

Submission to the Australian Government Consultation: Respect@Work - Options to progress further legislative recommendations

Introduction

SASVic welcomes the opportunity to respond to the ‘Respect@Work - Options to progress further legislative recommendations’ Consultation Paper (the Consultation Paper). We note that, as recommended by the Australian Human Rights Commission (AHRC) in its *Respect@Work: Sexual Harassment National Inquiry Report (2020)*, the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* took effect in September 2021. While the Act introduces some important changes (including paid miscarriage leave and the stop sexual harassment order regime), many of the AHRC’s recommendations are not yet reflected in legislation and as a result, employer obligations in relation to sexual harassment remain largely unchanged. The remaining legislative reforms recommended by the AHRC are urgently needed in order to address and prevent gendered violence and sexual harassment in Australian workplaces, hold perpetrators accountable, and support victim survivors to recover and receive redress.

SASVic strongly supports the implementation of the six outstanding AHRC recommendations in scope of the current consultation process. In addition to completing the consultation survey, SASVic has prepared this more detailed feedback, with the overall aim of helping to ensure that employers are responsible for taking proactive steps to prevent sexual harassment, discrimination and victimisation from occurring in the first place and that victim-survivors can access fair legal and financial redress for the harm they experience.



About SASVic

Sexual Assault Services Victoria (SASVic) is the newly incorporated and expanded peak body for specialist sexual assault and harmful sexual behaviour services in Victoria. Our purpose is to promote the rights and recovery of all victim-survivors of sexual assault and address harmful sexual behaviours in children and young people. We seek to achieve this by working collectively to address the attitudes, systems and structures that enable abuse to occur or negatively impact victim-survivors. SASVic members provide support to all victims of sexual assault and sexual violence, including women, children, young people, men, and people who identify as gender diverse. This includes support for victim-survivors of sexual harassment and gender-based violence in the workplace.

Members of SASVic include:

- Australian Childhood Foundation
- Ballarat Centre Against Sexual Assault (CASA)
- CASA Central Victoria
- CASA House
- Centre Against Violence – Ovens and Murray CASA
- Eastern CASA
- Gatehouse Centre
- Gippsland CASA
- Goulburn Valley CASA
- Kids First
- Mallee Sexual Assault Unit/Mallee Domestic Violence Service
- Northern CASA
- Sexual Assault Crisis Line
- South Eastern Centre Against Sexual Assault
- South Western CASA
- The Sexual Assault and Family Violence Centre
- West CASA

Acknowledgement of Country

SASVic acknowledges Aboriginal and Torres Strait Islander peoples as the traditional and ongoing custodians of the lands on which we live and work. We pay respects to Elders past and present. We acknowledge that sovereignty has never been ceded, and the strength and resilience of First Nations people who today continue to experience discrimination, including sex and gender-based discrimination and harassment, more frequently than other Australians.



The Power2Prevent Coalition Joint Statement

SASVic is a proud member of the Power2Prevent Coalition - a group of more than 60 diverse community organisations, unions, academics, peak bodies, health professionals, lawyers and victim-survivors. We see the effects of sexual harassment on people around Australia every day and are working together and drawing on our collective expertise to improve the way the system responds to sexual harassment and ensure that the *Respect@Work* recommendations are fully implemented.

Power2Prevent has released a joint statement calling on the Australian Government to implement all remaining recommendations of the *Respect@Work* Report in full and without further delay. This includes urgently amending our laws to create the following eight changes:

1. Confirmation that one of the objects of the *Sex Discrimination Act 1984 (Cth)* is substantive equality – **Recommendation 16(a)**
2. Amending the *Sex Discrimination Act* to prohibit the creation of a hostile, sexist working environment – **Recommendation 16(c)**
3. A positive duty on all employers to take reasonable and proportionate steps to stop sex discrimination and sexual harassment – **Recommendation 17**
4. New compliance and investigation powers for the Australian Human Rights Commission to enforce the positive duty – **Recommendation 18**
5. A new inquiry power for the Sex Discrimination Commissioner to investigate systemic sexual harassment – **Recommendation 19**
6. A new process to allow representative bodies to bring actions to court on behalf of people who have been sexually harassed – **Recommendation 23**
7. Creating an express prohibition on sexual harassment and an accessible new complaints process in the *Fair Work Act 2009 (Cth)* – **Recommendation 28**
8. A new Work Health and Safety Code of Practice on Sexual Harassment at Work – **Recommendation 35**

Response to the Consultation Paper

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

The *Respect@Work* Report recommended that the Sex Discrimination Act be amended to expressly prohibit creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex (recommendation 16(c)). The purpose of the recommendation is to prohibit conduct that creates a hostile work environment in a general sense, rather than requiring conduct (such as sexual harassment or bullying) to be directed towards a particular person.¹ This includes prohibition of a pattern of behaviour designed to exclude a person and make them feel uncomfortable and unwelcome² on the basis of sex or gender.

SASVic strongly supports the implementation of this recommendation. 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. The prohibition on creating a hostile environment should apply to all employers. 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.

SASVic supports the suggestion made in the Consultation paper that non-legislative options should also be considered to increase community and employer awareness of the new prohibition, including education and guidance materials for workplaces, including good practice sexual harassment and discrimination workplace policies, procedures and practices for employers.³

Issue 2: Recommendation 17 – Positive duty

As observed in the Consultation Paper, the AHRC found that the current framework provided by the Sex Discrimination Act is not playing an effective role in preventing sexual harassment. To address this challenge, the *Respect@Work* Report recommended that a positive duty requiring employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible, be introduced into the Sex Discrimination Act.⁴

SASVic strongly supports the introduction of a positive duty into the Sex Discrimination Act in line with the AHRC’s recommendations. As noted in the Consultation paper, a positive duty in the Sex Discrimination Act would represent a symbolic change in the way employers understand their obligations – signalling to the

¹ Australian Government. Attorney General’s Department (February 2022). *Respect@Work - Options to progress further legislative recommendations’ Consultation paper*. P9.

² Australian Government. Attorney General’s Department (February 2022). *Respect@Work - Options to progress further legislative recommendations’ Consultation paper*. P10.

³ Australian Government. Attorney General’s Department (February 2022). *Respect@Work - Options to progress further legislative recommendations’ Consultation paper*. P10.

⁴ The Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. P28.



community that employers have a responsibility to provide a safe work environment and the burden of addressing discrimination should not fall on individuals.⁵

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. There is a critical equity issue at stake if small and medium size business are not held to the same principle as other employers in relation to their positive duty to prevent sexual harassment and the creation of hostile working environments. However, the obligations imposed should be scaled based on the circumstances of the employer with consideration given to the following:

- 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

If a positive duty in the Sex Discrimination Act is well implemented, then any complexity and workplace changes required can be managed effectively.

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

SASVic agrees that for a new positive duty (as discussed under Issue 2 above) to be effective, it must be accompanied by an appropriate enforcement mechanism.⁶ We support the recommendation of the *Respect@Work* Report that the AHRC be given the function of assessing compliance with and enforcing a positive duty in the Sex Discrimination Act. Visible enforcement and meaningful sanctions for breaches of the positive duty are important to deter non-compliance and encourage preventative action by employers.

The Australian Human Rights Commission should be given the following enforcement powers:

- 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.

⁵ Australian Government. Attorney General's Department (February 2022). *Respect@Work - Options to progress further legislative recommendations' Consultation paper*. P19.

⁶ Australian Government. Attorney General's Department (February 2022). *Respect@Work - Options to progress further legislative recommendations' Consultation paper*. P24.



We strongly support the recommendations by AHRC and VEOHRC, provided by this consultation process, as to how this should be best implemented in practice, and what further resourcing and consideration may be required.

Issue 4: Recommendation 19 – Inquiry powers for the AHRC

The *Respect@Work* Report recommended that the relevant legislation be amended to provide the AHRC with a broad inquiry function to inquire into systemic unlawful discrimination, including systemic sexual harassment.⁷ Specifically, the *Respect@Work* Report recommended that the AHRC be given the powers to require: the giving of information; the production of documents; and the examination of witnesses, with penalties applying for non-compliance, when conducting such an inquiry.⁸

SASVic is supportive of this recommendation. We support the recommendations by AHRC and VEOHRC, provided by this consultation process, as to how this should be best implemented in practice, and what further resourcing and consideration may be required.

Issue 5: Recommendation 23 – Representative Actions

Respect@Work recommended that the AHRC Act be amended to allow unions and other representative groups to bring representative claims to court *on behalf of others*. As noted in the Consultation Paper, this would be consistent with the existing provisions in the AHRC Act that allow unions and other representative groups to bring a representative complaint to the AHRC on behalf of one or more people aggrieved by conduct amounting to unlawful discrimination.⁹

SASVic is supportive of a new process to allow representative bodies to bring actions to court on behalf of people who have been sexually harassed. 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 unions and other representative groups.

Issue 6: Recommendation 25 – Cost protections

As stated in the Consultation paper, the *Respect@Work* was concerned that the current laws relating to cost orders can deter a person from initiating civil proceedings under anti-discrimination law (even if the person has a strong claim) as they may be ordered to pay the costs of all parties if they are ultimately unsuccessful. The *Respect@Work* Report observed that despite courts having a broad discretion to award costs at any stage and in any manner, the courts generally follow the practice of awarding costs after the event according

⁷ Australian Government. Attorney General's Department (February 2022). *Respect@Work - Options to progress further legislative recommendations' Consultation paper*. P32.

⁸ Australian Government. Attorney General's Department (February 2022). *Respect@Work - Options to progress further legislative recommendations' Consultation paper*. P32.

⁹ Australian Government. Attorney General's Department (February 2022). *Respect@Work - Options to progress further legislative recommendations' Consultation paper*. P35.



to who was successful. This means that the unsuccessful party, whether the applicant or respondent, would be required to pay the costs of all parties.¹⁰ The issue of costs is further exacerbated by the fact that damages awarded by the courts in sexual harassment matters are low, especially when compared with other causes of action, such as defamation.¹¹

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

SASVic recommends the adoption of an Equal Access model of costs reform. This model, also known as vertical costs shifting or qualified one-way costs shifting, has been adopted both internationally and domestically.¹ 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.

¹⁰ Australian Government. Attorney General's Department (February 2022). Respect@Work - Options to progress further legislative recommendations' Consultation paper. P41.

¹¹ Australian Government. Attorney General's Department (February 2022). Respect@Work - Options to progress further legislative recommendations' Consultation paper. P42.

Further priorities

Clearly contextualising sexual harassment as a cause and reinforcer of gender inequality

Girls and young women's experience of sexual harassment in educational settings and public spaces often teaches them that sexual harassment in the workplace will not be taken seriously, undermining their confidence that they can seek justice. Gendered violence at work, including sexual harassment, must therefore be addressed as part of an integrated and holistic strategy to prevent gendered violence and promote gender equality. Subsequently, SASVic would like to take this opportunity to reinforce the urgent need for to implement Recommendations 6 & 7 of the *Respect@Work* Report:

- **Recommendation 6:** All Australian governments have gender equality strategies that address sexual harassment and that recognise sexual harassment is driven by gender inequality and is a form of gender-based violence.¹²
- **Recommendation 7:** All Australian governments have strategies for the prevention of violence against women that are based on Change the Story, recognise that sexual harassment is driven by gender inequality and is a form of gender-based violence, and include the prevention of sexual harassment as a key area for action.¹³
- **Recommendation 10:** All Australian governments ensure children and young people receive school-based respectful relationships education that is age appropriate, evidence-based and addresses the drivers of gender-based violence, including sexual harassment.¹⁴
- **Recommendation 15:** The Australian Government ratify International Labour Organization Convention 190 concerning the elimination of violence and harassment in the world of work.¹⁵

Equitable access to redress and support

Respect@Work reported that sexual harassment in Australian workplaces is widespread and pervasive, with one in three people experienced sexual harassment at work in the past five years.¹⁶ 'Underpinning this aggregate figure is an equally shocking reflection of the gendered and intersectional nature of workplace sexual harassment.'¹⁷ The Report highlighted the disproportionate impacts of sexual harassment on women, in particular on Aboriginal and Torres Strait Islander women, women of colour, gender diverse people, women with disability, younger women, older women, and low paid and insecurely employed women. As a result, the AHRC recommended that initial primary prevention efforts should be focused on interventions that address sexual harassment of populations at higher risk of sexual harassment, including those who experience intersectional discrimination.¹⁸

¹² The Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. P41.

¹³ The Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. P41.

¹⁴ The Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. P42.

¹⁵ The Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. P43.

¹⁶ The Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. P10.

¹⁷ The Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. P10.

¹⁸ The Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. P25.

SASVic supports this overarching recommendation and would like to take this opportunity to highlight the importance of implementing the following specific AHRC recommendations in relation to addressing the intersectional nature of workplace sexual harassment.

- **Recommendation 8:** Our Watch lead the development of evidence-based strategies for the prevention of sexual harassment, including implementation, monitoring and evaluation, including immediate prioritisation of targeted, evidence-based prevention strategies to address sexual harassment of populations who are at higher risk.¹⁹
- **Recommendation 9:** Educational resources for young people of working age on workplace rights be identified, adapted to ensure relevance to workplace sexual harassment and promoted by the Australian Human Rights Commission and Fair Work Ombudsman for use in schools, tertiary education institutions and other settings that reach young people.²⁰
- **Recommendation 53:** All Australian governments provide increased and recurrent funding to community legal centres, Aboriginal and Torres Strait Islander Legal Services, and legal aid commissions to provide legal advice and assistance to vulnerable workers who experience sexual harassment, taking into account the particular needs of workers facing intersectional discrimination.²¹
- **Recommendation 40:** All Australian governments should: a. Ensure that relevant bodies responsible for developing training, programs and resources for judges, magistrates and tribunal members make available education on the nature, drivers and impacts of sexual harassment. This should be trauma-informed and in line with the principles of Change the Story. b. Support and encourage judicial officers and tribunal members across civil and criminal jurisdictions who may come into contact with victims of sexual harassment to undertake this education and training.²²

Access to specialist support

Sexual violence, including sexual harassment, causes deep and lasting damage, including trauma. For individual victim survivors, sexual violence can result in developmental, cultural, financial, psychological, physical and social harm, be a causal factor in mental and physical illness, substance dependence and gambling harm, and negatively impact on survivors' cultural, economic, political and social participation.

Victim survivors require ready access to information, advice, safety, specialist support and counselling, justice, recovery and redress. Given the significant barriers to reporting cited by victim survivors, it is vital that they are able to access specialist, trauma-informed sexual assault counselling and support before they are asked to make decisions about proceeding with legal options. With adequate support and information, more victims may choose to report. SASVic members are currently the major providers of specialist sexual violence counselling and therapeutic support services in Victoria. Many of our member services already have long waitlists and are experiencing significant workforce shortages in the face of rising demand. As a result,

¹⁹ The Australian Human Rights Commission (2020) Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces. P41.

²⁰ The Australian Human Rights Commission (2020) Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces. P42.

²¹ The Australian Human Rights Commission (2020) Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces. P51.

²² The Australian Human Rights Commission (2020) Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces. P48.



there is a significant gap in the provision of counselling support to victim-survivors of sex-based discrimination and harassment at work.

While not specifically in scope of the current consultation process, SASVic is keen to take this opportunity to reinforce:

- the need for victim-survivors of sexual harassment and gendered workplace bullying to be able to access the specialist trauma-informed support they require (whether therapeutic, social and/or legal) where and when they need it.
- that formal reporting and complaint options available to victim-survivors at different stages of their journey can be confusing and overwhelming with including options to report to police, WorkSafe, VEOHRC, the Victorian Civil and Administrative Claim Tribunal (VCAT), AHRC and/or industry regulators.
- that SASVic member services are already struggling to meet demand in a context of increased awareness and reporting of sexual harassment, significant pressures on the specialist workforce, and the overall prevalence of sexual harassment and gendered violence across our communities and workplaces.

SASVic notes that under the new tender arrangements, 1800RESPECT will now include sexual harassment within its scope of services. While welcoming this change in principle, SASVic shares the concerns of its members about the impact increased referrals from 1800RESPECT will have on the ability of state-based specialist services to meet demand. It is critical that this issue be addressed as an urgent priority or victim-survivors referred on from 1800RESPECT will encounter and compound the already significant waitlists that currently exist at the state-level. For this reason, SASVic strongly supports Recommendations 55 of the *Respect@Work*, that:

Psychosocial support for people affected by workplace sexual harassment be provided through a national network of services, including specialist sexual assault support services, mental health helplines, and healthcare providers with the expertise to respond appropriately to the gendered nature of sexual harassment. **All Australian governments should prioritise funding to these services to ensure accessibility and capacity.**²³

To facilitate this, SASVic recommends that all Australian governments develop workforce development strategies to support the development, growth and sustainability of specialist sexual assault response services.

Finally, SASVic supports the implementation of **Recommendation 27** of the *Respect@Work* Report, that a disclosure process be established that enables victims of historical workplace sexual harassment matters to have their experience heard and documented with a view to promoting recovery. The Australian Government should fund the AHRC to facilitate this process.²⁴

²³ The Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. P51.

²⁴ The Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*. P45.