Submission to Respect@Work Consultation on Remaining Legislative Recommendations

March 2022

Women's Health VICTORIA
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Contents

Introduction

Women's Health Victoria (WHV) welcomed the opportunity to provide feedback to the *Respect@Work Consultation on Remaining Legislative Recommendations* in March 2022.

Note: This submission was originally made as a response to an online survey.

The survey questions relate to each of the remaining six legislative proposals that the Government is consulting on. The questions are focused on understanding whether legislative changes are necessary, and if so, determining the appropriate amendments to implement the relevant recommendation.

Survey responses

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

Q1. What are your views on amending the Sex Discrimination Act to prohibit the creation or facilitation of a hostile work environment on the basis of sex?

(Please select one)		WHV Response
a	*Support amending the Sex Discrimination Act to prohibit the creation or facilitation of a hostile work environment on the basis of sex*	**YES**
b	*Do not support amending the Sex Discrimination Act to prohibit the creation or facilitation of a hostile work environment on the basis of sex*	Not selected
c	*Unsure*	Not selected
Please expand on your response		**N/A**

Q2. If you SUPPORT this proposal, what are your key reasons?

(Please select all that apply)		WHV Response
a	*The current law requires clarification and this proposal would fill a gap that exists in the current legal frameworks*	**YES**
b	*People who are exposed to sexual conduct, but who are not the direct target, are currently not clearly covered by the sexual harassment provisions in the Sex Discrimination Act and should be*	**YES**
c	*A legislative change would send a strong message to people in the workplace about their obligations and role in preventing sexual harassment*	**YES**
d	*The Australian Human Rights Commission should have a clear responsibility in relation to this type of conduct, in addition to complaint mechanisms and remedies available under other existing frameworks*	**YES**
e	*Other*	**YES**
Please expand on your response		**See below**

Q2 - Expanded response

- Sexist, exclusionary and hostile work environments create the preconditions for sexual harassment to occur. Changing these types of work environments is key to preventing sexual harassment.
- Such work environments cause significant harm to workers and organisations. A meta-analysis of studies examining women's occupational wellbeing showed that 'the more frequent, less intense, and often unchallenged gender harassment, sexist discrimination, sexist organizational climate, and OTSH [organizational tolerance of sexual harassment] appeared at least as detrimental for women's well-being' as low-frequency acts of harassment targeted at an individual, such as sexual coercion. The organisation-wide harm resulting from this kind of conduct may be much larger, although less visible.[1]
- The harm described above is particularly acute for women with intersectional identities and people who identify as LGBTQIA+.[2]
- The law requires clarification and the above proposal would address the following issues that exist in the current legal framework.
    - It is not clearly unlawful to create or facilitate a work environment that is generally hostile towards workers in sexist but not overtly sexual ways, where behaviours are not directed at a particular individual. Sexist, hostile work environments are not routinely recognised by individuals and organisations as sexual harassment[3] or other unlawful conduct under the Sex Discrimination Act.
    - It is also difficult to succeed with a claim of sex discrimination based on multiple instances of mistreatment even if, when considered together, the cumulative effect is unlawful sex discrimination. Under the current law a complainant must prove that each incident of unfavourable treatment is substantially because of that person's sex, which is often difficult. If multiple incidents could be considered together as part of a hostile work environment then a clearer picture of cumulative, discriminatory effect can emerge.
- The addition of the proposed specific prohibition would clarify the legal position for duty holders and complainants.
- Individuals should be entitled to seek individual redress for harm caused by this type of discriminatory conduct, in addition to having the option to report the situation to the Australian Human Rights Commission (AHRC) and a work health and safety (WHS) agency for an equality, health and safety response.

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1 Sojo VE, Wood RE, Genat AE (2016) Harmful workplace experiences and women's occupational well-being: a meta-analysis. *Psychology of Women Quarterly* 40(1):10-40. p. 10, 31. See also Smith B, Schleiger M, Elphick L (2019) Preventing sexual harassment at work: exploring the promise of work health and safety laws. *Australian Journal of Labour Law.* 32(2):219-249, p. 226.

2 Australian Human Rights Commission (2018) Everyone's business: fourth national survey on sexual harassment in Australian workplaces Australian Human Rights Commission. Sydney.

3 Australian Human Rights Commission (2020) Respect@Work: Sexual Harassment National Inquiry report. Australian Human Rights Commission. Sydney. p. 458.

Q3. If you DO NOT SUPPORT this proposal, what are your key reasons?

(Please select all that apply)		WHV Response
a	*The current laws and legal frameworks sufficiently address this proposal already*	**N/A**
b	*This proposal would create additional complexity for employers and/or workers due to overlap with the Work Health and Safety framework, Fair Work Act and Sex Discrimination Act*	**N/A**
c	*The current work underway to enhance and strengthen the existing Work Health and Safety framework sufficiently addresses this proposal*	**N/A**
d	*Further guidance material and education on the operation of the existing framework would sufficiently address this proposal*	**N/A**
e	*Other*	**N/A**
Please expand on your response		**N/A**

Q4. Which of the following workplace roles or positions, if any, should a prohibition on creating or facilitating a hostile work environment apply to?

(Please select all that apply)		WHV Response
a	*Executive leadership (senior managers, leaders)*	Not selected
b	*Middle management (managers, supervisors)*	Not selected
c	*Junior staff*	Not selected
d	*All individual/s who contribute towards creating or facilitating an intimidating, offensive, humiliating and hostile work environment*	**YES**
e	*Other*	Not selected
Please expand on your response		**See below**

Q4 – Expanded response

Who should be liable?

- The prohibition on creating a hostile environment should apply to all individual/s who contribute towards creating or facilitating an intimidating offensive or humiliating and hostile environment.
- This broad approach is consistent with WHS laws, which require all workers to ensure their acts or omissions 'do not adversely affect the health and safety of other persons' while at work.

Issue 2: Recommendation 17 – Positive duty

Q1. What are your views on introducing a positive duty into the Sex Discrimination Act to prevent sexual harassment from occurring in Australian workplaces?

(Please select one)		**WHV Response**
a	*Support introducing a positive duty into the Sex Discrimination Act*	**YES**
b	*Do not support introducing a positive duty into the Sex Discrimination Act*	Not selected
c	*Unsure*	Not selected
Please expand on your response		**N/A**

Q2. If you DO support the introduction of a positive duty into the Sex Discrimination Act, what are your key reasons?

(Please select all that apply)		**WHV Response**
a	*Promote a culture of prevention in workplaces – the proposal would contribute to cultural change around addressing sexual harassment, promoting a preventative approach rather than a reactive, remedial one*	**YES**
b	*More effective than the existing work health and safety duty – the proposal would be a more targeted measure than the existing work health and safety duty, which requires persons conducting businesses or undertakings (PCBUs) to ensure, so far as reasonably practicable, the health and safety of workers*	**YES**
c	*Capacity to address systemic issues – a positive duty would better enable systemic sexual harassment issues to be addressed, compared to the current individual complaints-based framework*	**YES**
d	*Involvement of a specialist regulator – the proposal would mean a regulator with a focus on sexual harassment would enforce compliance with the positive duty*	**YES**
e	*Shift the burden of enforcement from individuals – a positive duty would transfer the burden of upholding the legal framework from individuals who experience sexual harassment to employers, businesses and institutions – YES*	**YES**
f	*Alignment with the existing Work Health and Safety framework's focus on prevention – the proposal would align employers' obligations under the Sex Discrimination Act with their obligations under the Work Health and Safety framework, by focusing on preventative efforts*	**YES**
g	*Other*	**YES**
Please expand on your response		**See below**

Q2 – Expanded response

Why a positive duty is required in the Sex Discrimination Act

- The Sex Discrimination Act should contain a positive duty, which requires employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual and sex-based harassment and victimisation as far as possible.
- A positive duty is required in the Sex Discrimination Act to address the main driver of sexual harassment – gender inequality. This is not listed in the survey or consultation paper as a key reason for introducing a positive duty in the Sex Discrimination Act, but in our view, it is the most important reason.
- A positive duty in the Sex Discrimination Act would achieve the following:
    - Promote a culture of prevention in workplaces
    - Address systemic issues
    - Involve a specialist regulator
    - Shift the burden of enforcement from individuals

Benefits to business and the community

- Sexual harassment creates an enormous human and financial cost to the community. Deloitte Access Economics estimates that in 2018 sexual harassment cost $2.62 billion in lost productivity, which represents the loss of gross domestic product imposed by workplace sexual harassment.[4] Approximately 70% of that cost is borne by employers. Twenty three percent of the cost is borne by governments losing tax revenue.[5]
- Conversely, there is much to be gained by promoting equality in employment. Economic modelling in KPMG's report *Ending workforce discrimination against women*[6] shows that halving the gap in workforce participation rates would increase our annual GDP by $60 billion over the next 20 years. This could also result in a $140 billion lift in our cumulative measured living standards by 2038.

4 Deloitte Access Economics (2019) The economic costs of sexual harassment in the workplace: final report Deloitte Access Economics. Canberra. p. 47.

5 Deloitte Access Economics (2019) The economic costs of sexual harassment in the workplace: final report Deloitte Access Economics. Canberra. p. 6.

6 KPMG Australia (2018) Ending workforce discrimination against women KPMG Australia. Melbourne. p. 2.

Q3. If you DO NOT SUPPORT the introduction of a positive duty into the Sex Discrimination Act, what are your key reasons?

(Please select all that apply)		WHV Response
a	*Duplication – A positive duty would not motivate business effectively as it overlaps with the existing work health and safety duty and vicarious liability provisions in the Sex Discrimination Act, which should already be motivating business to create safe workplaces*	**N/A**
b	*Complexity across two frameworks – A positive duty would impose a further obligation on employers, adding to the regulatory burden already in place under the existing Work Health and Safety framework*	**N/A**
c	*Cost and regulatory burden for small business – A positive duty would disproportionately impact and increase costs and regulatory burden for small and micro-business*	**N/A**
d	*Cost and regulatory burden for large business – A positive duty would disproportionately impact and increase costs and regulatory burden for larger businesses*	**N/A**
e	*Other*	**N/A**
Please expand on your response		**N/A**

Q4. What, if any, complexities would introducing a positive duty into the Sex Discrimination Act create for employers and/or people who experience sexual harassment?

- If a positive duty in the Sex Discrimination Act is well implemented, then any complexity and workplace changes required can be managed effectively.
- Implementation must take place in a staged and gradual way to promote compliance and cultural change. This should include four stages:
  i. Sufficient time for an agency (ie the Australian Human Rights Commission) to build internal capacity and expertise, as well as develop targeted training, guidance, resources and templates for organisations that must comply with the duty.
  ii. A subsequent period of time to support employers to build capacity and expertise and become ready to comply with the positive duty
  iii. A third phase for voluntary compliance before the positive duty is enforced, so that organisations and the responsible agency can develop their capacity in a supported and collaborative manner.
  iv. A final stage where the positive duty is enforced and compulsory obligations commence.
- The agency (AHRC) must be well resourced to ensure successful implementation of the positive duty.

Q5. What are your views on the interaction between a new positive duty in the Sex Discrimination Act and the existing work health and safety duty? Can you identify any particular areas of interaction or concern that would require further thought or consideration, such as between different regulators when investigating issues of sexual harassment?

Interaction with existing obligations, including the work health and safety regime

- A positive duty in the Sex Discrimination Act would require something different of employers to what currently exists under work health and safety laws and the vicarious liability provision of the Sex Discrimination Act – it would complement but not duplicate what already exists.
- A positive duty in the Sex Discrimination Act would require employers to promote equality by identifying and addressing the systemic drivers of sexual and sex-based harassment and gender inequality in their workplace, whereas work health and safety laws are focussed on achieving workplace health and safety. While these objectives are closely related and inter-dependent, it is much more likely that a positive duty under the Sex Discrimination Act will encourage employers to take steps to promote gender equality and other systemic causes of sexual harassment more broadly, as well as addressing worker health and safety. This includes reflecting on gender equality across the employer's business, including with respect to:
    - equal pay and conditions
    - gender diversity within the workforce and leadership
    - organisational culture
    - inclusive work practices that do not indirectly discriminate based on gender, such as parental leave policies.
- Positive duties under WHS laws and the Sex Discrimination Act would be mutually consistent and reinforcing, in the sense that an employer's actions to meet obligations under WHS laws could also count towards meeting a positive duty under the Sex Discrimination Act.
- This interrelationship between the two regimes would require increased collaboration between work health and safety agencies and human rights commissions. This would be a positive development, which recognises that sexual harassment is both a workplace safety issue and an issue of gender equality and discrimination. These agencies can develop memoranda of understanding to address any regulatory overlap, such as WorkSafe Victoria and the Victorian Equal Opportunity and Human Rights Commission have done.
- Relevant agencies would need to collaborate to develop guidance to assist employers to understand the content of a new positive duty to take reasonable and proportionate measures under the Sex Discrimination Act. Just as Safe Work Australia has listened to and drawn from the AHRC's Respect@Work Report to develop its new guidance materials, the AHRC could learn from Safe Work Australia to develop complementary guidance materials for a positive duty.
- Existing vicarious liability obligations under the Sex Discrimination Act are not fulfilling the same functions as a positive duty. Individuals rarely report sexual harassment or pursue legal action, so the vicarious liability provisions are rarely used and play a limited role in encouraging employers to take meaningful, systemic action and prevent sexual harassment. This is evidenced by the fact that rates of sexual harassment are actually

increasing under the current framework, while rates of reporting have decreased. A positive duty is also more likely to have a normative effect and prompt changes that promote equality and improve workplace culture.

Q6. What other options to prevent sexual harassment in the workplace could the Government consider, alongside or instead of, introducing a positive duty into the Sex Discrimination Act?

(Please select all that apply)		**WHV Response**
a	*Providing further education on employer obligations and building capacity across all industries on creating safe workplace cultures*	**YES**
b	*Encouraging increased compliance with the existing Work Health and Safety framework, for example through training or production of further guidance materials*	**YES**
c	*Establishing a specific accreditation framework targeted at sexual harassment, under which businesses could seek accreditation for facilitating workplace environments that are free from intimidating, hostile, humiliating or offensive behaviour and have that accreditation removed*	Not selected
d	*Establishing industry codes of conduct/practice, which would set out specific standards for sexual harassment prevention and could be mandatory or voluntary to adopt (building on efforts already underway by some industries to respond to the findings of the Respect@Work Report and under recommendation*	**YES**
e	*Other*	**YES**
Please expand on your response		**See below**

Q6 – Expanded response

In addition to those mentioned above, a positive duty should also be supported by government measures that implement other primary prevention efforts to promote gender equality, stop violence against women and end sexual harassment, as recommended in Respect@Work.

All these activities would complement the function of a positive duty; they are not a substitute for the positive duty.

Q7. What are your views on how broadly or narrowly a positive duty should apply in terms of who it covers?

(Please select one)		WHV Response
a	*Apply to all employers as broadly as possible within the working world, regardless of size, structure and revenue, with no exclusions.*	**YES**
b	*Apply to employers generally but there should be some exclusions, for example for micro-businesses, community or volunteer organisations.*	Not selected
c	*Apply to certain types of employers (such as public sector employers), or employers of a certain size, structure or revenue.*	Not selected
d	*Other*	Not selected
Please expand on your response		**N / A**

Q8. What considerations should be relevant when determining whether a duty holder has adequately discharged a positive duty?

(Please select all that apply)		WHV Response
a	*The nature and size of the business or operations*	**YES**
b	*Business resources*	**YES**
c	*Business operational priorities*	Not selected
d	*The practicability and costs of the measure*	**YES**
e	*Any systemic issues within that industry or workplace*	**YES**
f	*Any other relevant facts or circumstances*	Not selected
g	*Other*	**YES**
Please expand on your response		**See below**

Q8 – Expanded response

- As noted in our response to Q7, our view is that the positive duty should apply to all employers as broadly as possible within the working world, regardless of size, structure and revenue, with no exclusions.
- However, the obligations imposed should be scaled based on the circumstances of the employer with consideration given to the following factors when determining whether a duty holder has adequately discharged the positive duty:

- The nature and size of the business or operations
- Business resources
- The practicability and costs of the measure
- Any systemic issues within that industry or workplace
- The benefits of implementing the measures
- The consequences and risks of failing to implement measures

Q9. What assistance or guidance would help support employers to meet any new positive duty obligations?

Guidance and support

A supportive approach to implementation is essential. The agency with responsibility for overseeing the positive duty must provide employers with the following support:

a. a detailed Guideline modelled on the VEOHRC Guideline

b. template reports, policies, staff surveys and other documents that may be necessary to prevent sexual harassment and promote equality

c. training to support organisations to implement policies, comply with reporting requirements and create organisational change, including template workforce communications

d. regular communications and targeted support to assist with implementation.

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

Q1. If you SUPPORT the introduction of a positive duty, how should it be enforced?

(Please select one)		WHV Response
a	*Option 1 – Utilising existing complaints mechanisms (i.e. no new enforcement powers)*	Not selected
b	*Option 2 – Enforcement powers modelled on the framework contained in the Equal Opportunity Act 2010 (Vic), where the Victorian Equal Opportunity and Human Rights Commission has investigative powers, but lacks the enforcement powers to issue compliance notices or seek enforceable undertakings*	Not selected
c	*Option 3 - New enforcement powers, as recommended in the Respect@Work Report*	**YES**
d	*Other*	Not selected
Please expand on your response		**N/A**

Q2. If you SUPPORT the introduction of enforcement powers (option 3 above) for the Australian Human Rights Commission, what powers should be made available?

- The Australian Human Rights Commission should be given:
  - compliance and co-regulatory powers
  - investigation powers, including the power to conduct own-motion investigations and compel the production of information and documents and examine witnesses, with penalties for non-compliance
  - enforcement powers, including the power to enter into enforceable undertakings, issue compliance notices and bring proceedings to enforce determinations in court.
- Visible enforcement and meaningful sanctions for breaches of the positive duty are important to deter non-compliance and encourage preventative action by employers. Efforts to persuade compliance with the law are more effective if they are backed by consequences for non-compliance.
- Currently the Australian Human Rights Commission lacks the full suite of powers that form the “enforcement pyramid”, particularly at the pointy end. While it has education and dispute resolution functions, and limited investigation powers, it does not have meaningful powers to compel compliance with discrimination laws, including the Sex Discrimination Act.

- Without a regulator that can enforce the Sex Discrimination Act, the legal, social and financial penalties for contraventions are dependent upon a victim-survivor commencing action. This means that the risks – and, therefore, the regulatory pressures - faced by those who contravene the Sex Discrimination Act are low.

Q3. Should the Australian Human Rights Commission be able to exercise enforcement powers in relation to an alleged breach of the positive duty by any employer, regardless of size or number of employees?

(Please select one)		WHV Response
a	*Yes*	**YES**
b	*No*	Not selected
c	*Unsure*	Not selected
Please expand on your response		**See below**

Q3 – Expanded response

- The Australian Human Rights Commission should be able to exercise enforcement powers in relation to an alleged breach of the positive duty by any employer, regardless of size or number of employees. Like other regulators, the AHRC should apply principles of regulatory theory to determine which businesses to target for maximum public benefit, noting that it has finite resources. This ability should not be curtailed by legislative restrictions linked to the size of the employer, as there may be a need to target problem industries that are largely comprised of small businesses, and taking action against a single business may be an important part of a larger strategy to address sexual harassment in that industry.

Issue 4: Recommendation 19 – Inquiry powers for the Australian Human Rights Commission

Q1. What are your views on providing the Australian Human Rights Commission with new or additional inquiry powers to inquire into systemic unlawful discrimination, including sexual harassment?

Women's Health Victoria (WHV) supports The Respect@Work Report's recommendation that the AHRC be provided with a broad function to inquire into systemic unlawful discrimination, including systemic sexual harassment. WHV also supports the report's further recommendation that this power be accompanied by enhanced enforcement powers to enable the AHRC to require information, the production of documents and the examination of witnesses, with penalties for non-compliance when conducting such an inquiry.

Q2. If you SUPPORT providing the Australian Human Rights Commission with new or additional inquiry functions, what are your key reasons?

- In light of the significant cultural and systemic drivers of sexual harassment and gendered violence at work, it is important to have a legal and regulatory system that can actively address systemic discrimination and sexual harassment.
- The existing legal framework is reactive and is designed to provide redress to individual victim-survivors of sexual harassment who pursue a complaint.
- Currently, individual victim-survivors of sexual harassment bear the sole burden of enforcing sexual harassment laws and holding people to account for contravening these laws. This system does not promote compliance with the Sex Discrimination Act or address systemic sex discrimination and harassment. It is ineffective, inappropriate and unfair to place the sole burden of enforcement on individual victim-survivors.
- In many cases individual complainants will not pursue a complaint due to power imbalances, social and cultural reasons, psychological barriers, financial barriers, risk of costs, procedural barriers and time delays. Providing the AHRC with broader investigative powers would enable the AHRC to inquire into unlawful conduct in problematic workplaces without placing pressure on individual complainants to pursue complaints.
- Additional inquiry powers, including the power to conduct own-motion investigations, must be provided to the AHRC to create a legal framework that can effectively address systemic discrimination and prevent workplace sexual harassment.

Q3. If you DO NOT SUPPORT providing the Australian Human Rights Commission with new or additional inquiry functions, what are your key reasons?

Not applicable.

Q4. What are your views on limiting the Australian Human Rights Commission's proposed inquiry powers?

Should the proposed inquiry powers be limited?

- The AHRC should have the power to inquire into any potentially unlawful conduct under Federal discrimination laws that may be relevant to the subject matter of the inquiry, including discrimination, harassment and victimisation.
- It is important that the AHRC's inquiry powers are not unduly limited so that it can properly inquire into intersectional discrimination and, specifically, the ways in which other forms of discrimination can uniquely contribute to and compound the experience of sexual harassment. This is of particular concern to First Nations people, young people, people with disability, the LGBTIQ+ community and people from culturally and linguistically diverse backgrounds who experience sexual harassment at higher rates and in uniquely harmful ways.
- No limitation should be placed on the type of employer that the AHRC can investigate. There is no basis for limiting the AHRC's inquiry power to the public sector, for example, as the Respect@Work Report highlighted that sexual harassment in the private sector is endemic. Workers are entitled to work free from sexual harassment regardless of where they work.
- The AHRC should have the freedom to develop a strategy around how to use the proposed inquiry power in a way that will best promote compliance with the Sex Discrimination Act and eliminate sexual harassment. The AHRC will be best placed to determine this strategy, based on survey data, complaint trends, consultation and other regulatory considerations.

Q5. What are your views on accompanying any new or additional inquiry powers for the Australian Human Rights Commission with additional investigatory powers (such as the power to require the giving of information, the production of documents and the examination of witnesses)?

(Please select one)		**WHV Response**
a	*Support accompanying any new or additional inquiry powers for the Australian Human Rights Commission with additional investigatory powers*	**YES**
b	*Do not support accompanying any new or additional inquiry powers for the Australian Human Rights Commission with additional investigatory powers*	Not selected
c	*Unsure*	Not selected
Please expand on your response		**See below**

Q5 – Expanded response

The importance of investigatory powers accompanying inquiry powers:

- The AHRC's investigatory powers are limited and need to be expanded to ensure that it can effectively exercise the expanded inquiry function that is proposed.
- The AHRC should be provided with broad investigative powers that allow the AHRC to require:
    - the giving of information
    - the production of documents
    - the examination of witnesses
    - with penalties applying for non-compliance, when conducting such an inquiry.
- The AHRC should also have the power to conduct own motion investigations, for example, in cases where credible anonymous or third party reports of sexual harassment are received.
- Investigative powers should be coupled with stronger compliance mechanisms and enforcement powers such as the power to enter enforceable undertakings, issue compliance notices and enforce penalties for non-compliance upon those who do not comply with their inquiry powers. Creating a potential financial risk for non-compliance will likely promote greater accountability and compliance generally.
- The proposed powers are not a significant departure from the current work of the AHRC. For example, the AHRC routinely conducts human rights inquiries into complaints of 'irrelevant criminal record' discrimination and makes recommendations in this regard. If a person alleges that they have been discriminated against of the basis of their criminal record they may bring a complaint to the AHRC. During this process, the AHRC may (amongst other things) ask the respondent to provide specific information or a detailed response to the complaint, conduct a conciliation, and write a report issuing recommendations.
- Allowing the AHRC to compel disclosure of information and documents and examine of witnesses will assist it to understand the nature of the discrimination and/or sexual harassment that it is investigating and determine how best to use its inquiry power. For example, such information could help to determine whether the problems are:
    - systemic
    - common across a particular workplace, industry or sector
    - common to a particular respondent, pattern of behaviour or other risk factor
    - a matter which requires further investigation and/or referral to other regulatory bodies
    - a matter which should progress through the usual complaint mechanism.

Performing different functions

- With appropriate protections in place, giving the AHRC additional investigative and inquiry powers would not undermine its conciliation functions.
- As the Consultation Paper states at paragraph 118, there are regulators, such as the OAIC and ASIC, which have processes and procedures to manage any real or perceived conflicts of interest, such as separate teams and firewalls to distinguish functions within the organisation. These processes ensure that the use of investigative or enforcement powers are used appropriately and within legislative constraints.

- Giving the AHRC additional powers to enforce the Sex Discrimination Act is likely to strengthen the impact of its education and engagement activities. Employers are likely to be more receptive to this work if there are consequence for non-compliance with the Sex Discrimination Act.

Q6. Are any investigatory powers appropriate to accompany a broad inquiry power for the Australian Human Rights Commission?

(Please select all that apply)		**WHV Response**
a	*Require the giving of information*	**YES**
b	*Require the production of documents*	**YES**
c	*Enable the examination of witnesses*	**YES**
d	*Enable the examination of witnesses*	**YES**
e	*Other*	Not selected
Please expand on your response		**See below**

Q6 – Expanded response

Please see expanded response to Question 5 above.

Issue 5: Recommendation 23 – Representative actions

Q1. What are your views on amending the Australian Human Rights Commission Act to allow representative bodies to commence representative actions in the Federal Court in relation to anti-discrimination matters?

(Please select one)		WHV Response
a	*Support amending the Australian Human Rights Commission Act to allow representative bodies to commence representative actions in the Federal Court in relation to anti-discrimination matters*	**YES**
b	*Do not support amending the Australian Human Rights Commission Act to allow representative bodies to commence representative actions in the Federal Court in relation to anti-discrimination matters*	Not selected
c	*Unsure*	Not selected
Please expand on your response		**See below**

Q1 – Expanded response

WHV supports the Respect@Work Report's recommendation that the Australian Human Rights Commission Act (AHRC Act) be amended to allow unions and other representative groups to bring representative claims to court, consistent with the existing provisions in the AHRC Act that allow unions and other representative groups to bring a representative complaint to the AHRC. This would give representative bodies, such as unions and other advocacy organisations, 'standing' to make a claim in court on behalf of one or more persons who have experienced discrimination or harassment.

Q2. If you SUPPORT this proposal, what are your key reasons?

(Please select all that apply)		WHV Response
a	*The amendment may increase the potential for systemic issues to be pursued under the Sex Discrimination Act and more matters to be heard in the federal courts without placing the burden on individuals to bear the cost and responsibility for commencing proceedings*	**YES**
b	*The amendment may provide consistency for individuals affected by sexual harassment and supported by representative bodies if their matter progresses from the Australian Human Rights Commission to the federal courts*	**YES**

c	*The amendment may encourage more individuals to pursue legal remedies by reducing the financial and other burdens (for example, re-traumatisation) associated with pursuing litigation*	**YES**
d	*The amendment may strengthen the role of representative bodies in addressing discrimination in the workplace, including sexual harassment*	**YES**
e	*Other*	Not selected
Please expand on your response		**See below**

Q2 – Expanded response

Why provisions relating to representative action are required in the AHRC Act

Amending the AHRC Act as proposed by recommendation 23 would have the following benefits.

- Increase the potential for systemic issues to be pursued under the Sex Discrimination Act and more matters to be heard in the federal courts without placing the burden on individuals to bear the cost and responsibility for commencing proceedings.
- Benefit under-resourced and vulnerable complainants who have shared experiences and a community of interest, but are faced with a well-resourced, powerful respondent.
- Provide consistency for groups of individuals affected by sexual harassment and supported by representative bodies if their matter progresses from the Australian Human Rights Commission (where unions and other representative groups have standing to bring representative complaints) to the federal courts (which do not permit such bodies to continue to represent those whom they represented before the AHRC). The current approach, with different standing requirements from the AHRC phase to the court phase, is clunky and inconsistent for complainants and should be streamlined.
- Encourage more individuals to pursue legal remedies by reducing the financial and other burdens (for example, re-traumatisation) associated with pursuing litigation as an individual applicant, restoring the balance in litigation.
- Reduce complication – harmonising the standing requirements for the making of representative complaints to the AHRC and pursuing them in court, will streamline and enhance the existing legal framework.
- Align with the objects of the Sex Discrimination Act, particularly the elimination, so far as is possible, of discrimination involving sexual harassment, and discrimination involving harassment on the ground of sex.
- Restore previous rights that existed prior to the changes effected by the Human Rights Legislation Amendment Act 1999 (Cth). Representative bodies, such as unions and other representative groups, previously had standing to represent complainants in Commonwealth anti-discrimination hearings and routinely did so.

The current system is onerous and inconsistent

- The provisions in the AHRC Act which govern standing are inconsistent and limit access to justice in the case of representative complaints, by changing the rules in mid-stream and imposing additional restrictions, to the disadvantage of complainants.
- Under the current system, an individual complainant who is represented by a union or representative group at the AHRC can only pursue their matter to the Federal Court if they relinquish that representation and commence a new application under the more restrictive, complex provisions of the court system. This creates unnecessary pressure, stress and complexity for complainants.
- At present, a minimum of 7 complainants are required in order to commence a representative action in the Federal Court. This has the effect of devaluing, excluding and marginalising smaller groups of complainants, who may have legitimate complaints of systemic sexual harassment or other unlawful discrimination, and wish to have the comfort of having their representative claim managed to finality by representative bodies such as unions and other representative groups.

Q3. If you DO NOT support this proposal, what are your key reasons?

(Please select all that apply)		**WHV Response**
a	*The amendment is not necessary because the existing mechanisms to enable representative proceedings in the Federal Court for anti-discrimination matters (including sexual harassment) is sufficient*	**N/A**
b	*The amendment is not necessary as representative bodies are already able to provide financial, legal and other support to individuals and groups to pursue litigation*	**N/A**
c	*Representative proceedings may have limited benefit as a mechanism for applicants to seek redress given the individual and case-by-case nature of sexual harassment matters*	**N/A**
d	*Allowing representative bodies to commence representative proceedings may heighten the existing conflict of interest risks in class actions in circumstances where the interests of the representative plaintiff, lawyers, litigation funders and other members of the class may not align*	**N/A**
e	*Other*	**N/A**
Please expand on your response		**N/A**

Q4. Do you consider representative complaints and representative proceedings (class actions) to be an effective mechanism for people to address anti-discrimination matters, such as sexual harassment?

(Please select one)		WHV Response
a	*Yes*	**YES**
b	*No*	Not selected
c	*Unsure*	Not selected
Please expand on your response		**See below**

Q4 – Expanded response

Prior to the changes effected by the Human Rights Legislation Amendment Act 1999 (Cth), representative bodies, such as unions and other representative groups, had standing to represent complainants in Commonwealth anti-discrimination hearings and routinely did so with positive outcomes for the groups of individuals who were represented (for example, Scott & Disabled People International (Australia) Ltd v Telstra (1995) EOC 92–717; Finance Sector Union v Commonwealth Bank of Australia [1997] HREOCA 12).

Please also see expanded response to Question 5 below.

Q5. What are the advantages of allowing representative bodies to commence representative proceedings on behalf of people who have experienced discrimination, including sexual harassment, given they are already able to provide financial, legal and other support to applicants under the existing framework?

The advantages of representative proceedings (noting the existing ability of representative bodies to provide financial, legal and other support to applicants under the existing framework)

- The provision of financial, legal and other support is not the same as a representative action.
- Making a claim of sexual harassment creates involves personal risk and cost to the victim-survivor. These are not just financial and legal costs, but social and emotional costs and costs to wellbeing that financial or legal support cannot address. Having one or more co-claimants and the shield of a representative body can, however, reduce the individual risks (eg reputational risks) and social costs – for victim-survivors of sexual harassment there is safety in numbers.
- As recently noted by the AHRC, the current rules of standing 'reinforce the burden on individuals in the complaint-handling framework'. Representative bodies, such as unions and other representative groups, are better able to bear the obligations and pressures placed on complainants.

- Having a mere supporting role is qualitatively inferior to having standing, which triggers a variety of procedural benefits. including reciprocal standards of behaviour and conduct between parties.
- As noted in the Respect@ Work Report, the change proposed by Recommendation 23 would also assist in cases of systemic discrimination that are more difficult to raise and address through an individual complaint.

Q6. Are there other benefits associated with allowing representative bodies to commence representative proceedings in the federal courts in anti-discrimination complaints? Is there any evidence to support these benefits?

Please see response to Q5.

Q7. What are your views on placing limits and restrictions on any amendments that would permit representative bodies to bring a representative proceeding on behalf of applicants in anti-discrimination matters to prevent potential misuse of such a mechanism? If you support limitations, what should these limits be?

Limits and restrictions on representative action

- There are sufficient checks and balances that exist under the AHRC Act and Federal Court Act which ensure that frivolous or vexatious claims are not made, and that proceedings are not an abuse of process. There is no need to place any additional restrictions or limitations on representative action. These checks and balances sufficiently ensure that only claims concerning legitimate interests can be considered, which adequately protects the Commission and court from undue strain on their functions or capacity

Issue 6: Recommendation 25 – Costs protections

Q1. What are your views on changing the current costs model?

(Please select one)		WHV Response
a	Support changes to the current costs model	**YES**
b	Do not support changes to the current costs model	Not selected
c	*Unsure*	Not selected
Please expand on your response		**See below**

Q1 – Expanded response

The Respect@Work Report recommended that the existing approach to the payment of legal costs – that is, the unsuccessful party may be ordered to pay the other party's legal costs – should be changed so that all parties pay their own legal costs unless there is unreasonable or vexatious behaviour. However, members of the Power2Prevent coalition, of which WHV is a member, have recently engaged in further research and consultation about this issue and consider that the best model to adopt is an Equal Access model.

Under the Equal Access model, an unsuccessful complainant is only liable to pay the costs of the other party if they made vexatious claims or their unreasonable behaviour caused the other party to incur costs. An Equal Access model would require an amendment to the AHRC Act.

Q2. If you SUPPORT a change to the costs model, what are your key reasons?

(Please select one)		WHV Response
a	The current costs model deters applicants from initiating civil proceedings, even if they have a strong claim	**YES**
b	The current costs model favours parties with significant resources, such as large employers and businesses	**YES**
c	*Other*	**YES**
Please expand on your response		**See below**

Q2 – Expanded response

Why a change to the current cost model is required?

The current discretionary costs system creates significant issues in sex discrimination and sexual harassment matters because it:

- creates a lack of certainty for complainants
- does little to mitigate the very real risk of paying the costs of the other side where a complainant is unsuccessful
- deters complainants from initiating civil proceedings, even if they have a strong claim
- favours parties with significant resources, such as large employers creating imbalance between parties and access to justice issues for marginalised communities
- perpetuates a culture where complainants lose the opportunity to have a judicial determination which results in a lack of development of legal precedent and decisions that may encourage systemic change to workplace culture

Q3. If you DO NOT support a change to the current costs model, what are your key reasons?

(Please select all that apply)		**WHV Response**
a	The current costs model is operating effectively and no changes are necessary	**N/A**
b	Any challenges associated with the current costs model are better addressed through alternative mechanisms, such as increased funding for legal services, improved processes in the federal courts, and education and awareness raising	**N/A**
c	The proposed alternative models may have unintended consequences for parties	**N/A**
d	The proposed alternative models are unlikely to reduce the deterrent effect associated with cost orders	**N/A**
e	*Other*	**N/A**
Please expand on your response		**N/A**

Q4. Which of the following options, if any, is the most appropriate costs model to apply in anti discrimination matters?

(Please select all that apply)		WHV Response
a	Replicate section 570 of the Fair Work Act in the Australian Human Rights Commission Act – each party bears their own costs unless one party acted vexatiously or unreasonably	Not selected
b	Cost neutrality – each party bears their own costs in the first instance, but the courts may make exemptions in the interests of justice	Not selected
c	Cost capping – increased use of cost capping orders in anti-discrimination matters	Not selected
e	*Other*	**YES**
Please expand on your response		**See below**

Q4 – Expanded response

The most appropriate costs model

- An Equal Access model of costs reform is the most appropriate costs model. This model, also known as vertical costs shifting or qualified one-way costs shifting, has been adopted both internationally and domestically.[7]
- Under an Equal Access model, complainants will generally not be liable for adverse costs, except where vexatious claims are made, or a complainant's unreasonable conduct in the course of proceedings has caused the other party to incur costs.
- Where a complainant is unsuccessful, each party will bear their own costs, unless the unreasonable behaviour of the respondent has caused the complainant to incur additional costs.
- Where a complainant is successful and the court has found a respondent has engaged in unlawful conduct in breach of the Sex Discrimination Act, the respondent will be liable to pay the complainant's costs because respondents should not be excused from paying costs where they have been found by a court to have breached anti-discrimination law.
- It is unlikely that costs neutrality and an increased use of cost capping, while an improvement on the current adverse cost model in matters arising under the Sex Discrimination Act, will reduce the uncertainty faced by complainants seeking to bring sexual harassment and sex discrimination matters to court. This is because wide judicial discretion already exists and has done little to alleviate issues of access to justice.
- It is also unlikely that the costs model in s 570 of the Fair Work Act 2009 (Cth) is an appropriate model under the Sex Discrimination Act. This is because under this model, complainants would be more unlikely to secure pro bono assistance or assistance from private solicitors on a no win-no fee basis, given that under this model complainants would be unable to recover costs. This issue would also arise under a cost neutrality model (i.e. where the presumption is that the parties bear their own legal costs).

[7] For example, section 1317 AH of the *Corporations Act 2001* (Cth) and section s 14ZZZC of the Taxation Administration Act 1953 (Cth) and United Kingdom's Rule 44.13-44.17 *Civil Procedure Rules 1998.*

Outstanding legislative recommendation: Recommendation 28 – Fair Work Act Amendment

This consultation does not cover recommendation 28 of the Respect@Work Report, which is that the Fair Work Act be amended to expressly prohibit sexual harassment to create an accessible process for workers to take action through the Fair Work Commission. This recommendation is integral to the reform of key legal frameworks that complement and reinforce employer obligations relating to sexual harassment.

The introduction of legislative amendments to the Sex Discrimination Act and the 'stop sexual harassment order' regime under the Fair Work Act do not address the gap in the Fair Work Act that is highlighted by recommendation 28. While the ability to seek stop sexual harassment orders is a welcome reform, the regime is limited in the following ways:

- It does not apply to all workers or cover all circumstances of sexual harassment.
- A worker is required to prove that the risk of harm is ongoing and they must be a current employee before they can access protection.
- Compensation cannot be awarded.

A full implementation of recommendation 28 would ensure that:

- sexual harassment is expressly prohibited under the Fair Work Act, ensuring that ambiguities and gaps in how sexual harassment is handled under the Fair Work Act is addressed
- the definition of sexual harassment in the Fair Work Act is consistent with that in the Sex Discrimination Act
- workers who experience sexual harassment at work as well as other conduct that is unlawful under the Fair Work Act can have their claims dealt with in the one jurisdiction
- the fact that sexual harassment at work is prohibited and victim-survivors have an enforceable right is clearly and specifically communicated.