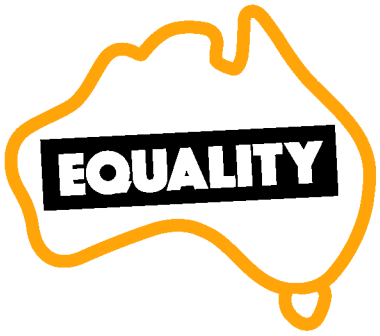

EVERYONE DESERVES RESPECT @ WORK

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE INQUIRY INTO THE ANTI-DISCRIMINATION AND HUMAN RIGHTS LEGISLATION AMENDMENT (RESPECT AT WORK) BILL 2022

11 October 2022

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ABOUT EQUALITY AUSTRALIA

Equality Australia is a national LGBTIQ+ organisation dedicated to achieving equality for LGBTIQ+ people.

Born out of the successful campaign for marriage equality, and established with support from the Human Rights Law Centre, Equality Australia brings together legal, policy and communications expertise, along with thousands of supporters, to address discrimination, disadvantage and distress experienced by LGBTIQ+ people.

Sydney office: 414 Elizabeth Street Surry Hills NSW 2010
Melbourne office: Victorian Pride Centre, 79-81 Fitzroy Street St Kilda VIC 3182

Telephone: +61 03 9999 4527

Email: info@equalityaustralia.org.au

www.equalityaustralia.org.au

We acknowledge that our offices are on the land of the Kulin Nation and the land of the Eora Nation and we pay our respects to their traditional owners.

EXECUTIVE SUMMARY

Thank you for the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) (**Bill**).

Everyone deserves respect at work. While there is much to commend it, this Bill does not extend the same protections to everyone who is protected under federal discrimination law, or even everyone who is protected under the *Sex Discrimination Act 1984* (Cth). LGBTIQ+ people, among others, are being left out of the protections offered by this Bill. We ask this Committee to ensure our national discrimination framework remains coherent and responsive to discrimination and harassment, no matter how it manifests and who experiences it.

Equality Australia welcomes the provisions of this Bill that:

- extend and make consistent the timeframes for lodging a discrimination complaint;
- enable the Australian Human Rights Commission to conduct inquiries into systemic discrimination;
- better protect complainants from the risk of adverse costs orders.

Our submission makes some suggestions for improvements to the drafting of some of these provisions.

Equality Australia also welcomes the provisions of the Bill (and previous reforms contained in the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth)) that introduce provisions into the *Sex Discrimination Act 1984* (Cth) specifically dealing with hostile workplace environments, harassment and a positive duty to take reasonable and proportionate measures to eliminate discrimination. These provisions largely simplify and reinforce existing discrimination protections. For that reason, we argue that these provisions should be extended beyond the attribute of 'sex' and should apply to all attributes protected under federal discrimination law, but especially to all attributes in the *Sex Discrimination Act* – including sexual orientation, gender identity and intersex status. This would ensure consistency and coherence in federal discrimination law, avoid unintended legal consequences, and ensure that all protections in the *Sex Discrimination Act* apply equally to people regardless of their gender, sexual orientation or sex characteristics.

While Equality Australia welcomes the extension of the representative actions regime, we think the model which has been adopted by the Bill is flawed and needs amendment. Representative bodies should have the same rules apply to them for making a representative complaint to the Australian Human Rights Commission as they do when filing a discrimination claim in the federal courts. This is because these are two steps in the same process. That means, removing the requirement for individually naming and obtaining consent from the beneficiary class, and leaving to the courts the discretion to tailor appropriate relief depending on the nature of the claim and who is affected by it.

LIST OF RECOMMENDATIONS

1. **Everyone deserves respect at work.** Extend the proposed 'hostile workplace environment' provisions, the existing 'sex-based harassment' protections and the positive duty to eliminate discrimination to all protected attributes under the *Sex Discrimination Act 1984* (Cth), including sexual orientation, gender identity and intersex status.

   Insert specific 'hostile workplace environment' protections and a positive duty to eliminate discrimination into the *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

   Insert specific harassment protections into the *Racial Discrimination Act 1975* (Cth) and *Age Discrimination Act 2004* (Cth).

2. **Positive duties.** Replace the positive duty in proposed section 47C of the *Sex Discrimination Act 1984* (Cth) with one that:

    - extends to all duty holders wherever they have existing obligations under the *Sex Discrimination Act*;
    - applies to all protected attributes under the *Sex Discrimination Act*, including sexual orientation, gender identity and intersex status.

    The positive duty should remain responsive to the size and circumstances of the duty holder, so that the duty enlarges or reduces depending on the circumstances of the case.

    Insert identical positive duties into the *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

3. **Representative applications.** Ensure the representative application regime in proposed section 46POA of the *Australian Human Rights Commission Act 1986* (Cth) is consistent with the requirements for making a representative complaint under section 46PB of the *Australian Human Rights Commission Act*. This means:

    - allowing an organisation or union to bring a complaint to the Commission and a claim to the courts on behalf of another person;
    - not requiring the organisation to individually name or obtain consent from the beneficiary class, provided it has described or otherwise identified them and specified the nature of the complaints made and the nature of the relief sought.

4. **Costs protections.** Amend proposed section 46PSA of the *Australian Human Rights Commission Act 1986* (Cth) so that each party bears their own legal costs unless the court considers it unjust to do so or the applicant is successful (in which case the applicant should be awarded their legal costs).

5. **Systemic discrimination.** Broaden the Commission's inquiry functions to serious or systemic unlawful discrimination (including suspected serious or systemic unlawful discrimination), or remove proposed section 35L(2)(b) of the *Australian Human Rights Commission Act 1986* (Cth) requiring the unlawful discrimination to be 'continuous, repetitive or form a pattern' in order for it to be systemic.

    Give the Australian Human Rights Commission appropriate regulatory enforcement powers and funding to perform functions similar to other Commonwealth regulatory bodies where serious or systemic discrimination has occurred or a positive duty to eliminate discrimination has been breached. These functions should include, in addition to its existing educative, guidance and public reporting functions:

    - the power to enter enforceable undertakings (in lieu of a civil penalty);
    - the power to issue lower-level fines as part of its compliance notice power;
    - the power to seek larger civil penalties from a court for failure to comply with the law, or an enforceable undertaking.

    These functions should be exercisable subject to standard duties to afford procedural fairness to all parties and should be appropriately reviewable by a court.

EVERYONE DESERVES RESPECT @ WORK

Everyone deserves to be treated with dignity and respect at work. Yet LGBTIQ+ people experience high rates of discrimination, including harassment and sexual harassment. Reforms to improve the operation of the *Sex Discrimination Act 1984* (Cth) should apply equally to everyone who is protected by that Act, including LGBTIQ+ people. We should also lift the standards for everyone who is protected under Australian discrimination laws, so that everyone can benefit from the clearer standards set by these reforms.

Like many other groups, LGBTIQ+ people experience high rates of discrimination, including harassment and sexual harassment. In the largest study of its kind in Australia, *Private Lives 3* documented the experiences of 6,835 LGBTIQ+ people living in Australia. Among its findings were that:

- 6 in 10 participants reported feeling treated unfairly to some degree because of their sexual orientation in the past 12 months, and 3 in 4 trans and gender diverse participants reported being treated unfairly to some degree because of their gender identity in the past 12 months.[1]
- 60.7% of respondents felt accepted 'a lot' or 'always' at work, meaning that 39.3% felt more limited acceptance or no acceptance at all at all. The proportion who felt accepted 'a lot' or 'always' in health or support services, in public, at non-LGBTIQ+ events/venues, or faith-based events or services was significantly lower, ranging from 43.4% to as low as 10.5%.[2]
- Around 1 in 4 LGBTIQ+ people experienced harassment (such as being spat at or offensive gestures) in the past 12 months because of their sexual orientation or gender identity. Just over 1 in 3 experienced being verbally abused, or socially excluded.[3]

Focusing on the experiences of LGBTIQ+ people at work, 62% of the 1,390 respondents in the 2015 Australian Human Rights Commission *Resilient Individuals* consultation reported feeling unable to disclose their sexual orientation in the workplace despite wanting to.[4] There is also evidence of:

- substantially higher rates of unemployment for trans and gender diverse people;[5]
- a wage gap between Australian workers doing the same job because of their sexual orientation;[6] and
- higher rates of workplace sexual harassment being experienced by LGBTIQ+ people than those who identify as straight or heterosexual, or who are cisgendered or not intersex.[7]

Extend the protections to everyone

In light of these experiences of discrimination we support extending the new protections regarding hostile workplace environments in Schedule 1 of the Bill and the positive duty to eliminate discrimination in Schedule 2 of the Bill beyond the attribute of 'sex'. We also urge extending the sex-based harassment protections passed under the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth)[8] to every protected attribute under federal discrimination law where no such specific protection applies. Currently, while sex- and disability-

[1] Hill et al (2020) *Private Lives 3: The health and wellbeing of LGBTIQ people in Australia*, Australian Research Centre in Sex, Health and Society, La Trobe University, p 40 ('Private Lives 3').

[2] Hill et al (2020) *Private Lives 3*, p 37.

[3] Hill et al (2020) *Private Lives 3*, p 40.

[4] Australian Human Rights Commission (2015) *Resilient Individuals: Sexual orientation, gender identity and intersex rights*, National Consultation Report, p 19.

[5] Hyde et al (2014) *The First Australian National Trans Mental Health Study*, School of Public Health, Curtin University; Hill et al (2020) *Private Lives 3*, p 25; Equality Australia (2020) *Inequality Magnified: Submission to the Australian Senate inquiry into Australia's response to COVID-19*, pp 17-8.

[6] La Nauze (2015) 'Sexual orientation–based wage gaps in Australia: The potential role of discrimination and personality', *The Economic and Labour Relations Review* 26:1.

[7] Australian Human Rights Commission (2018) *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces*, pp 8, 21-23, 26.

[8] See *Sex Discrimination Act 1984* (Cth) ss 28AA, 28AB.

based harassment are already specifically protected,[9] harassment based on other protected attributes relies on first establishing discrimination under much more complex legal definitions which vary from statute to statute.[10]

Amplifying existing deficiencies in our national discrimination framework

All recent discrimination reforms in Australia have moved towards a better understanding of intersectional discrimination and the overlapping nature of many discrimination complaints. The Respect@Work report itself noted that while the environment for sexual harassment is often seen through the lens of gender, the risks of harassment could also be attenuated by reference to age, sexuality, trans experience, intersex status, race and disability.[11] The Bill foreshadows that a workplace environment may be hostile for reasons other than the sex of a person, but stops short of providing the same protection to others who experience a hostile workplace environment because of their race, disability, age, sexual orientation, gender identity, intersex status or marital and relationship status, as examples.[12] Indeed the illustrative example in the Explanatory Memorandum serves to highlight the unfairness of this approach, where racist jokes made by a restauranteur about others which are heard by employees are not captured by the protection when pornographic images of women displayed in the kitchen area are.[13]

The result of this piecemeal approach further amplifies the deficiencies in our national discrimination framework. Among those deficiencies are:

- complex definitions of 'direct discrimination' which incorporate a comparator test,[14] meaning that poor treatment experienced both by people with and without the particular attribute may result in protections cancelling each other out when people with a variety of protected attributes are all treated poorly;
- the failure of multiple federal anti-discrimination laws to deal with the issue of intersectional discrimination as one, rather than multiple alternative claims, where experiences of discrimination are based on a combination of protected attributes. Examples of this would be a gay man who is discriminated against because he is presumed to be HIV-positive, which is a unique intersectional experience of discrimination informed by sex, sexuality and presumed disability. Currently, a gay man who experiences discrimination based on a presumed HIV status may have to argue that his mistreatment amounts to three alternative forms of discrimination based on sex, sexual orientation and presumed disability, rather than one combined experience of intersectional discrimination.

By extending the protections by reference to the attribute of 'sex' only, the Bill invites technical arguments from employers defending complaints on whether workplace conduct that is otherwise offensive, intimidating or humiliating was really on the grounds of sex, or some other ground like sexual orientation or gender identity. The point is, no one should be subjected to conduct in a workplace which is offensive, intimidating or humiliating (as those terms are understood in law) regardless of whether the conduct relates to sex, sexual orientation, gender identity or any other attribute.

Potential unintended legal consequences

The piecemeal nature of these reforms also raises specific concerns for us about unintended legal consequences in the interpretation of existing protections under the *Sex Discrimination Act 1984* (Cth). In having specific provisions

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[9] *Sex Discrimination Act 1984* (Cth) s 28AA; *Disability Discrimination Act 1992* (Cth) ss 35-39.

[10] *Sex Discrimination Act 1984* (Cth) ss 5-7B; *Age Discrimination Act 2004* (Cth) ss 14, 15; *Disability Discrimination Act 1992* (Cth) ss 5, 6; *Racial Discrimination Act 1975* (Cth) s 9.

[11] Australian Human Rights Commission (2020) *Respect@Work National Inquiry into Sexual Harassment in Australian Workplaces*, p 19.

[12] Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) (**Bill**), Schedule 1, Item 4 (proposed section 8A of the *Sex Discrimination Act 1984* (Cth)).

[13] Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth), 23 (**Explanatory Memorandum**).

[14] *Sex Discrimination Act 1984* (Cth) ss 5-7A; *Age Discrimination Act 2004* (Cth) s 14; *Disability Discrimination Act 1992* (Cth) s 5; *Racial Discrimination Act 1975* (Cth) ss 11-13.

dealing with hostile workplace environments and harassment only the basis of 'sex', there may be an argument that Parliament intended to exclude from standard discrimination protections hostile workplace environments or harassment based on other protected attributes in the *Sex Discrimination Act*, including gender identity, sexual orientation and intersex status. In particular, as the explanatory memorandum says, there is limited judicial authority on whether conduct that creates an intimidating, humiliating or offensive workplace environment is unlawful in Australia when it is not specifically directed at a particular employee,[15] and this piecemeal reform may serve to lead to an interpretation that it is not.

Courts may construe the protections afforded under other attributes more narrowly by giving significance to the legislative omissions in this Bill. So, in a worst-case example, hostile environments based on gender identity or sexual orientation may no longer constitute forms of discrimination, because if Parliament had intended to capture them they would not have passed provisions only prohibiting hostile environments on the grounds of 'sex'. At best, the simpler pathways established by specific harassment and hostile workplace environment protections will not apply to other protected attributes under the *Sex Discrimination Act*, leaving everyone who experiences these forms of discrimination with more convoluted legal pathways to establishing their complaints.

Introducing a hierarchy of protections

The reality is that duty holders will have to update policies, procedures and training to implement these new protections and the positive duty regardless of the scope of the Bill. Accordingly, it is better and more efficient to make all protections and duties consistent now, than to leave them in an unfinished and inconsistent state. We also fear that the inconsistency of these protections and positive duties will establish a new hierarchy of protection where less focus is placed on some forms of discrimination over others because of the legislative emphasis being given to the attribute of 'sex'. We fear that discrimination against LGBTIQ+ people will become further marginalised in policies and practices adopted by employers across the country which pick up the asymmetrical protections and duties that will be contained in the *Sex Discrimination Act*. This is particularly concerning given the lack of a definition of 'sex' in the *Sex Discrimination Act*, and the argument which has been raised by some that this attribute may not protect people whose sex assigned at birth does not align with their gender or whose gender is not binary. An analysis of the legal issues in this regard is set out in the Queensland Human Rights Commission recent report considering reforms to the Queensland *Anti-Discrimination Act 1991* (Qld).[16]

RECOMMENDATION 1

Extend the proposed 'hostile workplace environment' provisions, the existing 'sex-based harassment' protections and the positive duty to eliminate discrimination to all protected attributes under the *Sex Discrimination Act 1984* (Cth), including sexual orientation, gender identity and intersex status.

Insert specific 'hostile workplace environment' protections and a positive duty to eliminate discrimination into the *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

Insert specific harassment protections into the *Racial Discrimination Act 1975* (Cth) and *Age Discrimination Act 2004* (Cth).

[15] Explanatory Memorandum, 22.

[16] Queensland Human Rights Commission (2022) *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991*, pp 277-281.

POSITIVE DUTIES

It is better to prevent discrimination rather than address the harm once it has occurred. That is why we support a positive duty that ensures all duty holders take reasonable and proportionate steps to eliminate discrimination, including sexual harassment, before it occurs. We support extending the positive duty to mirror all existing obligations under the *Sex Discrimination Act 1984* (Cth), so that all existing duty holders must take reasonable and proportionate steps to eliminate unlawful discrimination, sexual harassment and victimisation.

Recognising that employers, educators and goods and services providers already have discrimination obligations, including ancillary and vicarious liability obligations,[17] they should already be taking reasonable steps to prevent a breach of their obligations. A positive duty does not, in truth, add a new duty. Rather, it reinforces existing obligations and provides a mechanism for enforcement that is systemic rather than dependant on individual complaints. For that reason, we see no benefit in limiting the positive duty to the attribute of 'sex' (as we have previously submitted), or only to certain duty holders under the *Sex Discrimination Act*. Further, the approach of aligning the positive duty with the concept of an employer or person conducting a business or undertaking (**PCBU**) from workplace health and safety (**WHS**) laws sits uneasily with the *Sex Discrimination Act's* focus on specific areas of public life, such as employment, education and the provision of goods and services, and the relevant relationships of employer/employer, educator/student, and provider/consumer. It makes the positive duty much more complex to understand and apply than it needs to be, given the duty itself is intended to be flexible to the circumstances of the case. There would be little to no additional regulatory burden on existing duty holders in the *Sex Discrimination Act* by introducing a simple and straightforward positive duty like Victoria has done,[18] the ACT[19] and Northern Territory[20] are proposing, and Western Australia[21] and Queensland[22] are currently considering.

The positive duty is too narrowly framed

Even putting aside the exclusion of LGBTIQ+ people in the manner in which this positive duty is framed, this duty appears to fail so many women who have experienced sexual harassment, as recently exposed in university settings (such as on campus accommodation)[23] and in aged care facilities.[24] The employment lens put on the positive duty in proposed sections 47C(3) and 47C(5) may mean that educational institutions, accommodation and service providers do not take steps to limit the risks of sexual harassment, not only by their employees, but by other students, service users, or people who visit their premises.

Examples of scenarios that may not be captured by this positive duty are:

- A local council that runs a swimming pool which fails to take steps to ensure they manage the risk of patrons sexually harassing other patrons while on premises.
- An aged care provider who has not taken reasonable and proportionate steps to prevent harassment by one aged care resident against another from reoccurring.

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[17] *Sex Discrimination Act 1984* (Cth) ss 105-106.

[18] *Equal Opportunity Act 2010* (Vic) s 15.

[19] Exposure Draft Discrimination Amendment Bill 2022 (ACT) s 21 (proposed section 75(1) of the *Discrimination Act 1991* (ACT)).

[20] Exposure Draft Anti-Discrimination Amendment Bill 2022 (NT) cl 9.

[21] Law Reform Commission of Western Australia (2022) *Review of the Equal Opportunity Act 1984 (WA): Project 111 Final Report*, recs 121-125. The WA Government has indicated that it has 'broadly accepted the recommendations' of the Law Reform Commission's report with further consideration to be given to the extent they will be implemented: 'WA's anti-discrimination laws set for overhaul', 16 August 2022, Press release by Western Australian Attorney-General the Hon John Quigley MLA.

[22] Queensland Human Rights Commission (2022) *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991*, recs 15.1-15.3. The Queensland Government is currently considering the report and its recommendations: 'Sweeping reforms proposed for Queensland's anti-discrimination laws', 1 September 2022, Press release by Queensland Attorney-General the Hon Shannon Fentiman.

[23] Heywood et al (2022) *National Student Safety Survey: Report on the prevalence of sexual harassment and sexual assault among university students in 2021*, The Social Research Centre; Australian Human Rights Commission (2017) *Change the Course: National Report on Sexual Assault and Sexual Harassment at Australian Universities*.

[24] Royal Commission into Aged Care Quality and Safety (2021) *Final Report: Care, Dignity and Respect*, Vol 1, p 68.

- A university college that fails to take steps to prevent the sexual harassment of students by other students through instating robust reporting mechanisms and disciplinary processes.
- A dating app that fails to allow users to remove users who sexually harass other users.

In all these cases, obligations are already in place on a person who *'causes, instructs, induces, aids or permits another person'* to act in a prohibited manner,[25] in addition to having direct duties to their students, customers and service users as educational institutions or providers of goods, services, facilities and accommodation.[26] If one of these organisations is on notice of the likelihood of prohibited conduct by a non-employee, and fails to take reasonable steps to prevent it, they may already be liable – so it makes little sense to define the positive duty only by reference to employment and vicarious liability provisions.

A better positive duty

Instead of proposed section 47C, we would suggest this alternative drafting:

> ***41C Duty to eliminate unlawful discrimination, sexual harassment or victimisation***
>
> *(1) This section applies to a person who has a duty under Part II not to engage in discrimination, sexual harassment or victimisation.*
>
> *(2) A person must take reasonable and proportionate measures to eliminate unlawful discrimination, sexual harassment or victimisation as far as possible.*
>
> *(3) The following matters are to be taken into account in determining whether a person has complied with subsection (2):*
>
> *(a) the size, nature and circumstances of the person's business, undertaking or operations;*
>
> *(b) the person's resources, whether financial or otherwise;*
>
> *(c) the practicability and the cost of the measures;*
>
> *(d) any other relevant matter.*

We would suggest a similar positive duty be inserted into each federal discrimination law, to ensure that if organisations are to implement a positive duty anyway, they do so in respect of all protected attributes.

RECOMMENDATION 2

Replace the positive duty in proposed section 47C of the *Sex Discrimination Act 1984* (Cth) with one that:

- extends to all duty holders wherever they have existing obligations under the *Sex Discrimination Act*;
- applies to all protected attributes under the *Sex Discrimination Act*, including sexual orientation, gender identity and intersex status.

The positive duty should remain responsive to the size and circumstances of the duty holder, so that the duty enlarges or reduces depending on the circumstances of the case.

Insert identical positive duties into the *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

[25] *Sex Discrimination Act 1984* (Cth) s 105.

[26] *Sex Discrimination Act 1984* (Cth) ss 21-23.

REPRESENTATIVE APPLICATIONS

Representative applications allow a representative body, such as a trade union or community organisation, to bring a complaint on behalf of an affected community when they experience systemic discrimination. It lessens the burden on individuals and allows the affected community to seek justice together through its representative bodies. The representative applications procedure proposed by this Bill is flawed and must be improved to ensure it is fit for purpose.

When someone makes a complaint of discrimination, they want it resolved. Sometimes, that resolution can be reached privately between the parties, including with the assistance of a conciliator. Sometimes, that resolution requires an arbiter who decides what the resolution should be, where the parties cannot themselves agree. For constitutional reasons,[27] the federal discrimination complaints resolution process has divided these two functions across two different bodies: one function performed by the Australian Human Rights Commission and one function that can only be performed by the federal courts. But for a person who makes a complaint, these are steps along the way to the same objective: the resolution of their complaint. That is why the process for filing a federal discrimination complaint through to making a claim in the federal courts if that complaint is not resolved must be seen as one single process. The rules throughout that process should be consistent, and the same options for resolving the complaint should be open to everyone who is entitled to make a complaint.

Inconsistent rules within the same complaints process

Currently, the Bill proposes to introduce rules about who can make a representative claim to the federal courts which are inconsistent with the existing rules about who can initiate the complaint to the Australian Human Rights Commission. The representative application regime in proposed section 46POA of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) must be consistent with the representative complaints requirements currently in section 46PB of the AHRC Act. That is, like the existing section 46PB(2)(a) of the AHRC Act, there should be no requirement for the beneficiary class to be individually named (only described or otherwise identified) in the application: cf proposed section 46POA(2)(b)[28]. And, like section 46PB(4) of the AHRC Act, there should be no requirement for consent from the class members: cf proposed section 46POA(1)[29].

The purpose of representative actions is to allow an organisation (such as a peak organisation or union) to bring an action on behalf of persons aggrieved by the conduct, without requiring those persons to individually do so. Requiring an organisation (such as an LGBTIQ or disability rights organisation) to individually name and obtain consent from the beneficiary class defeats the purpose of enabling an organisation to uphold the law on behalf of its constituency, and it also means that representatives complaints cannot in practice be made to the Commission and then go on to court if conciliation is not successful and the complaint is terminated by the Commission. This proposed provision therefore does not solve the issues identified in *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council*,[30] and would seem to make it harder – not easier – for a representative organisation to bring a complaint as a representative for a class. This is because they would have to start their complaint to the Commission with an eye to the more onerous requirements for initiating a claim in the federal courts, if they fear that their complaint cannot be resolved by conciliation.

A better way forward on representative applications

In addition to the existing representative complaints regime under section 46PB of the AHRC Act, there are better representative models found in other state and territory discrimination laws, such as in the ACT (based on a

[27] *Brandy v Human Rights & Equal Opportunity Commission* [1995] HCA 10.

[28] See Bill, Schedule 4, Item 8.

[29] See Bill, Schedule 4, Item 8.

[30] *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615.

'sufficient interest' test),[31] currently proposed in the Northern Territory[32] and recently recommended by the Queensland Human Rights Commission.[33] Western Australia and Tasmania also have more liberal regimes.[34]

The key is to ensure that these three principles are met:

- **The person who experiences the discrimination can be different to the person bringing the complaint.** So, for example, the discrimination can be experienced by LGBTIQ+ young people as a class, but the complaint can be brought on their behalf by a charity serving the interests of LGBTIQ+ young people. That seems to be achieved by proposed section 46PO(2A).[35]
- **A person can bring the complaint on their own behalf and on behalf of someone else.** That seems to be achieved by proposed section 46PO(2A).
- **If an organisation or union is bringing the application as a representative applicant, they should only be required to describe the class (not individually name them) and should not be required to obtain individual consent.** This would be consistent with sections 46PB(3) and 46PB(4) of the AHRC Act for representative complaints made to the Commission.

There is no need for the beneficial class to be individually named or provide individual consent before a claim is filed because people who belong to the class are not subject to the risks of an adverse costs order, only the representative applicant is: see proposed section 46PSA(4).[36] And, if the representative applicant is successful, they can obtain relief for the class which is appropriate to the case, as the court retains a discretion to make orders which it considers fit: see section 46PO(4) of the AHRC Act (and proposed section 46PO(4A)[37]). This ensures that a court can tailor the relief appropriately to the circumstances of the case, including by considering how the relief should be framed where the class has not been individually identified or consented to the claim. For example, the court could decide only to order declaratory relief rather than award compensatory damages, or limit relief only to those who identify themselves and consent to the orders applying to them once the orders are made.

Dealing with class identification and consent once a claim is successful is much more preferable than imposing a mandatory requirement of class identification and consent before a claim can be made. First, in many cases it would not be reasonable or even feasible to expect a representative organisation that seeks to represent a protected class, to identify and seek consent from everyone who may benefit from the action, given these representative complaints tend to address systemic issues – not issues limited to only one person. Second, sometimes it is only the respondent that knows who may be affected by their conduct, if for example, they hold information regarding the affected class. Third, the currently proposed approach would particularly prohibit actions brought on behalf of people with attributes that are not visible or known to the representative body e.g. some undiagnosed conditions, where individually naming the class and getting consent may not possible given persons may not even know they belong to the class. These are some of the reasons why the representative regime must establish a different test for standing for representative bodies that does not rely on individual consent or identification. Finally, a person can always opt out of a representative application if they wish: see proposed section 46POB(2)-(5).

[31] *Human Rights Commission Act 2005* (ACT) ss 43(1)(f) and 43(2).

[32] Exposure Draft Anti-Discrimination Amendment Bill 2022 (NT), proposed section 62A.

[33] Queensland Human Rights Commission (2022) *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991*, recs 10-11.

[34] *Equal Opportunity Act 1984* (WA) ss 114-117; *Anti-Discrimination Act 1998* (Tas) s 82.

[35] See Bill, Schedule 4, Item 1.

[36] See Bill, Schedule 5, Item 3.

[37] See Bill, Schedule 4, Item 7.

RECOMMENDATION 3

Ensure the representative application regime in proposed section 46POA is consistent with the requirements for making a representative complaint under section 46PB of the AHRC Act. This means:

- allowing an organisation or union to bring a complaint to the Commission and a claim to the courts on behalf of another person;
- not requiring the organisation to individually name or obtain consent for the beneficiary class, provided it has described or otherwise identified them and specified the nature of the complaints made and the nature of the relief sought.

COSTS PROTECTIONS

Justice can be expensive to obtain. The federal discrimination costs regime should protect complainants from the risk of adverse costs orders unless it would be unjust to do so. However, successful complainants should be awarded their legal costs, as these costs would not have been incurred but for the discrimination they have suffered.

We support the proposal to reduce the risk of adverse costs orders against applicants who bring discrimination complaints. While we think the proposed section 46PSA[38] is better than the current costs approach under the AHRC Act, we suggest considering adding either an additional default principle or a further matter for consideration under subsection 46PSA(3) that tips the scales of justice towards giving a successful applicant recovery of their reasonable legal costs.

We think this is important for several reasons.

- First, the damages awarded in discrimination matters can be low when the claim is only seeking declaratory relief, or an order to prevent the discrimination from continuing. Damages for loss of dignity, where there is no significant financial loss, are also likely to be relatively modest. This means that the cost of legal representation may well outweigh the monetary damages awarded, notwithstanding the importance of the claim. Given the cost of legal representation (even if a 'no win, no fee' retainer is offered), giving applicants more certainty that they can recover their reasonable legal costs if they win is more likely to allow them to obtain legal representation.
- Second, the risk of an applicant recovering their legal costs may give the respondent more reason to offer to resolve the matter if they consider the matter has higher prospects of success. This saves the court time in resolving the matter, but also saves the applicant the costs and time involved in litigating their claim.

Discrimination complaints are not merely monetary complaints; they go to fundamental injustices and harms to dignity. For this reason, the usual costs recovery approach that might work well in a commercial dispute, or a dispute where monetary damages are likely to be higher or more readily calculable, are not appropriate in the discrimination context and discourage worthy complaints from people who have been discriminated against. However, it still costs money to obtain legal advice and representation when someone has been discriminated against, and those costs are really part of the harm that the complainant has suffered and would not have been incurred but for the discriminatory conduct. It is for this reason that each party should bear their own costs, unless the court considers it unjust to do so, or the applicant is successful (in which case the applicant should be awarded their legal costs).

Instead of proposed section 46PSA, we would suggest this alternative drafting:

46PSA Costs

(1) *Subject to subsection (2), in proceedings under this Division against a respondent to a terminated complaint, each party is to bear that party's own costs unless the court considers that there are circumstances in which it would be just to make, whether by way of interlocutory order or otherwise, a different order as to costs.*

(2) *In circumstances where an applicant has partly or wholly succeeded in their claim, the court must award costs to the applicant on either an ordinary or indemnity basis as the court considers just.*

(3) *In considering whether it would be just to make a different order as to costs under subsection (1), or whether it would be just to award costs on an either ordinary or indemnity basis under subsection (2), the court concerned must have regard to the following matters:*

[38] See Bill, Schedule 5, Item 3.

(a) *the subject matter of the proceedings, including whether it involves an issue of public importance;*

(b) *the financial circumstances of each of the parties to the proceedings;*

(c) *the conduct of the parties to the proceedings (including any conduct of the parties in dealings with the Commission), including whether the proceeding has been brought vexatiously or is an abuse of process;*

(d) *whether any party to the proceeding has been wholly or partly successful in the proceedings;*

(e) *whether any party to the proceedings has made an offer in writing to another party to the proceedings to settle:*

(i) *the proceedings; or*

(ii) *the matter the subject of the terminated complaint;*

and, if so, the terms of the offer;

(f) *any other matters that the court considers relevant.*

(4) *In the case of a representative application, subsection (1) does not authorise the court concerned to award costs against a person on whose behalf the application is made other than the person who made the application.*

RECOMMENDATION 4

Amend proposed section 46PSA of the AHRC Act so that each party bears their own legal costs unless the court considers it unjust to do so or the applicant is successful (in which case the applicant should be awarded their legal costs).

SYSTEMIC DISCRIMINATION

Every regulatory regime needs a regulator. Yet federal discrimination law is one of the only regulatory regimes that mostly relies on affected individuals in order to obtain compliance. We welcome the Australian Human Rights Commission being given more inquiry and enforcement powers, but these need to be further extended.

We support the Australian Human Rights Commission being given powers to inquire into systemic unlawful discrimination.[39] We think these provisions could be improved by broadening the definition of 'systemic unlawful discrimination' and providing the Commission with more powers to respond to systemic and serious discrimination.

The definition of 'systemic unlawful discrimination' requires the suspected unlawful discrimination to be 'continuous, repetitive or forms a pattern' and affects a class or group.[40] However, a systemic issue might not be related to discrimination of the same subject matter, but a systemic or cultural failure of the organisation to investigate and respond to discrimination *per se*. For example, the systemic issue might be a failure to have effective processes and policies to ensure people are not victimised if they make a discrimination complaint. The current definition of 'systemic unlawful discrimination' appears too narrow to address these types of systemic omissions or failures, so we would suggest removing the requirement in proposed section 35L(2)(b) or broadening the Commission's inquiry function to capture *serious or systematic* unlawful discrimination (or suspected serious or systemic unlawful discrimination).

Once systemic discrimination is identified, the Australian Human Rights Commission is then limited in its regulatory response toolkit to simply making a report.[41] That is, the Australian Human Rights Commission is effectively powerless as a regulator to take appropriate regulatory action in the way other Commonwealth regulators, like the Australian Competition and Consumer Commission, Fair Work Ombudsman or the Australian Securities and Investments Commission, are currently empowered to do.

To be effective, a regulatory regime needs to have the regulatory infrastructure to be able to respond appropriately depending on the degree of any contravention, so that:

- at the lower end of the scale, a failure to comply supports educative responses that promote compliance and improves standards across an industry; and
- at the more acute end of the scale, a regulatory agency can prosecute systemic or serious discrimination.

Currently, the discrimination framework largely places the burden of policing compliance on the individuals most affected when that burden could be better placed with a regulatory agency that can investigate a potential breach and take appropriate steps where a contravention has occurred. A regulatory agency needs a toolbox of regulatory 'carrots and sticks'; the ability to seek penalties or injunctions from a court for serious breaches and the ability to accept enforceable undertakings for organisations that are willing to improve their compliance. Under this approach, individuals who have experienced discrimination become whistleblowers and witnesses to misconduct, rather than plaintiffs. However, there can also be provisions allowing affected individuals to obtain compensation for loss they have suffered,[42] concurrently with regulatory action.

The Bill currently foreshadows a better regulatory regime will apply in respect of the positive duty to eliminate discrimination insofar as it extends to the attribute of 'sex'.[43] In our view, this proposed regulatory regime should also apply to instances where the Commission has determined systemic discrimination has occurred, subject to the usual safeguards for procedural fairness and judicial review. However, this proposed regulatory regime has no provision for either civil penalty provisions or a means by which a compliance notice can be enforced other than by

[39] Bill, Schedule 3.

[40] Bill, Schedule 3, Item 8 (proposed section 35L(2) of the *Australian Human Rights Commission Act 1986* (Cth)).

[41] Bill, Schedule 3, Item 8 (proposed section 35Q of the *Australian Human Rights Commission Act 1986* (Cth)).

[42] See for example, Australian Consumer Law s 79B.

[43] Bill, Schedule 2, Item 23.

way of contempt of court proceedings. We think this is a gap in the regulatory regime because the risk of a fine is always a significant driver for commercial operators to improve their practices. The 'stick' of a potential fine makes the 'carrot' of an enforceable undertaking a better pathway for duty holders who can and want to do better. Accordingly, we believe that the Australian Human Rights Commission needs appropriately regulatory enforcement powers and funding to step into the role of a Commonwealth regulator where it identifies serious or systemic unlawful discrimination has occurred or a positive duty to eliminate discrimination has been breached.

RECOMMENDATION 5

Broaden the Commission's inquiry functions to serious or systemic unlawful discrimination (including suspected serious or systemic unlawful discrimination), or remove proposed section 35L(2)(b) requiring the unlawful discrimination to be 'continuous, repetitive or form a pattern' in order for it to be systemic.

Give the Australian Human Rights Commission appropriate regulatory enforcement powers and funding to perform functions similar to other Commonwealth regulatory bodies where serious or systemic discrimination has occurred or a positive duty to eliminate discrimination has been breached. These functions should include, in addition to its existing educative, guidance and public reporting functions:

- the power to enter enforceable undertakings (in lieu of a civil penalty);
- the power to issue lower-level fines as part of its compliance notice power;
- the power to seek larger civil penalties from a court for failure to comply with the law or an enforceable undertaking.

These functions should be exercisable subject to standard duties to afford procedural fairness to all parties and should be appropriately reviewable by a court.