



THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: ELC/HRC:SSns071022

7 October 2022

Dr James Popple  
Chief Executive Officer  
Law Council of Australia  
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Dear Dr Popple,

**Senate Committee Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022**

Thank you for the opportunity to provide input to the Law Council's submission to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 ("the Bill"). The Law Society's Employment Law and Human Rights Committees have contributed to this submission.

**Hostile work environment (Schedule 1) – Recommendation 16© of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report**

The Law Society supports the amendment set out in Item 5 of Schedule 1 to the Bill, which would insert a new section 28M to the *Sex Discrimination Act 1984* (Cth) ("SDA").

As noted in our previous correspondence to the Law Council,<sup>1</sup> our view is that a legislative provision that expressly prohibits subjecting persons to a hostile workplace environment on the ground of sex is necessary, given the limited case law at a federal level recognising that a hostile work environment could constitute sex-based discrimination.<sup>2</sup> Behaviour, which may not be directed at a specific person and, alone, may not constitute sexual harassment, can nevertheless foster a hostile environment if taken as part of a cumulative pattern of behaviour or conduct.<sup>3</sup> Accordingly, we consider the proposed section 28M addresses an important gap in the current law, by allowing individuals to make a complaint to the Australian Human Rights Commission ("AHRC") where they have been exposed to a hostile environment on the ground of sex.

Section 28M, in our view, sets out the meaning of a hostile workplace environment with sufficient clarity, noting that terms such as 'offensive, intimidating or humiliating' conduct are well established in anti-discrimination law and have been employed in other comparable jurisdictions.<sup>4</sup>

<sup>1</sup> Letter from Law Society of NSW to Law Council of Australia, 1 March 2022.

<sup>2</sup> Australian Human Rights Commission, Submission 19 to the to the Senate Education and Employment Legislation Committee, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (9 July 2021), 11.

<sup>3</sup> Legal Section of the Human Rights and Equal Opportunity Commission 'The Right to a Discrimination-Free Workplace', Australian Human Rights Commission (webpage), <https://humanrights.gov.au/our-work/right-discrimination-free-workplace#fn0>.

<sup>4</sup> See s 26, *Equality Act 2010* (UK).

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CONSTITUENT BODY

### **Positive Duty (Part 1 of Schedule 2) – Recommendation 17 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report**

The Law Society supports the amendment set out in Item 8 of Part 1 of Schedule 2 to the Bill, which effectively amends the SDA to introduce a positive duty on employers and persons conducting a business to “take reasonable and proportionate measures to eliminate, as far as possible” specified unlawful conduct under the SDA.

As noted in our previous submission,<sup>5</sup> the introduction of a positive duty on employers to prevent sex-based discrimination promotes harmonisation between the SDA and the existing model WHS laws,<sup>6</sup> and reflects an important legislative shift towards a “preventative focus that is proactive in dealing with discrimination and avoiding harm.”<sup>7</sup>

In considering the potential burden of a positive duty on employers and businesses under the Bill, we support the criteria proposed in section 47C(6), which in our view reasonably accounts for differences in the size, nature, resources, and circumstances of various enterprises subject to the SDA.

### **Compliance (Part 2 of Schedule 2) – Recommendation 18 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report**

The Law Society supports in principle the graduated introduction of the AHRC’s enforcement powers under Division 2 of Part 2 of Schedule 2 to the Bill, to reduce the overreliance on individual complainants pursuing legal action under the *Australian Human Rights Commission Act 1986* (Cth) (“AHRC Act”). Such complainants are often disadvantaged, and lack adequate resources or support, to carry the “bulk of responsibility for ensuring compliance with discrimination laws”.<sup>8</sup>

However, we note that the proposed changes would require a significant increase in funding, resourcing and expertise in the AHRC.

We also suggest that, in the initial phase of introducing a positive duty under the Bill, further consideration should be given to implementing co-regulatory mechanisms (eg voluntary audits, development of action plans) to increase understanding and compliance across businesses. In this regard, the Law Society supports the proposed AHRC functions under section 35A, which include, *inter alia*, publishing guidelines for complying with the positive duty in respect of sex discrimination, and undertaking research and educational programs in relation to this duty.

In relation to proposed section 35J(2), we suggest that consideration be given to enabling courts to impose pecuniary penalties for failure to comply with a compliance notice. Such a provision could be modelled on the current provisions of the *Fair Work Act 2009* for non-compliance with a notice from the Fair Work Ombudsman.

### **Inquiries into systemic unlawful discrimination (Schedule 3) – Recommendation 19 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report**

The Law Society supports Schedule 3 to the Bill, which effectively amends the AHRC Act to confer new functions on the AHRC, to conduct inquiries into systemic or suspected systemic unlawful discrimination.

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<sup>5</sup> Above n 1.

<sup>6</sup> Letter from Law Society of NSW to Law Council of Australia, 31 May 2021.

<sup>7</sup> Australian Human Rights Commission, *Free and Equal – A Reform Agenda for Federal Discrimination Laws* (2021), 56.

<sup>8</sup> *Ibid.*, 91.

We note that under proposed section 35M(b), the AHRC is empowered to perform its systemic inquiry functions “[when] it appears to the Commission to be desirable to do so.” While this provision is, in our view, consistent with the independent nature of the AHRC as a Paris Principles compliant institution,<sup>9</sup> we suggest that consideration be given to further clarifying the circumstances under which the AHRC may initiate an investigation under section 35M(b).

**Representative Applications (Schedule 4) – Recommendation 23 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report**

As noted in our previous correspondence,<sup>10</sup> the proposed amendments set out in Schedule 4 to the Bill are, in our view, uncontroversial, noting that the Federal Court of Australia already allows representative proceedings to be commenced in certain circumstances.<sup>11</sup>

**Costs (Schedule 5) – Recommendation 25 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report**

We refer to our previous correspondence to the Law Council where we suggest an amendment to the AHRC Act to insert an ‘equal access’ costs provision for sexual harassment and sex discrimination plaintiffs i.e., 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.<sup>12</sup> 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.

The Law Society therefore maintains its previous position and does not support the proposed amendments in Item 3 of Schedule 5 to the Bill, which provide for each party to bear their own costs.

**Victimisation (Schedule 7) – Recommendation 21 of the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* report**

The Law Society supports the amendments contained in Schedule 7 to the Bill, which clarify that victimisation can give rise to both civil and criminal proceedings under specified legislation, and ensure greater consistency between discrimination laws.

We hope this input is of assistance. Please contact Nathan Saad, Policy Lawyer, on (02) 9926 0174 in the first instance if you have any queries.

Yours sincerely,



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Sonja Stewart  
**Chief Executive Officer**

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<sup>9</sup> For further information, see Asia Pacific Forum of National Human Rights Institutions, ‘Fact Sheet 2: What do the Paris Principles say?’ (webpage) <https://asiapacificforum.net/members/what-are-nhris/paris-principles/>.

<sup>10</sup> Above n 1.

<sup>11</sup> *Federal Court of Australia Act 1976* (Cth) s 33C(1).

<sup>12</sup> Letter from Law Society of NSW to Law Council of Australia, 10 January 2022.