, which all findings point to being a common experience requiring urgent, enhanced action. The Law Council appreciates the recent effort on better promoting the relevance of WHS laws to addressing sexual harassment but more is needed.

61. In this respect, it is important to keep front of mind that the SDA and AHRC have a different purpose to the WHS regime, which is to promote and protect human rights.

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[55] Law Council of Australia, Submission to the Senate Education and Employment Legislation Committee, *Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (16 July 2021) 25-26, quoting Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (2020) 480.
[56] Ibid, 26.
[57] Australian Human Rights Commission, *Respect@Work: Sexual Harassment National Inquiry Report* (2020), 480 and 546-549.

Issue 3: Recommendation 18 – Enforcement powers for the AHRC

62. Recommendation 18 would ensure that a positive duty is enforceable, extending compliance with the SDA beyond the existing individual complaints mechanism. The Law Council views this as important, particularly as the current system relies on individuals pursuing legal action to gain compensation, which places the burden and bulk of responsibility for ensuring compliance with discrimination law on individuals, and often those who are least powerful or who are part of a group that experience disadvantage and are without adequate resources or support. As has been extensively noted, the current system is reactive rather than proactive in addressing issues such as sexual harassment.

63. The Law Council therefore agrees that there is a role for an appropriate body to assess compliance with and enforcement of a positive duty, and supports the concurrent consideration of Recommendations 17 and 18.

64. However, the Law Council emphasises that providing the AHRC with this function would only be appropriate if the level of funding available to the AHRC is increased significantly, as such assessment and enforcement powers will require extensive resourcing.

65. The proposed enforcement powers to issue compliance notices, enter into enforceable undertakings or seek court orders are all important, as otherwise the AHRC may have a 'valuable educative and normative force',[58] but not be able to achieve a concrete outcome or legal remedy.[59] This view aligns with Option 3 of the Consultation Paper. As noted above, the Law Council has also long supported the imposition of civil penalties for breaches of a positive duty.[60]

66. In saying this, the Law Council notes that the general approach to compliance can be a graduated one, which begins with a cooperative and coregulatory approach, and makes use of the coercive enforcement powers only where necessary such as in instances of repeated non-engagement or non-compliance, as the recent broader discrimination law position paper produced by Professor Rosalind Croucher AM set out in December 2021.[61]

67. In addition, the Law Council notes the importance of ensuring the appropriate separation eg, through 'information barriers', between functions of the AHRC regarding conciliation and compliance and enforcement to ensure ongoing goodwill by employers with its existing functions.

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[58] Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 268.

[59] See Australian Human Rights Commission, *Free and Equal – A Reform Agenda for Federal Discrimination Laws* (December 2021) <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws> 77.

[60] See Law Council of Australia, Submission to Australian Human Rights Commission, *Discussion Paper: Priorities for Federal Discrimination Law Reform* (20 December 2019) 33; Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 45.

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

Issue 4: Recommendation 19 – Inquiry powers for the AHRC

68. Recommendation 19 of the Respect@Work Report provides that the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) be amended to provide the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination, meaning any conduct that is unlawful under federal discrimination law, including systemic sexual harassment.

69. The Law Council has suggested previously that consideration be given to implementation of Recommendation 19.[62]

70. The Law Council also previously outlined support for expanding the AHRC's powers in its submission responding to the AHRC's *Discussion Paper: Priorities for Federal Discrimination Law Reform*. This supported expressly allowing the AHRC to conduct own-motion inquiries into systemic discrimination.[63]

71. As set out in the Consultation Paper, the AHRC has a series of existing functions to conduct inquiries, but these are limited to, for example, individual complaints of unlawful discrimination or government acts or practices inconsistent with human rights, by virtue of the operation and interaction of the relevant sections and definitions of the AHRC Act.[64]

72. Implementing Recommendation 19 would allow for investigation of systemic patterns of behaviour in the workplace that may be unlawful, and practices of private organisations, industries and sectors, outside of the current individual complaints mechanism.[65]

73. However, it is important that the circumstances in which the AHRC may conduct investigations on its own initiative are carefully considered and clearly outlined. The Victorian Equal Opportunity and Human Rights Commission has power to conduct its own investigations under section 127 of the *Equal Opportunity Act 2010* (Vic), and regard might be had to this example. While the experience of the Victorian model has been generally positive, it illustrates that the expansion of powers is not without difficulty in application. The absence of clearly defined parameters of statutory powers may leave reviews conducted by the AHRC open to legal challenge.[66] Any proposed amendment might specify, for example, whether there is a benchmark for intervention, such as that, for an investigation to begin, there must

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[62] Law Council of Australia, Submission to the Senate Education and Employment Legislation Committee, *Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (16 July 2021), 28. See also Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 31-32.
[63] Law Council of Australia, Submission to Australian Human Rights Commission, *Discussion Paper: Priorities for Federal Discrimination Law Reform* (20 December 2019) 32.
[64] *Australian Human Rights Commission Act 1986* (Cth) ss 3, 11(1)(aa), 11(1)(f), 20(1)(a)-(c), 30(1), 31. See also Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 31-32.
[65] See also Law Council of Australia, Submission to the Australian Human Rights Commission, *National Inquiry into Sexual Harassment in Australian Workplaces* (26 February 2019) 31-32.
[66] Law Council of Australia, Submission to Australian Human Rights Commission, *Discussion Paper: Priorities for Federal Discrimination Law Reform* (20 December 2019) 32, citing *United Firefighters' Union of Australia v VEOHRC and Anor* [2018] VSCA 252.

be a reasonably arguable rather than potentially vexatious or unmeritorious purpose.[67]

74. Similar to the above in relation to Recommendation 18, the Law Council suggests that the inquiry role envisaged by Recommendation 19, with the option to compel the production of documents and examine witnesses, might only be necessary in circumstances where a cooperative model is not first able to achieve the desired outcome.[68]

75. In the Roadmap Response to Respect@Work, the Government agreed-in-part to Recommendation 19 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.[69]

76. The Law Council does not support the Australian Government's preference for a greater investigative function to be limited to referred cases as this would undermine the independence of the AHRC and, potentially, its operation as a Paris Principles compliant institution.

Issue 5: Recommendation 23 – Representative actions

77. Recommendation 23 of the Respect@Work Report provides that the AHRC Act be amended to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions that allow these groups to bring representative complaints to the Commission.

78. The Consultation Paper sets out that:

- Under the AHRC Act, only an 'affected person' has standing to commence proceedings in the Federal Court of Australia (**FCA**) or Federal Circuit Court and Family Court of Australia (**FCFCA**). An 'affected person' is defined as a person on whose behalf the complaint was lodged. 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.
- The *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) allows representative proceedings to be commenced in the FCA only in certain circumstances.[70] A person can only bring a representative proceeding if they would also have a

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[67] See, eg, *Australian Human Rights Commission Act 1986* (Cth) s 46PH(1B)(a) for an example of this wording. See also Australian Human Rights Commission, *Free and Equal – A Reform Agenda for Federal Discrimination Laws* (December 2021) 150 for discussion of an investigative threshold in the context of the VEOHRC. In addition, see Law Council of Australia, Submission to Australian Human Rights Commission, *Discussion Paper: Priorities for Federal Discrimination Law Reform* (20 December 2019) 33 for onus of proof discussion, albeit in a slightly different context.
[68] See Australian Human Rights Commission, *Free and Equal – A Reform Agenda for Federal Discrimination Laws* (December 2021) 143 for the view that broad investigative powers could give it the flexibility to address systemic discrimination issues but 'if other preventative measures are working effectively, it should not be needed, other than in exceptional cases'.
[69] As reiterated in the Consultation Paper, 32.
[70] 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: *Federal Court of Australia Act 1976* (Cth), s 33C.

sufficient interest to commence a proceeding on their own behalf against another person.[71] This threshold for standing ensures that representative proceedings can only be initiated to protect the rights of the representative plaintiff and other affected individuals.

- Under the FWA, 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 – eg, a union could make a court application in relation to a contravention of the FWA general protections provisions on behalf of an employee who believes their employer has taken adverse action against them because of their sex. This kind of application is not a 'representative' or 'class' action as it relates to a specific process.
- The Consultation Paper suggests the AHRC Act could be amended to allow representative bodies to bring representative complaints to the FCA. Section 46PO of the AHRC Act may need to be amended so that a person does not need to be an affected person to make an application to the FCA. However, the Consultation Paper further notes that '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 supporting class members) and what rights this would confer onto representative bodies is required.' It also notes the possibility of placing an unreasonable burden on respondents, eg due to targeted campaigns against a particular employer.

79. As outlined in the Consultation Paper, 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, the representative body cannot then take the complaint to the FCA, as this can only be done by the affected person. The Law Council considers this is a complex area and requires further consideration having regard to certain factors, including that:

- in practice, relatively few sexual harassment matters lend themselves to class actions, given the different and specific factual circumstances which arise. The nature of sexual harassment, for which 'unwelcome conduct' contains subjective elements, is that is generally the experience of a single woman, rather than a class of persons;
- the role of the FCA in overseeing whether class actions can come forward is a complex process, requiring relevant thresholds to be reached in order to establish common claims. It is quite a different process to bringing a complaint to the AHRC;
- there may be risks of decisions made within conciliation processes, eg, limiting the scope of complaints to matters that can fall within the AHRC's powers, having consequences for subsequent FCA actions in which broader causes of action may be otherwise considered;
- a preferable response may be to permit a class action to commence immediately, rather than having to first seek conciliation by the AHRC. This may reduce the complexity, duration and cost of the overall process; and
- the proposed amendments to the AHRC Act would be available to all aspects of discrimination under relevant federal anti-discrimination acts. Further consideration may be necessary of the implications of the proposal given the recent case law on class actions regarding discrimination outside the sex

[71] Ibid, 33D.

discrimination framework, with the *Racial Discrimination Act 1975* (Cth), for example, becoming a primary vehicle for pursuing actions related to a class of people in the FCA or through settlement.[72] In contrast, in the case of *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*, the applicant was unsuccessful in being granted standing in the FCA in relation to multiple breaches of the *Disability Standards for Accessible Public Transport Act 2002* (Cth).[73] The AGD may wish to have regard to this case law in considering the issues of the current regime relating to class actions in discrimination law and the most appropriate solution. It may also wish to consult on the implication of the proposals outside of the SDA context.

80. The Law Council would be pleased to consult further on these issues should it assist.

Issue 6: Recommendation 25 – Costs protections

81. The Law Council is currently in a broader process of receiving views from its constituent bodies on this issue, and has not yet finalised a consolidated position. At this stage, the Law Council outlines the following as preliminary viewpoints on the different options for costs protections.

82. Presently in sexual harassment and sex discrimination claims, the award of costs is in the discretion of the court or judge.[74] While this discretion is broad,[75] the general rule is that costs 'follow the event', meaning that in most matters the unsuccessful party will be ordered to pay the costs of the successful party.[76] It is also noted that Rule 40.51 of the Federal Court Rules 2011 provides the Federal Court with the power to issue a cost-capping order, also known as a maximum or protective cost order. The Court may also issue a no cost order at the conclusion of litigation. However, these orders are discretionary and the Law Council has been advised these orders are rarely made, thereby providing prospective plaintiffs in sexual harassment and sex discrimination matters with little certainty that they will be successful in a cost-capping order or no cost order application.

83. Accordingly, under the current legal framework, where a plaintiff brings a sexual harassment or sex discrimination claim, and is unsuccessful, they are likely to be ordered to pay the costs of the respondent. This is referred to as the adverse cost risk for unsuccessful plaintiffs, and has been recognised as a primary obstacle to people who have suffered sexual harassment or sex discrimination pursuing court proceedings. The AHRC, in the Respect@Work Report, considered that this disincentive negatively impacts on access to justice, particularly for vulnerable members of the community.[77]

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[72] See, eg, *Wotton v State of Queensland (No 5)* [2016] FCA 1457; Jones Day, *Class Actions in Australia: 2016 in Review* (March 2017) 5; *Dawson v Commonwealth of Australia (No 2)* [2021] FCA 1636.
[73] *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615.
[74] *Federal Court of Australia Act 1976* (Cth), s 43.
[75] Ibid, s 43(3). See also *Federal Court Rules 2011* (Cth).
[76] See, eg, Federal Court of Australia, *Legal Costs* (website, undated) <https://www.fedcourt.gov.au/going-to-court/i-am-a-party/court-processes/legal-costs>; *Federal Court Rules 2011* (Cth), r 40.03; *Oshlack v Richmond River Council* (1998) 193 CLR 72; Judicial Commission of New South Wales, *Civil Trials Benchbook*, 'Costs' (website, March 2021) <https://www.judcom.nsw.gov.au/publications/benchbks/civil/costs.html>.
[77] Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Report, March 2020) 507 <https://humanrights.gov.au/our-work/sex-discrimination/publications/respectwork-sexual-harassment-national-inquiry-report-2020>.

84. In response to this adverse cost risk for unsuccessful plaintiffs, the Respect@Work Report proposed Recommendation 25 that the AHRC Act be amended to insert a costs protection provision consistent with section 570 of the FWA.[78] The effect of this provision is that each party will bear their own costs unless there are exceptional circumstances where the court is satisfied that one party acted vexatiously or unreasonably, and therefore orders that party to pay the other's costs. In most matters, therefore, no costs will be awarded. The QLS has informed the Law Council that it continues to support this recommendation, which would align the AHRC Act and the FWA.

85. On 10 December 2021, however, the AHRC released its position paper, *A Reform Agenda for Federal Discrimination Laws* (**the Discrimination Law Position Paper**),[79] as the first substantive outcome of its recent consultation, *Free and Equal: An Australian Conversation on Human Rights*. Recommendation 16 of the Discrimination Law Position Paper states that 'the Commission considers that the default position should be that parties bear their own costs',[80] which accords with the ordinary effect of Recommendation 25 of Respect@Work. However, it also supports the AHRC Act being amended to 'include mandatory criteria to be considered by the courts in determining whether costs should be varied', and, in this context, suggests that the 'list included in the Human Rights and Anti-Discrimination Bill 2012, which was based on the Family Law Act, is an instructive one'.[81]

86. In a similar vein, the Law Society of South Australia has suggested to the Law Council whether Recommendation 25 might be implemented, but a third paragraph added to the existing two paragraphs that are to be copied across from section 570 of the FWA, as follows: '(3) Notwithstanding (1) and (2) above, the AHRC or Commissioner has a discretion to award costs [if there are special circumstances justifying some other order or stipulation].'

87. The Law Council has also previously contemplated that any amendments in line with section 570 of the FWA could be balanced through the inclusion of a provision giving the court greater discretion to award costs 'in the interests of justice', noting that this is similar, for example, to the situation of the Queensland Civil and Administrative Tribunal, in which parties generally bear their own legal costs except where 'the interests of justice require otherwise'.[82]

88. The Law Society of New South Wales (**LSNSW**), on the other hand, does not support Recommendation 25, preferring instead that the AHRC Act be amended to insert an 'equal access' costs provision for sexual harassment and sex discrimination plaintiffs.

89. The LSNSW has indicated to the Law Council that it opposes Recommendation 25 of the Respect@Work Report on two bases, these being:

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[78] Ibid, 45.
[79] Australian Human Rights Commission, *A Reform Agenda for Federal Discrimination Laws* (December 2021) <https://humanrights.gov.au/our-work/rights-and-freedoms/publications/free-and-equal-reform-agenda-federal-discrimination-laws>.
[80] Ibid, 341.
[81] Ibid. See Parliament of Australia, 'Exposure Draft Human Rights and Anti-Discrimination Bill 2012', *Exposure Draft Legislation* (website, undated) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/antidiscrimination2012/info/index>. Proposed section 133 relates to costs, with the list referred to by the AHRC contained in proposed subsection 133(3).
[82] Law Council of Australia, Supplementary Submission to Senate Education and Employment Legislation Committee, *Inquiry into the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (30 July 2021) 10, citing *Queensland Civil and Administrative Tribunal Act 2009* (QLD), ss 100-102.

- it may simply create an additional cost and access to justice barrier for plaintiffs bringing sexual harassment and sex discrimination claims, because, even should a plaintiff be successful, there is no guarantee that the damages awarded will be enough to recoup their legal costs, and therefore legal teams are disincentivised from providing representation; and
- respondents who have been found to have engaged in sex discrimination or sexual harassment should be liable to pay for the plaintiff's legal costs.

90. Instead of inserting a 'no costs' provision, the LSNSW proposes an 'equal costs' provision. This would be a protective provision, providing that a plaintiff may only be ordered to pay costs: where their claim is determined to be vexatious or initiated without reasonable cause; or where the plaintiff pays only the quantum of costs that their conduct has caused the respondent to incur, which is determined to be unreasonable. This would have the effect that in most matters, where a plaintiff is successful, their costs will be covered by the respondent, and, where a plaintiff is unsuccessful, they will bear only their own costs. That is, the court can only order a plaintiff to pay so much of a respondent's costs as was caused by the plaintiff's own vexatious or unreasonable conduct.

91. The LSNSW asserts that an 'equal costs' provision would have several advantages, including:

    - it would circumvent both the adverse cost risk for unsuccessful plaintiffs present in the current costs scheme and the risk of creating a disincentive to legal representation by way of Recommendation 25 where even successful cases may be unable to recover legal costs;
    - it would encourage employers to take steps to prevent sexual harassment or sex discrimination in the workplace, and – by removing the general risk of an adverse costs order – would also encourage individuals who have experienced sexual harassment or sex discrimination to bring a legal claim;
    - in facilitating judicial determination as opposed to non-judicial conciliation, it may foster greater transparency, develop legal precedent, and bring about case law that has the potential to drive systemic change in workplace culture; and
    - it would be unlikely to increase the rate of frivolous or vexatious claims due to the exceptions for such conduct contained in the proposal.

92. Each of the above options has merit, and, as noted, the Law Council continues to engage with its constituent bodies as to whether a final consolidated position might be reached.

Conclusion

93. The Law Council reiterates its recommendation that the Australian Government ensure stakeholders have the opportunity to review the drafting of any proposed amendment that results from the current consultation, and looks forward to consulting further with its constituent bodies if and when specific legislative changes of this nature are released.