

2019-2020-2021

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**SEX DISCRIMINATION AND FAIR WORK (RESPECT AT WORK) AMENDMENT
BILL 2021**

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General and Minister for Industrial Relations, Senator the Hon Michaelia Cash)

ABBREVIATIONS USED IN THE EXPLANATORY MEMORANDUM

ACT	Australian Capital Territory
Acts Interpretation Act	<i>Acts Interpretation Act 1901</i>
AFP	Australian Federal Police
AHRC	Australian Human Rights Commission
AHRC Act	<i>Australian Human Rights Commission Act 1986</i>
Bill	Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021
FC	Federal Court
FCC	Federal Circuit Court <i>Note: Following the commencement of the Federal Circuit and Family Court of Australia Act 2021 and the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021, the Federal Circuit Court will continue in existence, and be known as the Federal Circuit and Family Court of Australia (Division 2).</i>
FW Act	<i>Fair Work Act 2009</i>
FWC	Fair Work Commission
MOPS Act	<i>Members of Parliament (Staff) Act 1984</i>
NT	Northern Territory
PCBU	A person conducting a business or undertaking
Respect@Work Report	Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020)
Roadmap for Respect	A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces
SD Act	<i>Sex Discrimination Act 1984</i>
WHS Act	<i>Work Health and Safety Act 2011</i>
WHS Regulations	<i>Work Health and Safety Regulations 2011</i>

SEX DISCRIMINATION AND FAIR WORK (RESPECT AT WORK) AMENDMENT BILL 2021

GENERAL OUTLINE

1. The Government is taking action to strengthen, simplify and streamline the legislative and regulatory frameworks that protect workers from sexual harassment and other forms of sex discrimination in the workplace. This Bill would ensure that more workers, particularly vulnerable workers, are protected and empowered to address unlawful conduct. These reforms are essential for advancing both women's safety and economic security.
2. In 2018, the Government funded the AHRC to undertake the landmark National Inquiry into Sexual Harassment in Australian Workplaces. The product of this inquiry – the Respect@Work Report – concludes that existing legal and regulatory frameworks for addressing workplace sexual harassment are complex and difficult to navigate. The Respect@Work Report recommended legislative amendments to simplify and clarify the overarching legal frameworks to ensure that employers and workers are able to effectively address sexual harassment in the workplace.
3. The Government set out its response to the Respect@Work Report in the *Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces*. The Roadmap for Respect provides a clear and comprehensive path forward to prevent and address workplace sexual harassment, while supporting meaningful culture change in Australian workplaces. This Bill would give effect to legislative amendments set out in the Roadmap for Respect and will implement Respect@Work Report Recommendations 16, 20, 21, 22, 29, and 30.
4. This Bill would also vary the existing entitlement to compassionate leave in the FW Act to include miscarriage as a permissible occasion. This will enable an employee to take up to two days of paid compassionate leave (unpaid for casuals) if the employee, or employee's current spouse or de facto partner, has a miscarriage. This amendment further supports women's safety and economic security.
5. The Government announced funding for a range of measures to improve women's safety and economic security in both the 2020-21 and 2021-22 Budgets. As the Roadmap for Respect highlighted, preventing and addressing sexual harassment requires a nation-wide effort and whole-of-society support. This Bill is an important part of this broad effort to ensure women are treated equally and protected from violence and harassment on the basis of sex.

Clarifying the object of the SD Act

6. This Bill would create a new object clause to make it clear that in addition to the elimination of discrimination and harassment, the SD Act aims to achieve, so far as practicable, equality of opportunity between men and women.

Prohibiting sex-based harassment

7. This Bill would insert a new provision in Division 3 of Part II of the SD Act to make it expressly clear that it is unlawful to harass a person on the ground of their sex.
8. The Respect@Work Report concluded that while sex-based harassment is already prohibited under the SD Act as a form of sex-based discrimination, this is not well understood.¹ This amendment would merely clarify the existing case law, which shows that sex-based harassment can already be found unlawful under the SD Act.
9. Sex-based harassment would be defined as unwelcome conduct of a seriously demeaning nature by reason of the person's sex in circumstances in which, in line with the existing test for sexual harassment, a reasonable person would have anticipated that the person harassed would be offended, humiliated or intimidated.
10. The new provision would not capture mild forms of inappropriate conduct based on a person's sex that are not of a sufficiently serious nature to meet the threshold of offensive, humiliating or intimidating, as well as seriously demeaning.

Expanding coverage of the SD Act

11. The Bill would simplify and amend the protection from workplace sexual harassment in the SD Act to ensure the provisions closely align with terms used in the model Work Health and Safety law, and ensure all workers and workplaces are protected.
12. The Bill adopts the concepts of 'worker' and 'PCBU' (persons conducting a business or undertaking) used in the model Work Health and Safety law. This would ensure that persons not previously covered under the SD Act, such as interns, volunteers and self-employed workers, are protected from harassment.
13. While this change would expand the existing prohibition under the SD Act, work health and safety laws already impose a duty on employers and PCBUs to ensure workers are not exposed to health and safety risks. This duty requires risks to health and safety to be eliminated or minimised so far as is reasonably practicable, including the risk of sexual harassment.
14. As such, this change will not impose an increased burden on business.
15. The Bill would also clarify that the scope of the SD Act extends to members of parliament, their staff, and judges at all levels of government. It would also remove the existing exemption of state public servants in the SD Act to ensure that the

¹ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 457 – 458.

protections from workplace discrimination and sexual harassment (as well as sex-based harassment) apply to these workers.

16. This would ensure public servants at all levels of government are protected under the SD Act in the same way as all other workers and would bring the SD Act in line with other federal anti-discrimination laws (the *Racial Discrimination Act 1975*, the *Disability Discrimination Act 1992* and the *Age Discrimination Act 2004*), which do not provide exemptions for state public servants.
17. This Bill would also ensure that a person who causes, instructs, induces, aids or permits someone else to engage in sexual harassment, or sex-based harassment, can also be found to have engaged in the unlawful conduct under the ancillary liability provision in the SD Act. The effect of this amendment would be to prohibit under the SD Act a person from assisting another person, as well as actually engaging themselves, in sexual harassment or sex-based harassment.

Simplified processes for complaints to the AHRC

18. This Bill would clarify that victimising conduct can form the basis of a civil action for unlawful discrimination in addition to a criminal complaint under the SD Act. This amendment responds to case law which has created uncertainty as to whether a civil complaint can be made for victimising conduct, as identified in the Respect@Work Report.² The effect of the amendment would be to clarify the existing position under the legislation, which has become unclear in response to judicial comments, that victimisation can form the basis of a civil action for unlawful discrimination.
19. This Bill would also amend the discretionary grounds on which a complaint may be terminated by the President of the AHRC. Instead of the current six months, a complaint under the SD Act could only be terminated if it is made more than 24 months after the alleged unlawful conduct took place. This timeframe was recommended in the Respect@Work Report to reduce procedural barriers arising from complainants being delayed in making a complaint under the SD Act.³ The President already has and would still maintain their discretion to consider a complaint beyond this timeframe. However, this change would reassure complainants their complaints would not be dismissed within 24 months of the conduct.

² Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 490.

³ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 493 – 496.

Clarify and expressly provide for the availability of ‘stop orders’ in relation to sexual harassment within the FW Act

20. This Bill would amend the existing anti-bullying jurisdiction in the FW Act to make it clear that within that jurisdiction, the FWC can make an order to stop sexual harassment in the workplace.
21. Conduct that amounts to bullying can also be sexual harassment.
22. The new provisions afford workers who have suffered workplace sexual harassment with access to a fast, low cost, informal mechanism to deal with complaints.
23. Just as is the case with the existing jurisdiction, orders are intended to prevent the risk of future harm. The FWC must be satisfied that the harassment has occurred to make an order, and orders would not be available in cases where there is no risk of harassment occurring again, for example when the person who harassed the worker is no longer employed at the workplace.

Sexual harassment as a valid reason for dismissal

24. The Respect@Work Report recommended amending the FW Act to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable.⁴ The Bill gives effect to Recommendation 30 by inserting a new legislative note into the FW Act that informs readers that sexual harassment in connection with the employee’s employment can be a valid reason for dismissal.

Miscarriage leave

25. The Bill would also vary the existing entitlement to compassionate leave in the FW Act to enable an employee to take up to two days of paid compassionate leave (unpaid for casuals) if the employee, or employee’s current spouse or de facto partner, has a miscarriage. Miscarriage is defined as the spontaneous loss of the embryo or fetus before 20 weeks’ gestation. This is based on the general medical meaning of miscarriage.
26. The changes build on the *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020*, which introduced improved access to unpaid parental leave and compassionate leave for families dealing with the trauma of stillbirths, infant deaths and premature births.
27. Currently, the FW Act provides two days’ paid compassionate leave (unpaid for casuals) when a member of the employee’s immediate family or household contracts

⁴ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 525 – 533.

or develops a personal illness, or sustains a personal injury, that poses a serious threat to their life, or dies. Compassionate leave is also available where a child is stillborn, if the child would have been a member of the employee's immediate family, or a member of the employee's household, if the child had been born alive.

28. The Bill would expand the minimum leave entitlement to ensure that a miscarriage constitutes grounds for compassionate leave. These amendments would ensure that when an employee, or an employee's spouse or de facto partner, has a miscarriage, the employee would be entitled to two days' paid compassionate leave (unpaid for casuals) in recognition of their bereavement.

FINANCIAL IMPACT

29. The amendments in the Bill have no financial impact at this time.

REGULATION IMPACT STATEMENT

30. Consistent with the Government's Regulatory Impact Analysis requirements, the Respect@Work Report been certified by the Attorney-General's Department as meeting the requirements of a Regulation Impact Statement. The Respect@Work Report was tabled in the House of Representatives on 5 March 2020 and is available online at:
https://parlinfo.aph.gov.au/parlInfo/download/publications/tabledpapers/a922593b-2c01-4e73-a23a-bd1f24ea3345/upload_pdf/AHRC_wsh_report_2020.pdf;fileType=application%2Fpdf#search=%22respect@work%20publications%22

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021

1. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

2. This Bill amends the *Australian Human Rights Commission Act 1986* (AHRC Act), *Sex Discrimination Act 1984* (SD Act) and *Fair Work Act 2009* (FW Act) to enhance the frameworks for preventing and addressing workplace sexual harassment and ensure they are streamlined and clear. These amendments will implement recommendations of the Australian Human Rights Commission's report *Respect@Work: National Inquiry into Sexual Harassment in the Workplace*. Significantly, reforms to the SD Act will allow a broader range of workers to make a complaint about unlawful conduct if it occurs. These reforms are essential for improving women's safety and economic security, particularly in the evolving world of work.
3. A new provision in Division 3 of Part II of the SD Act would be inserted to clarify the existing protection from 'harassment on the ground of sex'. In order to reduce complexity and duplication, this Bill would amend section 28B of the SD Act to provide greater clarity around the circumstances in which sexual harassment and harassment on the ground of sex is unlawful in the workplace.
4. This Bill would adopt the broader concepts of 'worker' and 'person conducting a business or undertaking' as defined under the *Work Health and Safety Act 2011* (WHS Act), to ensure all paid and unpaid workers are protected from sexual harassment under the SD Act. This would broaden the scope of Division 3 of the SD Act to include interns, apprentices, volunteers, and those who are self-employed. The amendments will also more closely align the protection in the SD Act with the WHS Act, reducing complexity and making it easier for workers and businesses to navigate the relevant protections and obligations.
5. In light of the sensitive nature of complaints initiated under the SD Act, this Bill would also amend the AHRC Act to provide that the President of the Australian Human Rights Commission (AHRC)'s discretion to terminate a complaint on the

grounds of time arises after 24 months, rather than the current six months, after the alleged unlawful conduct occurs.

6. This Bill would amend the FW Act to clarify that a worker who is sexually harassed at work may apply to the Fair Work Commission (FWC) for an order to stop the harassment. Conduct that amounts to bullying can also be sexual harassment. While sexual harassment that is repeated is already captured under the existing provisions of the anti-bullying jurisdiction, this Bill will insert new provisions in Part 6-4B of the FW Act to expressly provide that the FWC can make an order following a single instance of sexual harassment. The new provisions afford those who have suffered workplace sexual harassment with access to a fast, low cost, informal mechanism to deal with complaints.
7. The FW Act would also be amended to inform readers that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable.
8. In addition, the Bill extends the existing entitlement to compassionate leave in the FW Act to national system employees if they, or their current spouse or de facto partner, has a miscarriage in recognition of their bereavement.

Human rights implications

9. This Bill engages the following rights:
 - the right to equality and non-discrimination in Article 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR)
 - the right to an effective remedy in Article 2(3) of the ICCPR and Article 2 of the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)
 - the right to freedom of expression in Article 19 of the ICCPR
 - the right to work and rights in work in Article 6(1) and 7 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and Article 11 of the CEDAW
 - the right to the highest attainable standard of physical and mental health in Article 12 of the ICESCR, and
 - the right to privacy and reputation in Article 17 of the ICCPR.

Right to equality and non-discrimination

10. Article 2, 16 and 26 of the ICCPR protect the right to equality and non-discrimination by providing that all individuals have the same rights and deserve the same level of respect, regardless of their personal attributes such as race, sex, disability, age or colour (among other attributes).
11. Items 32-37 and 40 of the Bill engage the right to equality and non-discrimination in clarifying that the SD Act is intended to cover members of parliament, their staff, and judges. These items, along with item 48, would also ensure state and territory public servants are covered by the SD Act in the same way as all other workers, ensuring consistency across the protections and avenues for complaints. The definition of a 'worker' will also be inserted, capturing the full range of people engaged in work. The amendments would have the effect of protecting workers from discrimination equally and in a non-discriminatory manner, ensuring that protections from workplace sex discrimination and harassment are available regardless of a person's jurisdiction, occupation or workplace.
12. Item 60 inserts the definition of harassment on the ground of sex, protecting persons from conduct which is discriminatory but not clearly covered by the definition of sex discrimination or sexual harassment in the SD Act. In prohibiting harassment on the ground of sex, the Bill provides coverage of conduct which is not necessarily sexual in nature or resulting in obvious inequality. In doing so, the amendments would clarify that this form of discrimination is unlawful and promote the right to non-discrimination.
13. Items 4-5 and 11-28 amend the existing anti-bullying jurisdiction in the FW Act to make it clear that within that jurisdiction, the FWC can make an order to stop sexual harassment in the workplace. These amendments promote the right to equality and non-discrimination by reinforcing protections from sexual harassment.
14. By strengthening Australia's legislative frameworks in the SD and FW Acts and reducing legislative complexities in relation to sexual harassment and harassment on the ground of sex, the Bill will promote the right to equality and non-discrimination.

Right to an effective remedy

15. Article 2(3) of the ICCPR and Article 2 of the CEDAW provides the right to an effective remedy for persons who have suffered human rights violations by Australian authorities, as well as persons who have suffered discrimination perpetrated by Australian authorities. The UN Human Rights Committee has stated that the right to an effective remedy encompasses an obligation to bring to justice perpetrators of human rights abuses, including discrimination, and also to provide appropriate reparation to the persons who have suffered human rights abuses.

16. Item 77 would create a new civil provision relating to victimisation conduct in the SD Act. This amendment would ensure people who experience victimisation as a result of making a complaint (or taking related steps) under the SD Act are able to initiate civil proceedings against the alleged perpetrator in the Federal Court (FC) or Federal Circuit Court (FCC) under section 46PO of the AHRC Act,⁵ and therefore have the right to an effective remedy.
17. Item 3 further promotes the right to an effective remedy by amending the discretionary grounds on which a complaint may be terminated by the President of the AHRC to ensure that a complaint cannot be terminated due to a person being delayed in making a complaint under the SD Act. This period will be extended from six months to 24 months, recognising that complaints initiated under the SD Act are sensitive in nature and will not always be reported on within the first six months.
18. By seeking to clarify and align protections from sexual harassment and related forms of discrimination, the Bill as a whole promotes access to effective remedies for this type of conduct through the AHRC, the FWC, the FCC or the FC.

Right to freedom of expression

19. The right to freedom of expression is prescribed in Article 19 of the ICCPR and extends to any medium, including written and oral communications. This includes not only favourable information or ideas, but also unpopular opinions including those that may offend or shock (subject to limitations). Consistent with these limitations, the right is not absolute and carries with it special responsibilities, thereby allowing it to be restricted on several grounds.
20. Item 61 of the Bill may have the consequence of limiting the right to freedom of expression for the additional workers (including state and territory public servants) that would now be covered by the SD Act. This is consistent with other anti-discrimination legislation which seeks to achieve the appropriate balance between protecting against discrimination and protecting the right of an individual to express their views. The new protections against sex-based harassment have an impact on freedom of expression, but in effect legislate a prohibition of conduct already found to be unlawful in case law.
21. The limitation has a clear legal basis which is accessible and precise enough in legislation to ensure people are aware of the legal consequences of their actions.
22. Further, the limitation on the right of expression is in pursuit of a legitimate objective: protecting workers from discrimination. The Bill extends and clarifies

⁵ Note: Following the commencement of the *Federal Circuit and Family Court of Australia Act 2021* and the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021*, the Federal Circuit Court will continue in existence, and be known as the Federal Circuit and Family Court of Australia (Division 2).

existing protections of workers from discrimination to combat the prevalence of sexual harassment in the workplace, as identified by the Respect@Work Report.⁶

23. The connection between the limitation and the legitimate objective is rational, as the reforms are based on the comprehensive evidence provided within the Respect@Work Report on measures to prevent and address workplace sexual harassment.⁷
24. The limitation of the right to freedom of expression is reasonable, necessary and proportionate to the objective. The extent to which the right to freedom of expression is limited is the least restrictive way of achieving the objective. It is safeguarded, in relation to both sexual harassment and sex-based harassment, with an objective reasonable person test and the requirement to consider any relevant circumstances. Importantly, these safeguards already exist in the SD Act for the prohibition against workplace sexual harassment. The targeted focus of this legislation would ensure that the right to freedom of expression is only limited in instances of conduct that the legislation appropriately aims to address: workplace sexual harassment and harassment on the ground of sex.
25. Therefore, the limits on the right to freedom of expression contained in this Bill are necessary, reasonable and proportionate to achieve the legitimate objective of preventing and addressing sexual harassment and harassment on the ground of sex in the workplace.

Right to work and rights in work

26. Article 6(1) and 7 of the ICESCR and Article 11 of the CEDAW provides the right to work and rights in work, including the right of everyone to the opportunity to gain his or her living by work which he or she freely chooses or accepts. It also includes the right to enjoyment of just and favourable conditions of work which ensures safe and healthy working conditions, and the right to protection of health and safety in working conditions. The right also encompasses the right not to be unjustly deprived of work, and to have security against unfair dismissal. The International Labour Organisation's (ILO) Termination of Employment Convention, 1982 (No. 158), relevantly provides that a person's employment shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the business.
27. Integral to the right to gain living by work and the enjoyment of just and favourable conditions of work is protection against discrimination in the workplace. Items 28-31 seek to achieve this through further strengthening protections against discrimination in the workplace under the FW and SD Acts. This is done by

⁶ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 463 – 468.

⁷ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 14.

broadening the scope of protection regardless of the complainant's jurisdiction, occupation or workplace. This has the consequence of providing a safer and healthier workplace and working conditions for all workers in ensuring that discriminatory conduct is prohibited. Similarly, item 60 inserts clearer protection against harassment on the ground of sex at work. As a result, these amendments ensure that workers are better protected against sexual harassment and harassment on the ground of sex and supported to address it when it occurs, to ensure safe and healthy working conditions.

28. Items 6-9 further promote the right to just and favourable working conditions by extending the entitlement to compassionate leave to employees if they, or their spouse or de facto partner, has a miscarriage. Miscarriage is defined in the Bill as a spontaneous loss of an embryo or fetus before a period of gestation of 20 weeks.
29. Currently, where an employee has a miscarriage, they may be able to access existing leave entitlements if they are unfit for work (e.g. paid personal leave in certain situations). An employee whose spouse or de facto partner has a miscarriage may also be able to take paid or unpaid carer's leave, depending on the circumstances. However, these leave entitlements would not always be available. The amendments would grant national system employees a guaranteed minimum entitlement to two days' compassionate leave in such a situation, where they might not otherwise have any leave available. This amendment will therefore provide national system employees with access to just and favourable working conditions, including time off work if they need it following a miscarriage.
30. The AHRC noted in the Respect@Work Report that 'Australians are suffering the financial, social, emotional, physical and psychological harm associated with sexual harassment.'⁸ Workplace sexual harassment can have negative effects on the general wellbeing, mental health and physical health of the person harassed.⁹ A key theme heard by the Commission is that the current system for addressing sexual harassment in the workplace is complex and confusing and requires a greater focus on prevention.¹⁰
31. Items 4-5 and 11-28 in the Bill, which amend the existing anti-bullying jurisdiction in the FW Act to make it clear that the FWC can make an order to stop sexual harassment in the workplace (including following a single instance), promote the right to safe and healthy working conditions by providing a mechanism to help individual workers to resolve a sexual harassment matter quickly and inexpensively.
32. Item 10 of the Bill promotes the right to safe and healthy working conditions by inserting a new legislative note into the FW Act to highlight that sexual harassment

⁸ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 13.

⁹ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 265.

¹⁰ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 14.

is conduct that can be a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable under section 387. This amendment will deter sexual harassment and assist employers to respond, thereby improving safety in Australian workplaces.

33. This amendment is consistent with the existing operation of the FWC's unfair dismissal jurisdiction and does not limit employees' rights not to be unjustly deprived of work. The FWC will continue to exercise its existing discretion in considering whether a valid reason is established and whether a dismissal was harsh, unjust or unreasonable in all the circumstances. This includes consideration of whether the employee was notified of the reason for dismissal and given an opportunity to respond, as well as other matters.
34. The right to work and rights in work are therefore promoted by the Bill by improving conditions in employment in the context of discrimination in the workplace, reinforcing protections for health and safety in the workplace in the context of sexual harassment and bullying. The Bill also promotes these rights by informing readers that sexual harassment can be a valid reason for dismissal and extending compassionate leave to employees if they, or their spouse or de facto partner, has a miscarriage.

Right to physical and mental health

35. Article 12 of the ICESCR requires that State Parties to the Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The UN Committee on Economic, Social and Cultural Rights has stated that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, extending to underlying determinants of health such as safe and healthy working conditions.
36. Items 6-9 protect this right by ensuring that a national system employee has a guaranteed entitlement to compassionate leave should they, or their spouse or de facto partner, have a miscarriage. This leave recognises the bereavement and emotional distress that miscarriage can have and provides time away from work for employees to grieve.
37. As noted in the Respect@Work Report, sexual harassment in the workplace can have significant negative effects on an individual's health and wellbeing.¹¹
38. The Bill promotes the right to the enjoyment of the highest attainable standard of physical and mental health by making it clear that the FWC can make orders to stop sexual harassment, including following a single instance of sexual harassment. This provides a means of early intervention to stop and prevent sexual harassment.

¹¹ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 13, 265 and 272.

39. Further, the harm that sexual harassment can have on the health and wellbeing of the person harassed is likely to be exacerbated by the perpetrator remaining in the workplace. Item 10 of the Bill promotes the right to physical and mental health by clarifying that sexual harassment can be a valid reason for dismissal and therefore can be a basis on which to remove a perpetrator from the workplace.
40. These measures in the Bill promote the right to physical and mental health. The Bill also achieves this in providing a guaranteed entitlement to leave for national system employees should they, or their spouse or de facto partner, have a miscarriage.

Right to privacy and reputation

41. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference in their privacy. Privacy guarantees a right to secrecy from the publication of personal information. For interference with privacy not to be arbitrary, it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality to the end sought and necessity in the circumstances.
42. Items 4-5 and 11-28 of the Bill (those amendments relating to the existing anti-bullying jurisdiction) do not directly engage this right. However, section 590 of the FW Act enables the FWC to inform itself in relation to any matter before it in such a manner as it considers appropriate. This can include requiring a person to provide documents or records to the FWC, for example, information about any management action that has been taken that relates to the application.
43. The ability of the FWC to collect this information is considered proportionate, appropriate and necessary to facilitate the effective administration of these amendments. Given the health risks posed by workplace sexual harassment, it is essential that the FWC is able to easily and quickly access information that relates to an application to stop sexual harassment and/or bullying. Any information collected through these processes will be handled in accordance with the FWC's privacy obligations under legislation such as the *Privacy Act 1988*.
44. To access compassionate leave in relation to a miscarriage under items 6-9, an employee will be required to comply with the existing notice and evidence requirements that already apply to employees taking compassionate leave for the other prescribed occasions. This means an employee must provide to their employer notice of taking the leave and, if required by the employer, evidence that would satisfy a reasonable person that the leave is taken after a miscarriage experienced by the employee or their spouse or de facto partner.
45. Requiring an employee to provide this information engages the right to privacy. The ability of the employer to collect the notice requirements is to assist employers to

make arrangements to accommodate an employee's absence from the workplace and the purpose of the evidence is to ensure that the entitlement is properly accessed. Allowing for relevant information to be provided to an employer is a suitable means for meeting these purposes.

46. There is no alternative means of administering the leave entitlement that is reasonably practicable and has a less restrictive effect on the right to privacy. The restriction on the right to privacy that is needed to effectively administer the leave entitlement is adequate in its balance. Employers would also be bound by any existing obligations in privacy legislation in relation to the disclosure of personal information.
47. The limits to the right to privacy are necessary, reasonable and proportionate to achieve the legitimate objective of the FWC exercising its anti-bullying jurisdiction, as well as by providing a guaranteed leave entitlement for employees should they, or their spouse or de facto partner, have a miscarriage.

Conclusion

48. The Bill is compatible with human rights because it promotes the protection of human rights and to the extent that it may operate to limit human rights, the limitations are reasonable, necessary and proportionate to achieve legitimate objectives.

NOTES ON CLAUSES

Preliminary

Clause 1 – Short title

1. This clause provides that the Bill, when passed, may be cited as the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*.

Clause 2 – Commencement

2. This clause provides that all provisions in the Bill would commence the day after the Act receives Royal Assent.

Clause 3 – Schedules

Schedule 1 – Amendments

Australian Human Rights Commission Act 1986

Items 1 and 2

3. Items 1-2 would amend the definition of ‘unlawful discrimination’ in the AHRC Act to remove the reference to the existing criminal offence relating to victimisation conduct in the SD Act (section 94). The definition of ‘unlawful discrimination’ in the AHRC Act would be amended to instead cover the new civil victimisation provision created by this Bill (new section 47A of the SD Act – see item 77 below), and to repeal the reference to the existing criminal offence as a necessary consequence. This is appropriate as the AHRC cannot consider criminal complaints.
4. This clarifying amendment is not intended to impact the AHRC’s jurisdiction in relation to unlawful discrimination. It is also not intended to create ambiguity in relation to the other Commonwealth anti-discrimination Acts, which contain similar victimisation provisions. The intention has always been that these provisions in relation to victimisation can form the basis of two causes of action, civil and criminal, which is made clear by their inclusion in the definition of ‘unlawful discrimination’ in the AHRC Act (notwithstanding their framing as criminal offences).
5. Item 2 would repeal paragraph (f), which refers to section 94 of the SD Act, as this is no longer necessary. The new section 47A of the SD Act created by this Bill is captured in paragraph (c).
6. The ability of the AHRC to inquire into, and attempt to conciliate, complaints of ‘unlawful discrimination’ arises under paragraph 11(1)(aa) of the AHRC Act. The ability for individuals to lodge a complaint of ‘unlawful discrimination’ with the AHRC arises under section 46P of the AHRC Act. Subsequently, the ability for

individuals to initiate civil proceedings under the SD Act arises through the operation of section 46PO of the AHRC Act. This provision enables a person to initiate civil proceedings to address ‘unlawful discrimination’ in the FC or FCC if their complaint is terminated by the President of the AHRC. The purpose of this mechanism is to require complainants to attempt to resolve issues through the AHRC’s conciliation process as a first step, before proceeding to the FC or FCC. If this is unsuccessful and the President terminates the complaint, a complainant is able to initiate civil proceedings to address the alleged conduct.

7. Prior to 2011, the case law held that the victimisation provision in subsection 94(1) of the SD Act could give rise to both *civil* and/or *criminal* proceedings. This was because the definition of ‘unlawful discrimination’ used in section 46PO of the AHRC Act specifically captured this provision.
8. However, as the Respect@Work Report highlighted, there have been three cases since 2011 that questioned whether the FCC or the FC has jurisdiction to hear a *civil* application of ‘unlawful discrimination’ under the AHRC Act that relates to victimisation.¹² This legal uncertainty has arisen predominantly because the victimisation provision in section 94 of the SD Act is set out as a criminal *offence* with criminal penalties.¹³
9. This amendment (together with item 77 of this Bill) would have the effect of ensuring that people who experience victimisation conduct for the purposes of the SD Act are able to make a complaint to the AHRC and, if their complaint is terminated, initiate civil proceedings in relation to ‘unlawful discrimination’ under section 46PO of the AHRC Act.
10. This amendment would give effect to the Government’s commitment in the Roadmap for Respect in relation to Recommendation 21 of the Respect@Work Report.

Item 3 ‘Paragraph 46PH(1)(b)’

11. This item would amend subsection 46PH(1) of the AHRC Act, which sets out the discretionary grounds on which a complaint may be terminated by the President of the AHRC. Under this provision, the President may consider, on a discretionary basis, a range of factors when determining whether a complaint should be terminated. These factors include the period of time between the alleged incident/s and the person lodging a complaint as well as the reasons for any delay between the incident and lodgement of a complaint.

¹² These cases are: *Walker v Cormack* (2011) 196 FCR 574; *Walker v State of Victoria* [2012] FCAFC 38; *Chen v Monash University* [2016] FCAFC 66. See Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 489 – 490. See also AHRC, *Federal Discrimination Law* (2016), 157 – 161.

¹³ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 490.

12. This amendment would extend the period of time in paragraph 46PH(1)(b) from six months to 24 months in relation to all complaints initiated under the SD Act. This extended time-period recognises that complaints initiated under the SD Act, including for sexual harassment, are sensitive in nature. As a result, it may be difficult for a person to lodge a complaint within six months of the incident/s occurring, particularly in circumstances where the person's mental health has been negatively affected, the person fears victimisation and/or lacks awareness about their legal rights and protections.¹⁴
13. This amendment would give effect to the Government's commitment in the Roadmap for Respect in relation to Recommendation 22 of the Respect@Work Report.

Fair Work Act 2009

Items 4 and 5

14. Existing Division 3 of Part 1-1 of the FW Act contains the guide to that Act. Items 4 and 5 are consequential amendments to the guide to reflect the fact that the Bill amends the existing anti-bullying jurisdiction to make it clear that the jurisdiction applies to sexual harassment. The items would achieve this by inserting the words "or sexually harassed" and "sexual harassment" into subsection 9(5B).
15. These amendments are also consequential to items 23 and 24 which expressly provide that workers who are sexually harassed at work may apply to the FWC for an order to stop sexual harassment under section 789FF.

Item 6

16. This item would insert definitions for 'miscarriage', 'sexually harass', and 'sexually harassed at work' into section 12 of the FW Act.
17. The amendment provides that 'miscarriage' means a spontaneous loss of an embryo or fetus before a period of gestation of 20 weeks. This definition is based on the standard medical meaning of the term miscarriage. The term 'embryo' is generally used up to nine weeks' gestation, after which the term 'fetus' is generally used.
18. The definition of miscarriage would include the spontaneous loss of an embryo or fetus, for example, where a non-viable embryo stops developing. It would also include a spontaneous loss of an embryo or fetus where a subsequent medical procedure is needed to remove tissue associated with the miscarriage (such as a 'dilation and curettage' procedure).

¹⁴ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 494.

19. The amendment provides that ‘sexually harass’ has the same definition given by section 28A of the SD Act. Section 28A provides that a person sexually harasses another person if:
- they make an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
 - they engage in other unwelcome conduct of a sexual nature in relation to the person harassed;
- in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.
20. The note to the new definition for ‘sexually harass’ states that other parts of speech and grammatical forms of ‘sexually harass’ has a corresponding meaning, referring the reader to section 18A of the Acts Interpretation Act. For example, ‘sexual harassment’ and ‘sexually harasses’ are given a corresponding meaning to the definition provided for sexually harass.
21. The amendment would also define ‘sexually harassed at work’ by reference to subsection 789FD(2A) at item 22. See the note on item 22 below.

Items 7 – 9

22. These items would insert new paragraph 104(1)(c) in the FW Act to provide for an additional ‘permissible occasion’ such that a national system employee will be entitled to compassionate leave if they, or their spouse or de facto partner, has a miscarriage (see item 6 of the Bill, which inserts a definition of ‘miscarriage’).
23. New subsection 104(2) provides that compassionate leave in relation to miscarriage will not be available to an employee where the miscarriage results in a stillborn child, or where their former spouse or former de facto partner has a miscarriage. Compassionate leave is already available where a child is stillborn under paragraph 104(1)(b) of the FW Act.
24. The amendments also make a minor technical change to the format of section 104 to accommodate new subsection 104(2), and make a consequential amendment to section 105 of the FW Act to ensure that an employee can take compassionate leave in relation to a miscarriage.
25. The existing notice and evidence requirements relating to compassionate leave in section 107 of the FW Act will apply to employees taking compassionate leave in relation to a miscarriage. This means an employee must give their employer notice of the taking of the leave as soon as practicable and must advise of the expected period of the leave. If required by their employer, the employee must also provide evidence that would satisfy a reasonable person that the leave is being taken for a

permissible occasion in the circumstances specified in subsection 105(1). This could include, for example, a medical certificate.

Item 10

26. This item would insert a new legislative note at the end of section 387 of the FW Act to inform readers that, for the purposes of paragraph 387(a), conduct that can amount to a valid reason for dismissal includes where an employee sexually harasses another person in connection with the employee's employment. Section 387 of the FW Act sets out the factors the FWC must take into account when considering whether a dismissal was harsh, unjust or unreasonable. These factors relevantly include whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees) (paragraph 387(a)).
27. This amendment is consistent with FWC decisions that have found sexual harassment can be a valid reason for dismissal. It does not limit the FWC's discretion in determining whether there is a valid reason for dismissal in cases involving sexual harassment or inappropriate conduct more broadly.
28. This amendment would give effect to the Government's commitment in the Roadmap for Respect in relation to Recommendation 30 of the Respect@Work Report.

Items 11 – 14

29. Items 11 to 14 are consequential amendments which insert the words "or sexually harassed" and "or sexual harassment" into sections of the FW Act that refer to the existing anti-bullying jurisdiction. This reflects the changes made by items 15 and 21 to headings to make it clear that orders can be made where a worker is either bullied or sexually harassed at work.

Item 15

30. This item would amend the heading of Part 6-4B of the FW Act to insert the words "or sexually harassed".

Items 16 and 17

31. Section 789FA provides a guide to Part 6-4B of the FW Act. These amendments would make it clear that workers who are sexually harassed at work may apply to the FWC for an order to stop the sexual harassment under this Part of the FW Act.

Item 18

32. This item would amend the heading of Division 2 to insert the words “or sexually harassed”.

Items 19 and 20

33. These items would amend section 789FC of the FW Act which outlines when a worker may apply to the FWC for an order to stop the bullying and/or sexual harassment.
34. The amendments expressly provide that workers who reasonably believe that they have been bullied and/or sexually harassed at work may apply to the FWC for an order to stop the bullying and/or sexual harassment under section 789FF of the FW Act. The terms bullied at work and sexually harassed at work are described in section 789FD.

Items 21 and 22

35. Section 789FD outlines when a worker is ‘bullied at work’.
36. Item 21 would amend the section heading to insert “or sexually harassed” at work.
37. Item 22 would insert subsection 789FD(2A) to provide that a worker is sexually harassed at work if, while the worker is at work in a constitutionally-covered business, one or more individuals sexually harasses the worker. “Sexually harass” has the same meaning as section 28A of the SD Act (see item 6).
38. Sexual harassment that constitutes bullying behaviour is already covered by the existing Part 6-4B jurisdiction. However, there will be some modifications to how this part applies to sexual harassment. In particular, the jurisdiction can be enlivened on one occasion or instance of sexual harassment; this is appropriate as sexual harassment is not always repeated or continuous (new subsection 789FD(2A)). That subsection also does not require the worker to establish a risk to health and safety when an application to the FWC concerning sexual harassment is made, as sexual harassment is a known and accepted work health and safety risk.
39. New subsection 789FD(2A) would also provide that sexual harassment can occur by one or more individuals. This language is to ensure consistency with the definition of ‘sexual harassment’ in section 28A of the SD Act (which is carried over to the FW Act by item 6), and requires a person to sexually harass another person.
40. A number of FWC decisions have considered the meaning of ‘at work’ in the existing anti-bullying jurisdiction and these principles will continue to be relevant in relation to sexual harassment matters. The most authoritative is the decision of a five member Full Bench of the FWC in *Bowker; Coombe; and Zwarts v DP World*

Melbourne Ltd; Maritime Union of Australia, Victorian Branch and Others [2014] FWCFB 9227 17 December 2014 in which it was noted that the concept of being ‘at work’ includes both the performance of work (at any time or location) and when the worker is engaged in some other activity which is authorised or permitted by their employer. A worker does not need to be performing actual work for the bullying or harassment to have a clear and temporal connection to work.

41. Further, the FWC has reasoned that behaviour that occurs at work events, coffee breaks, and other activities that are closely connected to work are all within the jurisdiction (*Rizwan Nasir Sheikh v Civil Aviation Safety Authority; Peter Marsh; Owen Richards* [2016] FWC 7039). Whether the requisite connection is present will in all cases depend on the particular facts and circumstances.
42. The provisions in this Part will only apply where the worker being ‘bullied or sexually harassed at work’ is at work in a constitutionally covered business. The term constitutionally-covered business is defined in subsection 789FD(3) which is not amended by this Bill.

Items 23 and 24

43. Existing section 789FF empowers the FWC to make any order it considers appropriate to prevent a worker from being bullied at work. The section outlines when an order may be made, and what the FWC must consider when determining the terms of an order.
44. Item 23 would amend the heading for the section by inserting “or sexual harassment”.
45. Item 24 would repeal existing subsection (1) and replace it with a new subsection (1). The new subsection substantially replicates the existing subsection dealing with bullying and includes express provisions for sexual harassment to clarify that orders can be made to address sexual harassment in the workplace as well as bullying.
46. New subsection 789FF(1) provides that before an order can be made, a worker must have made an application under section 789FC and the FWC must be satisfied of either or both of the following:
 - the worker has been bullied at work by an individual or group of individuals and there is a risk that this will continue, or
 - the worker has been sexually harassed at work by one or more individuals and there is a risk that this will continue.
47. Orders would not be available in cases where there is no risk of harassment occurring again, for example when the person who harassed the worker is no longer employed at the workplace.

48. The order can include any terms the FWC considers appropriate to prevent the worker from being bullied at work, sexually harassed at work, or both. The existing jurisprudence, which will continue to be relevant in relation to the modified jurisdiction, provides that orders can apply to a broad range of persons, most obviously co-workers but also employers and visitors to the workplace where appropriate.
49. Sexual harassment and bullying are not necessarily mutually exclusive behaviours, and can occur together. By allowing the FWC to consider both types of behaviour, the FWC will be able to make more effective orders to deal with the behaviours (new paragraph 789FF(1)(e)).
50. The primary aim of orders made under the new subsection 789FF(1) is to protect workers from future harm, and orders are not made with the intention of punishing bad behaviour (while they may have a deterrent effect). Orders cannot include a requirement to pay a pecuniary amount.

Items 25 – 27

51. Items 25 to 27 are consequential amendments that insert references to “sexually harassed” and “sexual harassment” into relevant provisions.

Item 28

52. Item 28 would insert transitional provisions for the commencement of the amendments to Part 6-4B of the FW Act. New item 41 of Part 11 to Schedule 1 ensures that stop-bullying orders previously made under existing subsection 789FF(1) to continue despite the repeal of subsection 789FF(1) by the Bill.
53. New item 42 of Part 11 to Schedule 1 makes clear that conduct that is sexual harassment that occurs prior to commencement of the amendments can be considered by the FWC when making an order under section 789FF after commencement of the amendments. However, the FWC can only make an order if it is satisfied that there is a risk that the worker will continue to be sexually harassed by the relevant individual or individuals, so that there is a risk of future harm. In this way, the jurisdiction of the FWC addresses future conduct rather than penalising past conduct.
54. In addition, sexual harassment that constitutes bullying behaviour is already covered by the existing Part 6-4B jurisdiction, noting again that orders can only be made if the FWC considers there is a risk of future harm to the worker.

Sex Discrimination Act 1984

Item 29

55. This item would extend the long title of the SD Act to include ‘discrimination involving harassment on the ground of sex.’ The addition of this term ensures the long title of the SD Act reflects the new provisions explicitly prohibiting harassment on the ground of sex inserted by this Bill.

Item 30

56. This item would amend the existing object clause at paragraph 3(c) to include ‘discrimination involving harassment on the ground of sex’ in addition to sexual harassment. This expanded object clause reflects the new clarifying provisions prohibiting harassment on the ground of sex created by item 49 of this Bill.

Item 31

57. This item would provide for a new object clause to clarify that a purpose of the SD Act is ‘to achieve, so far as practicable, equality of opportunity between men and women.’ The Respect@Work Report found that gender inequality is a key driver of workplace sexual harassment.¹⁵ This amendment would ensure that the concept of equality of opportunity between men and women, in addition to the elimination of discrimination, underpins the operation of the SD Act.
58. Equality of opportunity between men and women is based on the principle of free and equal participation in areas of public life. Discrimination, sexual harassment and harassment on the ground of sex contribute to gender inequality and constitute barriers to free and equal participation in areas of public life for both men and women.

Items 32 and 33

59. These items would repeal the current definition of ‘administrative office’ and create a new definition of ‘Commonwealth administrative office’ in subsection 4(1) of the SD Act. As item 40 introduces a new definition of ‘state administrative office’ the general term of ‘administrative office’ will no longer be used in the SD Act.
60. The new definition substantively replicates the definition of ‘administrative office’, but inserts new paragraphs (h) to (j). The note clarifies that an office of a member of either House of the Parliament, office of a person employed or engaged under the MOPS Act or a Commonwealth judicial office do not fall within the definition of Commonwealth administrative office. This is because the Bill adds these categories

¹⁵ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 18.

to the separate definition of ‘Commonwealth employee’ at items 34 and 35, outlined below.

Items 34 and 35

61. These items would clarify that the SD Act (including Division 3 of Part II) extends to all members of parliament, judges, staff and consultants employed under the MOPS Act, by expressly identifying them in the definition of ‘Commonwealth employee’.
62. The SD Act already applies to Ministers and Federal Executive Council Members, judges and other statutory office-holders to the extent the SD Act applies to ‘employment’. The existing definitions of ‘employment’ in subsection 4(1) of the SD Act includes ‘Commonwealth employee’. The existing definition of ‘Commonwealth employee’ includes ‘administrative office’. Ministers and Federal Executive Council Members, judges and other statutory office-holders are included within the existing definition of ‘administrative office’ as appointments made under a law of the Commonwealth and appointments made by the Governor-General or a Minister otherwise than under a law of the Commonwealth or of a Territory.
63. Members of parliament who are not Members of the Federal Executive Council or Ministers, and staff and consultants employed under the MOPS Act, do not clearly fall within the existing definitions of ‘administrative office’ and ‘Commonwealth employee’ under the SD Act. While they are already covered under existing section 28B of the SD Act which prohibits workplace sexual harassment by virtue of being workplace participants (such as employers/employees), this amendment would ensure this coverage is clear.
64. The amendments remove any doubt about the coverage of these provisions by expanding the definition of ‘Commonwealth employee’ to expressly include members of parliament, judges and staff and consultants employed under the MOPS Act. This ensures that it is clear that these groups of people are ‘Commonwealth employees,’ and therefore fall within relevant prohibitions of sexual harassment relating to employers and employees in subsections 28B(1), (2), (7) and (8). These amendments also clarify that these groups of people are included in the definition of ‘Commonwealth employee’ throughout the SD Act.

Item 36

65. The SD Act currently applies to judges at the federal level to the extent the SD Act applies to ‘employment’. The existing definitions of ‘employment’ in subsection 4(1) of the SD Act includes ‘Commonwealth employee’. The existing definition of ‘Commonwealth employee’ includes ‘administrative office’. Judges at the federal level are included within the existing definition of ‘administrative office’ which covers appointments made under a law of the Commonwealth and

appointments made by the Governor-General or a Minister otherwise than under a law of the Commonwealth or of a Territory.

- 66. The purpose of this amendment is to provide clarity that judges at the federal level fall within the definition of 'Commonwealth employee'. This item would insert the definition of 'Commonwealth judicial office' into subsection 4(1) of the SD Act. 'Commonwealth judicial office' is defined to include judges of the High Court and other judges of a court created by Parliament (such as Federal Court judges).
- 67. 'Commonwealth judicial office' will be included within the definition of 'Commonwealth employee' in subsection 4(1) by item 35. As the definition of 'employment' in subsection 4(1) includes 'Commonwealth employee', this amendment will clarify that judges at the federal level come within the scope of the SD Act to the extent the Act applies to 'employment'.
- 68. This clarification is not intended to cast doubt on the existing application of other Commonwealth anti-discrimination legislation to judges at the federal level.

Item 37

- 69. This item would amend the definition of 'employment' in subsection 4(1) of the SD Act to include 'work as a State employee of a State'. This amendment would ensure that those who fall within the definition of 'State employee' inserted by item 40 are covered by the SD Act to the extent that it applies to 'employment'. This will include people who are employed by a State, including independent contractors.
- 70. This amendment would work in conjunction with item 48, which would remove the exemption for employees of a State Government or of an instrumentality of a State with respect to the protections against discrimination in employment and sexual harassment.
- 71. This item and related amendments would also ensure that the SD Act protections apply to state and territory public servants.

Item 38

'Harass on the ground of sex'

- 72. This item would insert the definition of 'harass on the ground of sex' into subsection 4(1) of the SD Act. This would clarify that this term has the same meaning as the definition set out in new section 28AA of the Act. The note included in this definition confirms that different forms of this term that may be used in the SD Act have a consistent meaning.

Item 39

73. This item would remove the existing definition of ‘instrumentality of a State’ in subsection 4(1) of the SD Act, given this term would no longer be used in the Act as a result of the removal of section 13 (as a result of item 48).

Item 40

‘Parliament of a State’

74. This item would insert the definition of ‘Parliament of a State’ into subsection 4(1) of the SD Act. This would provide that in cases where the relevant State is either the ACT or NT, the references to ‘Parliament of a State’ throughout the SD Act will mean the Legislative Assembly of that respective territory. This clarifies that the scope of the SD Act extends to members of the Legislative Assembly, or their staff, in the ACT and the NT.

‘Person conducting a business or undertaking’

75. This item would insert the definition of a ‘person conducting a business or undertaking’ into subsection 4(1) of the SD Act. A ‘person conducting a business or undertaking’ is defined to include a person who is a ‘person conducting a business or undertaking’ within the meaning of the WHS Act.
76. The meaning of PCBU is provided in section 5 of the WHS Act. Consistent with its meaning in the WHS Act, the phrase ‘business or undertaking’ is intended to be read broadly and covers businesses or undertakings conducted by persons including employers, principal contractors, head contractors, franchisors and the Crown.
77. This amendment would ensure that PCBUs, in addition to employers, fall within the scope of the harassment provisions under Division 3 of Part II of the SD Act, reflecting the evolving world of work. This amendment would also ensure greater alignment between the SD Act and the WHS frameworks.

‘Public authority of a State’

78. This item would insert the definition of ‘public authority of a State’ into subsection 4(1) of the SD Act. The definition includes the State equivalents of each type of public authority under the definition of ‘public authority of the Commonwealth’ in subsection 4(1) of the SD Act.
79. ‘Public authority of a State’ would include:
- a body that is incorporated for a public purpose by a law of the State and employs staff on its own behalf

- an authority or body that is not a body corporate, is established for a public purpose by, or in accordance with the provisions of, a law of the State, and employs staff on its own behalf, or
 - an incorporated company over which the State, or a body or authority referred to above, is in a position to exercise control.
80. This would include, in some circumstances, local government authorities or bodies, where these fall within paragraphs (a)-(c) of the definition of ‘public authority of a State’. Given the variety of ways in which local governments may be constituted, it is appropriate that this definition is flexible, and captures those bodies with some legitimate link to a central state/territory government. Employees of such bodies would also be covered by the SD Act under the general definition of ‘employment’.
81. ‘Public authority of a State’ would be included within the new definition of ‘State employee’ which will be inserted into subsection 4(1) by item 40. As the definition of ‘employment’ in subsection 4(1) will be amended by item 37 to include work as a ‘State employee of a State’, these amendments will ensure that a ‘public authority of a State’ comes within the scope of the SD Act to the extent the Act applies to ‘employment’.

‘Sexually harass’

82. To assist with the clarity of the SD Act, this item would insert the definition of ‘sexually harass’ into subsection 4(1) of the SD Act which refers to the definition set out in section 28A of the Act. The note included in this definition confirms that different forms of this term that may be used in the SD Act have a consistent meaning.

‘State administrative office’

83. This item would insert a new definition of ‘state administrative office’ into subsection 4(1) of the SD Act. The definition includes the State equivalents of each type of office under the definition of ‘Commonwealth administrative office’ in subsection 4(1).
84. ‘State administrative office’ would be defined to include at paragraphs (a) to (c):
- an office established by, or an appointment made under, a law of the State, or
 - an appointment made by the Governor of the State, or the Administrator of the State or a Minister of the State, otherwise than under a law of the State, or
 - an appointment as a director of an incorporated company that is a public authority of the State.
85. ‘State administrative office’ would, under paragraphs (d) to (e), exclude an office or appointment under a law of the State that corresponds to the *Public Service*

Act 1999, or an office of a member of the Parliament of the State, or an office of a member of the staff of a member of the Parliament of the State, or a State judicial office of the State.

86. For example, this could include the head of each State and Territory anti-discrimination body that is appointed under a mechanism outlined in paragraphs (a) to (c), and not otherwise excluded under paragraphs (d) to (e).
87. ‘State administrative office’ will be included within the new definition of ‘State employee’ which will be inserted into subsection 4(1) by item 40. As the definition of ‘employment’ in subsection 4(1) will be amended by item 37 to include work as a ‘State employee of a State’, these amendments will ensure that a ‘State administrative office’ comes within the scope of the SD Act to the extent the Act applies to ‘employment’.
88. The note clarifies that an office or appointment under a law of the State that corresponds to the *Public Service Act 1999*, or an office of a member of the Parliament of the State, or an office of a member of the staff of a member of the Parliament of the State, or a State judicial office of the State do not fall within the definition of State administrative office. This is because the Bill adds these categories to the separate definition of ‘State employee’ in subsection 4(1), outlined below.

‘State employee’

89. This item would insert a new definition of ‘State employee’ into subsection 4(1) of the SD Act. A ‘State employee’ would be defined to include a person who:
- is appointed or engaged under a law of the State that corresponds to the *Public Service Act 1999*
 - holds a State administrative office of the State – see definition of ‘State administrative office’ inserted into subsection 4(1) by item 40
 - is employed by a public authority of the State – see definition of ‘public authority of a State’ inserted into subsection 4(1) by item 40
 - is a member of the Parliament of the State – see definition of ‘Parliament of a State’ inserted into subsection 4(1) by item 40
 - is a member of the staff of a member of the Parliament of the State, or
 - is a person who holds a State judicial office of the State – see definition of ‘State judicial office’ inserted into subsection 4(1) by item 40.
90. As the definition of ‘employment’ in subsection 4(1) will be amended by item 37 to include work as a ‘State employee of a State’, these amendments would ensure that a ‘State employee’ comes within the scope of the SD Act to the extent the SD Act applies to ‘employment’.

91. This amendment would ensure that the definition of ‘employment’ includes state employees, and would work in conjunction with item 48, which removes the exemption for employees of a State Government or of an instrumentality of a State. The intention is to provide State employees with the same protections under the SD Act that are available to other workers.
92. Even if a person working in a state public sector role is not covered by the definition of ‘state employee’ – for example, because they work for a local government body that does not meet the definition of ‘public authority of a State’ – they would be covered by the general definition of an employee (derived from the definition of ‘employment’).

‘State judicial office’

93. This item would insert a new definition of ‘State judicial office’ into subsection 4(1) of the SD Act. ‘State judicial office’ will include judges, justices and magistrates of a court of the State. A court of the State would include, for example, the Supreme Court of each State and Territory.
94. ‘State judicial office’ would be included within the new definition of ‘State employee’ which will be inserted into subsection 4(1) by item 40. As the definition of ‘employment’ in subsection 4(1) will be amended by item 37 to include work as a ‘State employee of a State’, these amendments will ensure that a ‘State judicial office’ comes within the scope of the SD Act to the extent the Act applies to ‘employment’.

‘Worker’

95. This item would insert the definition of a ‘worker’ into subsection 4(1) of the SD Act. A ‘worker’ would be defined to include a person who is a ‘worker’ within the meaning of the WHS Act.
96. Under section 7 of the WHS Act, a ‘worker’ means a person who carries out work in any capacity for a PCBU, including work as an employee, a contractor or subcontractor, an employee of a contractor or subcontractor, an employee of a labour hire company who has been assigned to work in the person’s business or undertaking (the host employer), an outworker, an apprentice or trainee, a student gaining work experience, a volunteer, or a person of a prescribed class. Under section 276 of the WHS Act, the Governor-General may make regulations in relation to any matter or thing required or permitted by the WHS Act to be prescribed. This means that additional classes of persons could be expressly prescribed as ‘workers’ by regulation.

97. The inclusion of the term ‘worker’ as defined under the WHS Act is intended to be broad and capture the full range of people who carry out work in any capacity for a PCBU. For example, ‘worker’ would include:
- a volunteer,
 - an intern, and
 - a self-employed person.
98. This amendment would ensure all types of workers are protected from harassment under Division 3 of Part II of the SD Act, reflecting the evolving world of work. This amendment would also ensure greater alignment between the SD Act and WHS laws.

‘Worker in a business or undertaking’

99. This item would insert the definition of ‘worker in a business or undertaking’ into subsection 4(1) of the SD Act. This provides that the term has the meaning provided by section 28AB, inserted by item 60 of this Bill.

Item 41

100. This item would amend existing section 8 of the SD Act, ‘act done for 2 or more reasons’, to insert a reference to new subsection 28AA(1), which provides for the definition of harassment on the ground of sex, ensuring that section 8 applies to that new subsection.
101. Section 8 provides that where certain provisions of the SD Act define unlawful discrimination to mean the doing of an act by reason of a particular matter (such as sex), this includes the doing of an act for more than just that one reason. Section 8 also means that it does not matter whether the particular matter (such as sex) is the dominant or substantial reason for the doing of the act.
102. For example, in relation to subsection 5(1), which defines sex discrimination as treating someone of one sex less favourably by reason of their sex (in summary), section 8 ensures that this definition includes situations where someone is treated less favourably by reason of their sex *and their age*, and regardless of whether age was actually the dominant reason for the treatment, rather than sex. This means that a person is not precluded from making a complaint of sex discrimination if the discrimination was also engaged in for other reasons, apart from sex.
103. The application of section 8 to new subsection 28AA(1) would mean that a person harasses another person on the ground of sex even if they engage in unwelcome conduct by reason of the other person’s sex and another reason (or reasons), and regardless of whether sex was the dominant or substantial reason for their engagement in the conduct. As Gordon J noted in *Sterling Commerce (Australia)*

Pty Ltd v Iliff [2008] FCA at 702, ‘the test of discrimination is not whether the discriminatory characteristic is the “real reason” or the “only reason” for the conduct but whether it is “a reason” for the conduct’.

Illustrative examples of section 8 (‘act done for 2 or more reasons’)

104. Karl and Chen are both managers in a large retail store. Karl regularly comments that Chen lacks the intelligence to be a manager and undermines her projects. He also suggests that she was only hired because their manager wanted another “pretty girl around the place” and to improve staff diversity. Chen lodges a complaint with the AHRC under section 28B on the basis that Karl’s conduct amounts to harassment on the ground of sex (as defined in section 28AA). The operation of section 8 means that it is not a defence for Karl to argue that his conduct was based primarily on Chen’s ethnicity, rather than her sex. If Chen can establish that sex was *one* of the grounds on which Karl harassed her (and the other elements can be met), she would be protected under section 28B.
105. Vincent and Emily are both paramedics and regularly work together. Emily is also a vegan and environmentalist. While on duty, Vincent regularly makes belittling comments about Emily’s dietary and lifestyle choices, calling her a “dirty hippy” and “stupid little tree hugger”. On multiple occasions, Vincent deliberately contaminates Emily’s food with meat so she is unable to eat it or smears meat on her seat in the ambulance. Vincent also implies that she should not be a paramedic because she is “feeble and weak”. He also regularly tosses medical supplies or equipment at Emily with unnecessary force, which causes her to drop things or fall over, and then jokes that she is “too much of a little girl to do her job properly.” Emily lodges a complaint with the AHRC under section 28B on the basis that this amounts to harassment on the ground of sex (as defined in section 28AA). While a person’s dietary choices are not a protected characteristic under the SD Act, the operation of section 8 means that Emily is protected under section 28B if she can establish that sex was *one* of the grounds on which Vincent harassed her (and the other elements can be met).

Items 42 – 46

106. These items would amend existing section 9 to clarify the application of the SD Act, as amended by this Bill.
107. Items 42 and 43 remove the reference in subsection 9(5) to section 28B and sexual harassment. Subsection 9(5) relates to the application of the SD Act to Commonwealth employees. This amendment reflects the insertion of new subsection 9(5A) by item 44, which separately provides that section 28B has effect in relation to sexual harassment and harassment on the basis of sex of Commonwealth employees (existing and prospective).

108. Item 45 removes the reference in subsection 9(6) to section 28C. Subsection 9(6) relates to the application of the SD Act to authorities or bodies exercising powers under Commonwealth laws to confer, renew, extend, revoke or withdraw an authorization or qualification (given section 28C prohibits members of qualifying bodies sexually harassing persons in certain circumstances). This amendment reflects the insertion of new subsection 9(6A) by item 46, which separately provides that section 28C has effect in relation to sexual harassment and harassment on the basis of sex by authorities or bodies exercising powers under a Commonwealth law to confer, renew, extend, revoke or withdraw an authorisation or qualification.

Item 47

109. This item would repeal existing section 12, which provides for how the SD Act binds the Crown in right of the states and the Commonwealth (and the Crown in right of the ACT and NT, given the definition of ‘state’ in the SD Act generally includes them), and would replace it with a new section 12.
110. Subsection 12(1) currently provides that the SD Act binds the Crown in right of the Commonwealth, but only binds the Crown in right of a state where the SD Act expressly provides for this. Existing sections 21-24, 26 and 27 expressly bind the Crown in right of a state.
111. New subsection 12(1) would provide that the SD Act binds the Crown in each of its capacities, meaning the SD Act would bind the Crown in right of the Commonwealth, states and territories.
112. It is necessary to make amendments to subsection 12(1) of the SD Act consequential to the removal of section 13, and to bring the SD Act into alignment with the other Commonwealth anti-discrimination laws (each of which binds the Crown in all its capacities).¹⁶
113. The removal of section 13 would ensure state and territory employees are able to make a complaint under sections 14 and 28B of the SD Act, where they had previously been unable to – see item 48. The amendments to section 12 will ensure that the Crown in right of the states and territories will be bound by the SD Act (that is, state and territory governments, departments and other entities without a separate legal personality will be bound by it), ensuring that complainants are able to make complaints in relation to their employers. For example, a state public servant making a complaint of sexual harassment against their supervisor under section 28B could also make a complaint that the government department they worked for, or the government itself, was vicariously liable for the conduct (under section 106).

¹⁶ See section 6 of the *Racial Discrimination Act 1975*; section 14 of the *Disability Discrimination Act 1992*; and section 13 of the *Age Discrimination Act 2004*.

114. It is important to note, however, that the vicarious liability provision in section 106 of the SD Act does not apply if it is established that the person took all reasonable steps to prevent their employee or agent from engaging in that prohibited conduct. Therefore, an entity would not be found to be vicariously liable if in practice it has no control over, or visibility of, the actual employing entity's operations, and that is appropriate in circumstances where the entity is truly independent.
115. As the Respect@Work identified, there is no current or continuing policy basis for the SD Act to continue to exclude state and territory public servants.¹⁷ Each state and territory has their own anti-discrimination legislative regime. The amendment of section 12 to bind the Crown in all its capacities will ensure state and territory public sector complainants have access to all the same complaints avenues and rights under the SD Act as other complainants, and will bring the SD Act into line with the other Commonwealth anti-discrimination Acts.
116. Pursuant to the existing operation of the SD Act, the exemptions available under sections 7D (special measures), 30 (genuine occupational qualification) and 40 (acts done under statutory authority) would apply. The AHRC also has the power to grant temporary exemptions under section 44 of the SD Act.
117. The amendments to subsection 12(2) would not make any substantive change to the operation of that provision; they simply reflect modernised drafting standards.

Item 48

118. This item would repeal section 13. Section 13 currently provides that:
- section 14 (which relates to discrimination in employment) does not apply to employment by an instrumentality of a State, and
 - section 28B (which relates to sexual harassment in employment) does not apply to acts done by employees of a State Government or of an instrumentality of a State.
119. The effect of section 13 is to exclude state public servants from being liable for and making complaints of discrimination in an employment context.
120. The Respect@Work Report noted that state and territory public servants are not covered by all elements of the SD Act, and so do not receive protections from workplace discrimination or harassment.¹⁸ This is inconsistent with the application to state and territory public servants under every other Commonwealth anti-discrimination law. While state and territory public servants are able to access

¹⁷ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 468 – 469.

¹⁸ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 468.

protections under state based anti-discrimination legislation, there are different protections available at the state level. This results in state and territory employees being unable to access the same protections and complaints avenues that are available for private sector employees within the same jurisdiction.

121. The rationale behind section 13 in the SD Act is not entirely clear.¹⁹ Since its inclusion, several reports have recommended section 13 be removed to enable state and territory public servants to access all available complaints mechanisms.²⁰ Given that each state and territory has legislated to prohibit sex discrimination and sexual harassment, there is no rationale for continuing to exclude state and territory public servants from the application of the SD Act provisions on sex discrimination and sexual harassment in an employment context (sections 14 and 28B of the SD Act). The removal of section 13 would bring the SD Act into line with other Commonwealth anti-discrimination Acts.
122. This amendment would ensure that State employees, including state public servants, are not excluded from the operation of the Act. This contributes to the implementation of the Government's commitment in the Roadmap for Respect in relation to Recommendation 16 of the Respect@Work Report.
123. These changes would also ensure that section 14 (discrimination in employment) applies to employment by ACT and NT government bodies (such as ACT and NT government departments), and that section 28B (sexual harassment in employment) applies to acts done by ACT and NT employees (such as territory public servants). This is because the definition of 'state' in the SD Act (except where used in certain subsections of section 9) includes the ACT and NT. This amendment would work in conjunction with amendments to various definitions in the SD Act (in particular the amended definition of 'employment' at item 37), and amendments to section 28B to ensure that state employees, state members of parliament and state judges can be liable for and protected from sexual harassment and discrimination under the SD Act.

Item 49

124. This item would amend the heading of Part II of the SD Act to reflect that it will now contain provisions that relate to matters other than prohibited discrimination. In

¹⁹ The 1992 [Report on review of permanent exemptions under the Sex Discrimination Act 1984](#) undertaken by the then Human Rights and Equal Opportunity Commission of Australia indicates that section 13 was one of 50 amendments that were introduced in October 1983 following concerns about states' rights, and the appropriateness of the Commonwealth legislating in an area for which some states had already enacted legislation.

²⁰ Report on review of permanent exemptions under the Sex Discrimination Act 1984 (1992); House of Representatives Standing Committee on Legal and Constitutional Affairs in *Halfway to Equal* (1992); *Equality Before the Law* ALRC review (1994); Senate Legal and Constitutional Affairs Committee's 2008 inquiry *Effectiveness of the Sex Discrimination Act 1984 in eliminating discrimination and promoting gender equality*.

particular, it will now contain a provision clarifying that victimisation is unlawful on a civil basis: new Division 5 of Part II and new section 47A will be inserted by item 77 to give effect to this.

Items 50 – 57

- 125. These items will make changes to sections 21-24, 26 and 27 as a consequence of the amendments to section 12.
- 126. New section 12 will ensure the Crown is bound in each of its capacities, meaning the Crown in right of the Commonwealth, states and territories will be bound by the SD Act. In practice, this will mean that departments of state (i.e. government departments) and other agencies without a separate legal personality will be bound by the SD Act. As a result, the provisions in sections 21-24, 26 and 27 will no longer need to expressly bind the Crown in right of a state.

Item 58

- 127. This item would amend the heading of Division 3 of Part II of the SD Act to reflect its expanded application to ‘harassment on the ground of sex’ (section 28AA).

Item 59

- 128. This item would amend section 28A of the SD Act so that the definition of sexual harassment applies to the SD Act as a whole, rather than just Division 3. This ensures that references to the term ‘sexual harassment’ used throughout the SD Act, such as the objects clause, will be interpreted using the same definition contained in section 28A.

Item 60

‘Harassment on the ground of sex’

- 129. This item would clarify that ‘harassment on the ground of sex’ is unlawful by inserting an explicit prohibition in the SD Act. Sections 28B to 28L set out the different circumstances in which this type of conduct, as well as sexual harassment, is prohibited.
- 130. The Respect@Work Report found that people may experience forms of harassing conduct based on their sex, but that is not necessarily sexual in nature.²¹ Depending on the circumstances, this form of ‘sex-based harassment’ may be captured under the existing prohibitions against sexual harassment or unlawful discrimination. However, the Sex Discrimination Commissioner recommended that this type of

²¹ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 457 – 458.

conduct is explicitly prohibited in the SD Act to ensure clarity for workers and employers as well as the broader community.²²

131. The concept of sex-based harassment has been explored in the case law. For example, in *Hill v Water Resources Commission* (1985) EOC 76 the complainant experienced offensive, sex-oriented conduct over a long period, such as anonymous and threatening mail, the smearing of female toilets with faeces, and tossing boxes with unnecessary force. The New South Wales Equal Opportunity Tribunal concluded that this constituted unlawful sex discrimination as it amounted to less favourable treatment because a comparable man would not have been harassed in the same circumstances.²³ However, the Tribunal was firm in describing the conduct as ‘gender-based harassment’ or ‘sexist harassment’ rather than ‘sexual harassment’.
132. Further, in *Cooke v Plauen Holdings Pty Ltd* [2001] FCMA 91 the complainant reported that her male manager asked extremely personal and inappropriate questions, told her personal things about himself, and asked her to model for him, among other forms of conduct. Driver FM found that while this conduct was sexual in nature on some occasions, it did not amount to sexual harassment in the circumstances. Instead, it was found that the conduct amounted to sex discrimination as the male manager treated female employees more poorly than male employees.²⁴
133. Expressly prohibiting harassment on the ground of sex in the SD Act confirms that people are protected from harassment on the ground of their sex in specific areas of public life. These protections will create a clear pathway for people to address this form of conduct and will complement the existing provisions prohibiting sexual harassment and sex-based discrimination within the SD Act.

New section 28AA

134. New section 28AA sets out the meaning of ‘harassment on the ground of sex’ for the purposes of the SD Act:
 - (1) For the purposes of this Act, a person harasses another person (the person harassed) on the ground of sex if:
 - (a) by reason of
 - (i) the sex of the person harassed; or
 - (ii) a characteristic that appertains generally to persons of the sex of the person harassed; or

²² Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 457 – 458.

²³ *Hill v Water Resources Commission* (1985) EOC 76, 280.

²⁴ [2001] FCMA 91, para 31.

- (iii) a characteristic that is generally imputed to persons of the sex of the person harassed;

the person engages in unwelcome conduct of a seriously demeaning nature in relation to the person harassed; and

- (b) the person does so in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

‘By reason of the sex’

135. The terms set out in paragraph 28AA(1)(a) provide for the grounds or reasons for which someone can be considered to have been harassed under section 28AA. These three related grounds will ensure that harassment on the basis of someone’s sex, as well as on the basis of a characteristics that relate to sex or that society generally imputes to a particular sex, is covered, consistent with the prohibition on sex-based discrimination in section 5. This is a common mechanism included in anti-discrimination laws across Australia:

All Australian anti-discrimination statutes extend beyond the specific attributes identified in the legislation, to cover also characteristics that appertain generally to people with an attribute, and characteristics that are generally imputed to people with a particular attribute.²⁵

136. Sex-based harassment, like sexual harassment, is a form of discrimination, so it is important to maintain conceptual consistency with these existing prohibitions in the SD Act. There may be overlap between these three grounds in practice, as the reason for the harassing conduct may be a combination of someone’s sex and characteristics appertaining generally to members of their sex, or these reasons may not be easily distinguishable from one another, but this does not prevent a claim under this section. Instead, it reflects the gender inequality that pervades society and that the SD Act was designed to address it.
137. Subparagraph 28AA(1)(a)(i) provides that harassment on the ground of sex includes harassment by *reason* of the sex of the person harassed. For example, if the other elements of section 28AA can be established, it would be unlawful under section 28B for a customer to repeatedly harass a male waiter on the basis that he is not as ‘attractive and attentive’ as the female wait staff and does not offer the same ‘customer experience’ because he is a male.
138. Subparagraph 28AA(1)(a)(ii) provides that harassment on the ground of sex includes harassment by reason of a characteristic (or characteristics) that appertains generally to persons of that sex. This could cover instances where someone is harassed

²⁵ Anna Chapman, ‘Australian Anti-Discrimination Law, Work, Care and Family’, Working Paper No. 51, Centre for Employment and Labour Relations Law, The University of Melbourne, page 8.

because of a characteristic associated with members of that person's sex, such as anatomical attributes. For example, this would include harassment of a female colleague by someone who asks invasive questions about her menstrual cycle and tells everyone in the office "she must be on her period" in staff meetings when she provides alternative views or options for solutions to work problems, or challenges someone on their thinking, accompanied by the placement of sanitary items on her desk. This could also include a male student being belittled by a teacher for having an "excessively high-pitched voice", "sounding more like a girl than a boy", and wearing a skirt to school instead of the male school uniform.

139. Subparagraph 28AA(1)(a)(iii) provides that harassment on the ground of sex includes harassment by reason of a characteristic that is generally imputed to persons of that sex. This would include harassment on the grounds of gendered stereotypes, including characteristics generally imputed by society to one sex or the other, such as caring responsibilities being the domain of women. For example, if the other elements of section 28AA could be established, it would be unlawful under section 28B for a male supervisor to harass a female worker on the basis that she "should be at home taking care of her husband and children" and "is a selfish and terrible mother" for remaining in the workforce.

'Unwelcome conduct'

140. The term 'unwelcome conduct' is an established concept in the case law and is generally factually specific.²⁶ In *Aldridge v Booth* [1988] FCA 279 'unwelcome conduct' was defined as conduct that is not solicited or invited, and the individual regards that conduct as undesirable or offensive. In *Ewin v Vergara* (No 3) [2013] FCA 1311, Bromberg J described 'unwelcome' as conduct that is disagreeable to the person to whom it was directed.²⁷ It is also well-established that it is not necessary that a complainant explicitly addresses the behaviour or inform the perpetrator that it is unwelcome.²⁸

'Of a seriously demeaning nature'

141. The concept 'of a seriously demeaning nature' is being introduced into the SD Act by this Bill. This term should be interpreted in accordance with its ordinary meaning. By definition, to 'demean' is to debase or degrade another person. The inclusion of this term is intended to provide an appropriate limit on the scope of conduct captured under this provision.

Reasonable person test

²⁶ See *Kraus v Menzie* [2012] FCA 3, para 22; *Elliot v Nanda & Commonwealth* [2001] FCA 418; *Ford v Inghams Enterprises Pty Ltd* (No 3) [2020] FCA 1784.

²⁷ *Ewin v Vergara* (No 3) [2013], 26.

²⁸ *Colin Ramon Reguero-Peunte v City of Rockhampton* (U2017/13857).

142. Section 28AA(1)(b) requires an inquiry into whether a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. Similar to the definition of sexual harassment in section 28A, this test does not require an assessment of what the actual person who engaged in the conduct would have anticipated, nor does it require an assessment of what the person who experienced the conduct would have anticipated.
143. Instead, this test requires an objective assessment as to whether a hypothetical, reasonable bystander would anticipate that a person would be offended, humiliated or intimidated by the unwelcome conduct.²⁹ Reasonableness is therefore addressed by reference to the conduct of the harasser rather than the actual response to that conduct. However, the requirement to consider what was reasonable ‘having regard to all the circumstances’ is a mechanism to bring in particular subjective considerations or factors, such as any particular vulnerabilities.
144. When considering what a reasonable person may have anticipated in all the circumstances, the decision-maker must consider, but is not limited to considering, the following circumstances provided for in subsection 28AA(2):
- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
 - (b) the relationship between the person harassed and the person who engaged in the conduct;
 - (c) any disability of the person harassed;
 - (d) any power imbalance in the relationship between the person harassed and the person who engaged in the conduct;
 - (e) the seriousness of the conduct;
 - (f) whether the conduct has been repeated;
 - (g) any other relevant circumstance.
145. It is not intended that any or all of these circumstances must be met for sex-based harassment to be successfully established.
146. The considerations listed at paragraphs 28AA(2)(a) to (c) are modelled on the existing considerations in paragraph 28A(1A)(a) to (c) of the SD Act (sexual harassment) and ensures that the intersectionality between sex and other protected attributes are considered when applying the reasonable person test. For example, a young woman with disability or an Aboriginal woman may experience sexual or sex-based harassment differently.

²⁹ For example, see *Leslie v Graham* [2002] FCA 32, para 70.

147. The importance of considering intersectionality was illustrated in *Djokic v Sinclair* [1994] HREOCA 16, in which the complainant's superior and co-workers regularly referred to her in a demeaning way with phrases such as "stupid wog bitch". In this case, the element of race was intermingled with incidents of sexual harassment and sex discrimination. The complainant succeeded in respect of all grounds, but there was a question about whether she would have satisfied the burden of proof if the various incidents had been disaggregated.³⁰
148. Under paragraphs 28AA(2)(b) and (d), a decision-maker must consider the relationship and any power imbalance in the relationship between the person harassed and the person engaged in the conduct. The Respect@Work Report found that power imbalance is a key driver of sexual harassment in the workplace.³¹ These may be caused by the seniority, position or influence of the person engaging in the conduct, or the inexperience or particular vulnerabilities of the person harassed, such as lack of job security.
149. Under paragraph 28AA(2)(e), a further circumstance to be taken into account is the *seriousness* of the conduct. As discussed below, this can be a clear factor in assessing whether the conduct meets the required level of 'offensive, humiliating or intimidating'. This would be particularly relevant where a single act or incident is the basis of the complaint.
150. Under paragraph 28AA(2)(f), a further circumstance to be taken into account is whether the conduct was *repeated*. As discussed below, this can be a key factor present to take conduct to the requisite level of 'offensive, humiliating or intimidating'. This would particularly be relevant where one instance of the conduct may be perceived as less serious or severe in nature, but when repeated would constitute serious harassment. However, repetition is not required for conduct to amount to sex-based harassment.
151. Under paragraph 28AA(2)(g), any other relevant circumstance may be taken into account. This could include aspects of the environment or culture in which the conduct took place. For example, if that environment was a workplace, a factor to consider could be the type of workplace and whether that workplace was dominated by one sex.

'Offended, humiliated or intimidated'

152. The meaning of the terms 'offended', 'humiliated' and 'intimidated' are well established in the case law relating to sexual harassment and other forms of

³⁰ *Djokic v Sinclair* [1994] HREOCA 16, 420.

³¹ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020),; 19.

discrimination.³² The terms are applied in relation to the facts of a matter, with a decision-maker determining whether particular conduct meets that threshold in the circumstances. The case law indicates that conduct must generally be *serious* or *repetitive* to meet the threshold of being offensive, humiliating or intimidating. For example, in *Cooke Driver FM* surmised that:

It is clear that sexual harassment constituted by conduct of a sexual nature can be the result of a single act or incident ... The question whether a single act or incident could constitute sexual harassment depends on the nature or quality of the action or statement. Some conduct may be so troublesome or vexing to be of such a nature as to cause offence sufficient to constitute sexual harassment. On the other hand, other conduct would not.³³

153. The following cases illustrate the level of conduct, whether a single *serious* incident or *pattern of behaviour*, that have met the threshold of being offensive, humiliating or intimidating in relation to sexual harassment or sex discrimination under the SD Act.

- In *Hill*, the New South Wales Equal Opportunity Tribunal held that the cumulative effect of numerous petty acts, including nuisance telephone calls, heavy handed jokes, and threatening jokes, was sufficiently offensive, humiliating and intimidating as to constitute sex discrimination.³⁴
- In *Leslie v Graham* [2002] FCA 32, Branson J concluded that it was *offensive*, *humiliating* and *intimidating* for a male worker to climb onto the bed of a female co-worker, while she was asleep and he was only wearing a towel. In terms of circumstances, Branson J placed great weight on the male worker's lack of clothing and the fact the female worker was asleep and in a position of considerable vulnerability.³⁵
- In *Lee v Smith* [2007] FMCA 59, Connolly FM concluded that displaying pornography in the workplace was *offensive*, and constituted an ongoing act of sexual harassment to those to whom the material was unwelcome.³⁶
- In *Poniatowska v Hickinbotham* [2009] FCA 680, Mansfield J concluded that it was *offensive* and *humiliating* for a male co-worker to request sexual favours from a female co-worker by email and text message. Mansfield J specifically noted that the complainant had 'indicated her attitude quite clearly' that these requests were unwelcome and the she would be offended if the requests continued. Further, Mansfield J noted that a reasonable person would have anticipated that the complainant would be *humiliated* by this conduct because it suggested she was

³² For example, see *Ewin v Vergara* (No 3) [2013]; *Johanson v Blackledge* (2001) 163 FLR 58; *Lee v Smith* [2007] FMCA 59; *Kraus v Menzie* [2012] FCA 3.

³³ *Cooke v Plauen Holdings* [2001] FMCA 91, para 25.

³⁴ *Hill v Water Resources Commission* (1985) EOC 76, 290.

³⁵ *Leslie v Graham* [2002] FCA 32, 69 – 70.

³⁶ *Lee v Smith* [2007] FMCA 59, para 198.

prepared to have a sexual relationship with the respondent, despite her clearly expressing her attitude to the contrary.³⁷

- In *Ewin v Vergara* (No 3) [2013] Bromberg J concluded that it was *intimidating* when a male employee turned off the lights and walked up behind a female employee while she was seated, touched her hand and demanded that she agreed to “come and talk to [him] about something.”³⁸ Bromberg J found that this conduct would raise a reasonable apprehension in a woman in the complainant’s circumstances of the likelihood of an impending sexual advance.
154. Conversely, in *Ford v Inghams Enterprises Pty Ltd* (No 3) [2020] FCA 1784, Collier J found that a male co-worker slapping another male co-worker on the buttocks did not constitute sexual harassment. Based on the relationship between the two workers and the broader workplace culture (among other factors), Collier J found that this conduct was not ‘of a sexual nature’ and was not offensive, humiliating or intimidating in the circumstances.³⁹

‘Conduct’

155. The definition of ‘conduct’ in subsection 28AA(3) provides that for the purposes of section 28AA, conduct includes (but is not limited to) making a statement orally or in writing, and not just physical acts (like gestures or physical abuse). Therefore, for the purposes of this provision, conduct could include spoken statements or written letters, text messages, social media messages or emails.

Scope of the provision

156. It is intended that new section 28AA of the SD Act would apply to the same *level* of conduct as existing section 28A (noting that section 28A requires conduct to be ‘of a sexual nature’ while section 28AA requires conduct to be ‘seriously demeaning in nature’). This means that harassing conduct on the ground of sex would need to be sufficiently serious or sustained to meet the threshold of offensive, humiliating, or intimidating, as well as seriously demeaning. Therefore, depending on the circumstances, this may include:
- Asking intrusive personal questions based on a person’s sex.
 - Making inappropriate comments and jokes to a person based on their sex.
 - Displaying images or materials that are sexist, misogynistic or misandrist.
 - Making sexist, misogynistic or misandrist remarks about a specific person.
 - Requesting a person to engage in degrading conduct based on their sex.

³⁷ *Poniatowska v Hickinbotham* [2009] FCA 680, 289.

³⁸ *Ewin v Vergara* (No 3) [2013], para 225.

³⁹ *Ford v Inghams Enterprises Pty Ltd* (No 3) [2020] FCA 1784, 707 – 734.

157. It is not intended that this provision would capture mild forms of inappropriate conduct based on a person's sex that are not of a sufficiently serious nature to meet the threshold of offensive, humiliating or intimidating, as well as seriously demeaning. For example, if a mechanic provided an overly simplistic and condescending explanation to a female client about the car repairs the mechanic had undertaken on her car, this would not meet the threshold of offensive, humiliating or intimidating simply because it was irritating for the female client. As such, it would not constitute sex-based harassment under section 28G (as amended by this Bill).

Illustrative examples of harassment on the ground of sex

158. George and Anna are co-workers of a similar age in a small retail business. George has a close friendship with the business owner, John. George regularly makes belittling comments to Anna about her appearance, including in front of customers, such as "Anna, you've put on some serious kilos, sweetheart" and "couldn't you make a bit more of an effort for the customers?" George also makes inappropriate comments about Anna's menopausal symptoms, joking that she is "bloody hormonal all the time" and is "constantly hiding in the bathroom". On many occasions, George intentionally creates a mess and then tells John to "get Anna to clean that up – she's the help around here – it's what women are for after all". John is aware of the conduct but takes no action to prevent or address it. Anna initiates a complaint against George under section 28B on the basis that his conduct is unwelcome and seriously demeaning, and causes her to feel humiliated and offended (section 28AA). Anna also initiates a complaint against John under section 106 of the SD Act on the basis that he did not take reasonable steps to prevent George from engaging in the harassing conduct.
159. Sharon is a female high school teacher and Franco is a male student teacher on his final teaching placement. Sharon is Franco's supervisor and is responsible for approving his placement. Initially, Sharon provides Franco with positive feedback and approves his performance. After a couple of weeks, Sharon asks Franco whether he would like to go out for a drink with her – an invitation he politely declines. From that time onwards, Sharon provides highly critical feedback on a daily basis and suggests she will not approve Franco's placement. Sharon makes comments about the limits of Franco's 'natural ability' to teach given he is male and "lacks empathy and compassion". Franco's confidence is undermined by Sharon's conduct to the point where he cannot deliver classes and stops showing up to work. Franco initiates a complaint against Sharon under section 28B on the basis that her comments were unwelcome and seriously demeaning, and he was humiliated by her conduct (section 28AA).

Interaction with section 28A (sexual harassment)

160. The fundamental difference between section 28A (sexual harassment) and section 28AA (harassment on the ground of sex) is whether the harassment was 'of a sexual

nature'. It is intended that section 28AA will capture harassing conduct that is seriously demeaning, but not necessarily sexual.

161. In practice, harassment on the ground of sex may occur alongside other forms of discriminatory conduct, including sexual harassment.⁴⁰ In circumstances where multiple forms of discriminatory conduct have occurred as part of the same pattern of conduct, such as harassment on the ground of sex and unlawful discrimination, protections from sex-based harassment under Division 3 of Part II may be used alongside other provisions to ensure all aspects of the misconduct are appropriately addressed. As noted in the Respect@Work Report, the case law supports the practice that complaints can be raised as a matter of sexual harassment, sex discrimination, or both.⁴¹

Interaction with section 8

162. The expanded coverage of section 8 of the SD Act means that this provision may be used in circumstances where a person is harassed on the ground of sex in addition to other grounds, such as gender identity or sexual orientation. This will ensure that a person can make a complaint under this provision in circumstances where they are experiencing harassment on the grounds of more than one personal attribute, including their sex. For example, a person may be experiencing harassment in the workplace on the grounds of being a pregnant woman or a man with disability.

Interaction with section 106

163. Section 106 of the SD Act provides that where an employee or agent of a person does, in connection with their employment or duties, an act that would be unlawful under specified provisions of the SD Act, the SD Act applies to that person (e.g. the employer) as if that person had also done the act, unless the person has taken all reasonable steps to prevent the employee or agent from engaging in the conduct. The new section 28AA would be covered by section 106 of the SD Act.
164. In practice, this provision creates an obligation for employers to take reasonable steps to prevent their employees or agents from engaging in the type of conduct that is prohibited under the SD Act, including sexual harassment, in order to avoid liability if any such incidents occur.

Interaction with section 105

165. Section 105 of the SD Act provides that a person who 'causes, instructs, induces, aids or permits' another person to do an unlawful act of discrimination is taken to have engaged in the same conduct. This means that a person can be held legally

⁴⁰ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 457 – 458.

⁴¹ *Elliot v Nanda* (2001) 111 FCR 240; *Cooke v Plauen Holdings Party Ltd* [2001] FMCA 91.

responsible for the acts of another person if they are found to have caused, instructed, induced, aided, or permitted to harass another person on the ground of sex. By operation of item 86 of this Bill, section 28AA will be covered by section 105 of the SD Act.

166. This effectively creates a form of accessory or ancillary liability in relation to specific provisions under the SD Act. For example, a supervisor is informed that a junior employee is harassing another employee on the basis of their sex. The supervisor does not take any action, and instead jokes and encourages the conduct. In these circumstances, the supervisor may be held liable as an accessory to the harassment as they aided and permitted its continuation.

Worker in a business or undertaking

167. This item would insert new section 28AB in the SD Act which provides that for the purposes of the Act, a worker (within the meaning of the WHS Act) that carries out work for a PCBU (within the meaning of the WHS Act) is deemed to be a worker of that particular PCBU.

Items 61 – 62, 64 – 76

168. These items would amend a number of provisions in Division 3 of the SD Act to ensure that harassment on the ground of sex is prohibited in the same areas of public life as sexual harassment (e.g. in employment, education institutions, provision of accommodation).⁴²

Item 63

169. This item would repeal the existing subsections 28B(3) to (7) of the SD Act and replace them with new subsections (3) to (8).
170. The existing section 28B of the SD Act prohibits sexual harassment in an employment context. The structure of the existing provision prohibits sexual harassment in two different ways. Subsections (1) to (5) provide that sexual harassment is unlawful within specific work *relationships* regardless of *where* the conduct occurs. Subsection (6) does not require a particular work relationship to exist but prohibits sexual harassment that occurs between workplace participants in a *workplace*. ‘Workplace’ is defined in subsection (7) as either a place where someone works or a place where a function that is connected with work is carried out. Some workers are not currently protected under these provisions due to the limited situations for which sexual harassment is prohibited within particular work

⁴² ss 28E, 28F(1) and (2), 28F(2A), 28F(2B), 28G(1) and (2), 28H(1), 28J, 28K, and 28L of the Sex Discrimination Act.

relationships, and also the narrow definition of ‘workplace participant’ at subsection 28B(7) of the SD Act.

171. To address these concerns, these amendments would simplify the operation of section 28B and expand its coverage to protect all workers from sexual harassment and sex-based harassment in a modern work context.
172. The Bill does not amend the existing subsections (1) and (2) of section 28B of the SD Act as these subsections are clear and effectively articulate the type of relationships in which sexual harassment and harassment on the ground of sex is prohibited.
173. The new subsections (3) to (6) use the new terms ‘worker’ and ‘PCBU’ which are inserted into subsection 4(1) of the SD Act by item 40 to ensure broader coverage of the SD Act and achieve further alignment with the WHS Act.

New subsections (3) and (4) of section 28B

174. Existing subsections 28B(3) to (5) are relationship-based and prohibit sexual harassment between specified types of workers:
 - Subsection 28B(3) makes it unlawful for a person to sexually harass their *commission agent* or *contract worker* or a person seeking to become their commission agent or contract worker.
 - Subsection 28B(4) makes it unlawful for a *commission agent* or *contract worker* to sexually harass a fellow *commission agent* or *contract worker*.
 - Subsection 28B(5) makes it unlawful for a *partner* in a partnership to sexually harass another *partner*, or a person seeking to become a partner, in the same partnership.
175. These subsections will be repealed and replaced with the following sections which use the broader concepts of ‘worker’ and ‘PCBU’ from the WHS Act.
 - New subsection 28B(3) makes it unlawful for a *person conducting a business or undertaking* to sexually harass, or harass on the ground of sex, a *worker* in the business or undertaking; or a person who is seeking to become a worker in the business or undertaking. This is intended to capture sexual harassment and sex based harassment that occurs between people who do not fall within the definition of employer and employee (so are not covered by (1)), but who nevertheless have a workplace relationship (see illustrative example below). Consistent with the existing operation of the protection, so long as the relationship is established, there is no requirement that the conduct occurs in connection with work.

- New subsection 28B(4) makes it unlawful for a *worker* in a business or undertaking to sexually harass, or harass on the ground of sex, a fellow *worker*; or a person who is seeking to become a *worker* in the *business or undertaking*. Similarly, this is intended to capture sexual harassment and sex-based harassment that occurs between people who do not fall within the definition of employee, but are nevertheless working for the same business or undertaking. Again, so long as the relationship is established, there is no requirement that the conduct occurs in connection with work.

176. Under the WHS Act, the categories of commission agent, contract worker, and partner are captured under the definitions of ‘worker’ and ‘PCBU’. This means that the coverage of the current subsections 28B(3) to (5) will not be narrowed by the use of these terms. Instead, these amendments will ensure that more workers are protected under these provisions.

Illustrative examples of subsections (3) to (5)

177. Hoang is a general practitioner and the owner of a small medical practice. Sandeep is a receptionist at the practice and a medical student. Following consultations with patients, Hoang regularly makes inappropriate sexual jokes about their appearance or medical conditions. Huang and Sandeep bump into each other at the local dog beach one weekend and Hoang invites Sandeep out for a drink and suggestively implies that he would be happy to help him find a residency position “if there was something in it for him” in return. After Sandeep declines and states that he is uncomfortable about the requests, Hoang begins spreading false rumours about Sandeep in the medical community. As Hoang is a PCBU and Sandeep is a worker of the same medical practice, they are both covered by new subsection 28B(3). The physical location and time that the conduct occurred is not relevant as this provision is focused on whether a relationship exists.
178. Joe is a policy officer and works remotely from his home under a flexible work arrangement. Joe’s colleague, Amy, also works from her home under a flexible work arrangement. Amy sends him suggestive and inappropriate messages via social media out of work hours. Joe advises Amy that the messages are unwelcome and ‘blocks’ her on his social media. Amy then sends Joe a number of emails via their work email portal which include sexualised and derogatory comments. As Amy and Joe are both ‘workers’ of the same organisation this scenario would be covered by new subsection 28B(4). The physical location (home-based work) and time (out-of-hours) that the conduct occurred is not relevant as this provision is focused on whether a relationship exists.

New subsections (5) to (8) of section 28B

179. The new subsections (5) to (8) of section 28B will replace existing subsection (6) to clarify the intended operation of the protection from sexual harassment that occurs in

the course of, or in connection with, performing work or functions related to work under existing subsection (6). The amendments also adopt the broader terms ‘worker’ and ‘person conducting a business or undertaking’ to ensure that people who are not currently covered by the definition of ‘workplace participant’ in the SD Act will be covered. In particular, this includes interns, volunteers and people who are self-employed.

180. Existing subsection (6) prohibits sexual harassment that occurs between workplace participants at a place that is a workplace of either or both of those persons. The existing definition of ‘workplace participant’ in subsection (7) includes employers, employees, commission agents, contract workers, and partners in a partnership. While this definition does not explicitly cover judges and members of parliament, these people would fall within the definition of employee and employer. However, this definition does not cover interns, volunteers or people who are self-employed. The term ‘workplace’ is defined in subsection (7) as a place where a workplace participant works or otherwise carries out functions in connection with being a workplace participant. This has been interpreted broadly by the courts.⁴³
181. The new subsections 28B(5) to (8) reflect the underlying policy intention of the current subsection (6) of ensuring that people are not exposed to sexual harassment by reason of engaging in activities connected to their work, and workers do not use their position to engage in sexual harassment. The amendments address any uncertainty or ambiguity about how current subsection (6) was intended to operate.
182. New subsections (5) and (6) will use the concepts of ‘worker’ and ‘PCBU’ while subsections (7) and (8) will provide equivalent provisions based on the concepts of ‘employee’ and ‘employer’.
 - New subsection 28B(5) makes it unlawful for a person who is a ‘worker’ or ‘PCBU’ (the first person) to sexually harass, or harass on the ground of sex, a person if the harassment occurs in connection with the first person being a ‘worker’ or ‘PCBU’.
 - New subsection 28B(6) makes it unlawful for a person to sexually harass, or harass on the ground of sex, a person (the second person) who is a ‘worker’ or ‘PCBU’ if the harassment occurs in connection with the second person being a ‘worker’ or ‘PCBU’.
 - New subsection 28B(7) makes it unlawful for a person who is an ‘employee or ‘employer’ (the first person) to sexually harass, or harass on the ground of sex, a person if the harassment occurs in connection with the first person being an ‘employee’ or ‘employer’.

⁴³ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 464.

- New subsection 28B(8) makes it unlawful for a person to sexually harass, or harass on the ground of sex, a person (the second person) who is an ‘employee’ or ‘employer’ if the harassment occurs in connection with the second person being an ‘employee’ or ‘employer’.
183. The term ‘in connection with’ does not mean that a ‘worker’ or ‘PCBU’, or ‘employee’ or ‘employer’ must be actually *performing* their work duties at the time the conduct occurs. Instead, the term ‘in connection with’ requires that they are engaged in some form of conduct or activity, or are visiting a particular place, as a result of being a ‘worker’ or ‘PCBU’, or ‘employee’ or ‘employer’. This may include the following:
- Attending a pub to continue a discussion begun at the principal workplace.
 - A vehicle used to travel to work, a conference or meeting, or to meet clients.
 - Visiting the workplace out of hours because of a connection to work, for example to check the roster, collect payslips or collect belongings from a locker.
 - Conduct that occurs out of work hours, such as through text message, if the parties only have a professional relationship.
 - Remaining in their workplace on a lunch break or after their shift has finished.
184. While not extending the application of the existing operation of section 28B, replacing the term ‘workplace’ with ‘in connection with’ work will make this operation clearer.

Illustrative Examples of Subsections (5) to (8)

185. Tony is a defence barrister working on a high profile trial. While waiting for a hearing to commence, Tony initiates a conversation with Melissa, who is a junior solicitor working on a separate matter, and her client, Sarah. Tony makes lewd and suggestive comments to both Melissa and Sarah about their clothing and appearance. He also intentionally brushes against Sarah’s thigh and attempts to kiss her. Given that Tony is a self-employed barrister, he would now fall within the meaning of a worker and can therefore be liable for conduct prohibited under the SD Act. As he is attending the courthouse ‘in connection’ with his employment, both Melissa and Sarah are protected by new subsection (5) and could initiate a complaint under section 28B.
186. Aditi is a part-time barista in a small café. Aditi stops by the café on one of her rostered days off to collect her payslips and lodge a request for overtime. While in the café, two regular customers make a series of derogatory remarks about her appearance and attempt to grope her breasts. Given that Aditi was attending the café

‘in connection with’ her employment, despite not performing work duties at the time, she is protected by new subsection (6) and could initiate a complaint under section 28B.

187. Jane is an editor at a publishing house. While attending an after-hours book launch organised by her employer, Jane is sexually harassed by another attendee, Mary. Jane and Mary have no prior relationship. Given that Jane was attending the event ‘in connection with’ her employment, despite the event occurring after hours, she is protected by new subsection 28B(6).

Item 77

188. The SD Act already prohibits a person from threatening or subjecting another person to detriment for taking action (such as making a complaint to the AHRC) in response to conduct that is prohibited under the SD Act.
189. Victimising conduct such as this is already prohibited under subsection 94(1) of the SD Act. This provision states that ‘a person shall not commit an act of victimization against another person’ and sets out penalties for individuals and body corporates.
190. Prior to 2011, the case law held that subsection 94(1) of the SD Act could give rise to both *civil* and/or *criminal* proceedings. This was because the definition of ‘unlawful discrimination’ used in section 46PO of the AHRC Act, which provides the mechanism for a person to initiate civil proceedings under the SD Act, specifically captured conduct that was covered by subsection 94(1) of the SD Act.⁴⁴
191. However, as the Respect@Work Report highlighted, there have been three cases since 2011 that questioned whether the FCC or the FC has jurisdiction to hear a *civil* application of ‘unlawful discrimination’ under the AHRC Act that relates to victimisation under subsection 94(1) of the SD Act.⁴⁵ This legal uncertainty has arisen predominantly because subsection 94(1) of the SD Act is set out as a criminal *offence* with criminal penalties.⁴⁶
192. To remedy this legal uncertainty and clarify that victimisation conduct is unlawful discrimination and can form the basis of a *civil* proceeding, this item will create a new provision (section 47A ‘Victimisation’) in a new standalone division (Division 5 – ‘Victimisation’) in Part II of the SD Act. Under new subsection 47A(1) ‘it is unlawful for a person to commit an act of victimisation against another person’ while new subsection 47A(2) sets out the meaning of victimisation.

⁴⁴ See AHRC, *Federal Discrimination Law* (2016), 157 – 161.

⁴⁵ Respect@Work: National Inquiry into Sexual Harassment in the Workplace (2020); 489 – 490.

⁴⁶ See *Walker v Cormack* (2011) 196 FCR 574; *Walker v State of Victoria* [2012] FCAFC 38; *Chen v Monash University* [2016] FCAFC 66.

193. Section 47A operates separately from subsection 94(1), however Note 1 has been inserted to ensure users of the SD Act are made aware of the mirrored civil and criminal provisions. The criminal offence provision remains as a separate mechanism for the AFP to address particularly egregious forms of victimisation conduct.
194. Subsection 47A(3) sets out a defence that can be made by a person who is accused of engaging in victimisation conduct. A person will not be liable under subsection 47A(1) if they can prove that the allegation was false and not made in good faith. This ensures that people are protected from vexatious or opportunistic complaints.
195. The creation of new section 47A, alongside the amendments to the definition of ‘unlawful discrimination’ by items 1 to 2 of this Bill, will clarify that people who experience victimisation conduct for the purposes of the SD Act can make a complaint to the AHRC and, if their complaint is terminated, initiate civil proceedings against the alleged perpetrator under section 46PO. Note 2 below subsection 47A(1) refers to the definition of ‘unlawful discrimination’ in the AHRC Act to make this operation clear.
196. This item would give effect to the Government’s commitment in the Roadmap to Respect in relation to Recommendation 21 of the Respect@Work Report.
197. As discussed above in relation to items 1 and 2, this amendment is not intended to create ambiguity in relation to the other Commonwealth anti-discrimination Acts, which contain similar victimisation provisions. The intention has always been that these provisions in relation to victimisation can form the basis of two causes of action, civil and criminal, which is made clear by their inclusion in the definition of ‘unlawful discrimination’ in the AHRC Act (notwithstanding their framing as criminal offences).

Example of victimisation conduct

198. Mei is a junior property manager for a real estate company. Clarke is a senior property manager in the company and Mathew and Dorothy are Clarke’s administrative assistants. Mei has lodged several internal complaints alleging that Clarke sexually harassed her on multiple occasions over a period of months. After attempting to resolve the matter through an internal human resources process, Mei lodges a complaint with the AHRC against Clarke and lists Mathew and Dorothy as witnesses. Once the complaint is lodged, Clarke pressures Mathew and Dorothy to lie in the AHRC conciliation process and threatens to reduce their work hours if they support Mei. Both Mathew and Dorothy then lodge a separate complaint under new section 47A of the SD Act against Clarke.

Items 78 – 83

199. These items clarify that the existing functions of the AHRC would extend to the new express prohibition against harassment on the ground of sex, inserted by this Bill. Items 79, 81 and 83 mirror existing functions in section 48(1), but specify that they will apply in relation to sexual harassment and harassment on the ground of sex.
200. Item 79 would insert a new function (paragraph 48(1)(gaaa)) which provides that the AHRC may on its own initiative or when requested by the Minister, report to the Minister as to the laws that should be made by the Parliament, or action that should be taken by the Commonwealth, on matters relating to discrimination involving harassment on the ground of sex. This mirrors the existing functions in paragraph 48(1)(g) of the SD Act.
201. Item 81 would insert a new function (paragraph 48(1)(gaa)) which provides that the AHRC may prepare, and publish in such manner as they consider appropriate, guidelines for the avoidance of discrimination involving sexual harassment or harassment on the ground of sex. This mirrors the existing functions in paragraph 48(1)(ga) of the SD Act.
202. Item 83 would insert a new function (paragraph 48(1)(gc)) which provides that the AHRC may, when it considers it appropriate to do so, with the leave of the court hearing the proceedings and subject to any conditions imposed by the court, intervene in proceedings that involve issues of discrimination involving harassment on the ground of sex. This mirrors the existing functions in paragraph 48(1)(gb) of the SD Act.

Item 84 and 86

203. These items would amend subsections 94(1) and (2) of the SD Act to substitute the correct spelling of the word ‘victimisation’ for consistency with other Commonwealth anti-discrimination legislation.

Item 86

204. This item would extend the coverage of section 105 of the SD Act to include Division 3 of Part II, which would prohibit both sexual harassment and harassment on the ground of sex (as a result of amendments made by this Bill).
205. Section 105 of the SD Act provides that a person who ‘causes, instructs, induces, aids or permits’ another person to do an unlawful act of discrimination is taken to have engaged in the same conduct. This effectively creates a form of accessory or ancillary liability in relation to specific provisions under the SD Act.
206. Section 105 currently only extends to any acts that are unlawful under Division 1 (discrimination at work) or Division 2 (discrimination in other areas) of Part II of the SD Act. Section 105 currently does not extend to Division 3 (sexual harassment) of Part II of the SD Act, unless the conduct also amounts to unlawful discrimination or

victimisation. This means that a person who causes, instructs, induces, aids or permits another person to engage in sexual harassment would not be liable under the SD Act, unless they are also an employer (section 106 of the SD Act).

- 207. This amendment would ensure that people who cause, instruct, induce, aid or permit another person to engage in sexual harassment or another provision included in Division 3 are also liable under the SD Act. For example, if a manager encourages one of their junior staff to sexually harass another staff member, the manager may be held liable as an accessory to the harassment. Further, if an employee encourages a fellow employee to harass a person on the basis of their sex, but does not engage in this conduct themselves, they may also be held liable as an accessory under this provision.
- 208. This amendment would implement the Government's commitment in the Roadmap for Respect in relation to Recommendation 20 of the Respect@Work Report.

Item 87

- 209. This item would provide that for the purposes of the SD Act all State employees of a State are deemed to be employed by that State. This language is consistent with existing section 108 of the SD Act concerning Commonwealth employees. This provision would ensure that the 'employer' of state employees is clear for the purposes of the SD Act, given employment arrangements across government bodies can vary significantly and it may not be obvious who a given employee or official's 'employer' is. For example, without this provision, it may be unclear who a state judicial officer's 'employer' is – under new section 109, their employer would be the state.
- 210. This is particularly important for section 106 of the SD Act, which renders employers vicariously liable for their employees' conduct (in breach of certain provisions of the SD Act) unless the employer took all reasonable steps to prevent the employee from engaging in conduct in breach of certain provisions of the SD Act (see discussion at item 47).
- 211. It is important to note that this provision (as with existing section 108 of the SD Act) does not prevent a complainant from making a claim of vicarious liability against a range of employers in their employment 'chain'. For example, a local librarian could make a claim against the person who directly engaged in the conduct, their employer library, the local government authority that is responsible for the library and the state government itself – this is at the complainant's discretion and will depend on the circumstances, such as the extent to which the librarian escalated a complaint and the oversight of each entity.

Item 88 and 89

212. These items would provide for the application and transitional arrangements applicable to the new victimisation provision in the SD Act (new section 47A), which would be inserted by this Bill (see item 77).
213. It is necessary to provide for these arrangements so that the inclusion of this new victimisation provision does not have unintended consequences for complainants who are part way through a complaints process involving a complaint of victimisation when the Bill takes effect, or are yet to make a complaint of victimisation based on conduct engaged in prior to the Bill taking effect.
214. Item 88 would provide for the application of new subsection 47A(1) of the SD Act to victimising conduct that has occurred prior to the commencement of this Bill. It provides that for the purposes of subsection 47A(1), it is immaterial whether the act of victimisation was committed before, at or after the commencement of this item and for acts of victimisation committed before commencement, subsection 47A(1) is modified to include the phrase ‘, and is taken to have been unlawful,’. As such, new subsection 47A(1) of the SD Act would read, in relation to acts of victimisation that occurred before the commencement of the Bill: ‘It is unlawful, and is taken to have been unlawful, for a person to commit an act of victimisation against another person.’
215. As the existing victimisation provision in the SD Act (and all other Commonwealth anti-discrimination Acts) was always intended to provide the basis of civil victimisation claims – through the operation of the definition of ‘unlawful discrimination’ in the AHRC Act – the new civil victimisation provision will be retrospective in operation. The effect of item 88 will be to give retrospective application of subsection 47A(1) to acts of victimisation that occurred prior to the commencement of this Bill and ensure this subsection operates effectively to cover those pre-commencement acts of victimisation. This will ensure that a complainant seeking to make a complaint about victimising conduct that occurred prior to commencement is not precluded from using the new subsection and not disadvantaged compared to complainants seeking to make a complaint about conduct engaged in after commencement. It is appropriate for this provision to apply for conduct that has already occurred given it is confirming the existing civil jurisdiction of section 94 and not introducing a new form of liability.
216. Item 89 would provide for the transitional arrangements for victimisation complaints:
- that are before the AHRC at the time this Bill commences
 - that are yet to be made to the AHRC, concerning conduct that occurred prior to commencement

- that have been terminated by the AHRC prior to commencement and are either before a court or yet to proceed to court.
217. Subsection (1) of item 89 provides that despite the amendments this Bill would make to the definition of ‘unlawful discrimination’ in the AHRC Act, paragraph (f) of the definition (which lists section 94 of the SD Act, being the existing victimisation provision) will continue to have effect in relation to victimising conduct engaged in prior to commencement of this Bill, as if it were not amended.
218. The effect of subsection (1) of item 89 would be to preserve the existing meaning of ‘unlawful discrimination’ in the AHRC Act for the purposes of complaints concerning victimising conduct engaged in prior to commencement of this Bill. This will enable the AHRC to continue to handle a victimisation complaint as if it relates to conduct that is unlawful under existing section 94 of the SD Act (unless the President decides to deal with it as a complaint of victimisation that relates to the new victimisation subsection of the SD Act, subsection 47A(1) – see discussion about subsection (3) of item 89 below), or enable the complainant to proceed to the FC or FCC with the complaint.
219. Subsection (2) of item 89 provides that following the commencement of item 89, a person will no longer be able to lodge a complaint of victimisation with the AHRC as if it relates to conduct that is unlawful under existing section 94 of the SD Act that deals with victimisation. These victimisation complaints should instead be made in relation to the new provision introduced by this Bill (section 47A) to deal with victimisation as a civil cause of action.
220. Subsection (3) of item 89 provides the President of the AHRC with the discretion to deal with complaints of victimisation lodged with the AHRC prior to the commencement of this Bill (as if they relate to conduct that is unlawful under the existing provision dealing with victimisation), that have not yet been terminated, as if they were complaints lodged in relation to conduct that is unlawful under the new provision dealing with victimisation as a civil cause of action.
221. In particular, paragraph (c) of subsection (3) provides that the President may declare in writing that the complaint will be so treated, and if they do so, subparagraph (d)(ii) in subsection (3) requires them to give a copy of the declaration to the person who made the complaint. The President may also amend the complaint to give effect to the declaration (subparagraph (d)(i)), and if they do so, they must give a copy of the amended complaint to the person who made the complaint (paragraph (e)).
222. Subsection (4) of item 89 provides that a declaration under subsection (3) is not a legislative instrument. The effect of this provision is to clarify that declarations of the President will not be legislative instruments for the purposes of the *Legislation Act 2003*. The declarations are administrative in nature, as they provide

for the application of the AHRC and SD Acts to particular complaints and their contents on a case-by-case basis.

223. Subsection (5) of item 89 ensures that actions under this item may be delegated, in accordance with subsections 19(2) and 19(2A) of the AHRC Act. This item will therefore operate with regards to delegation as if it were a provision of Part IIB of the AHRC Act.

Item 90

224. This item would provide that any conduct engaged in prior to the commencement of the item will continue to be governed by the version of section 28B of the SD Act that was in effect prior to the amendments in this Act coming into effect.
225. This means that if a complaint is already on foot in relation to sexual harassment in the employment context, then the previous terms of section 28B will apply. This also means that if a person makes a complaint after the commencement of this Act, but that relates to conduct or an incident that occurred prior to the commencement of this Act, then the previous terms of section 28B apply.
226. Therefore, the amended section 28B of the SD Act created by item 44 of this Bill will only be applicable in relation to conduct that occurred after the commencement of this Act.

Item 91

227. This item would provide that any sexual harassment guidelines made under paragraph 48(1)(ga) of the SD Act and in force at the commencement of the item will continue to have effect as if they had been made under new paragraph 48(1)(gaa) of the SD Act, as amended by this Bill.
228. This item would ensure that any guidelines relevant to sexual harassment in force at the time this Act commences are preserved on an ongoing basis. While existing guidelines may need to be updated to reflect the amendments contained in this Bill, it is not the intention that any existing guidelines would be rendered unlawful or ineffective due to the operation of this Bill.

Item 92

229. This item would provide that any court proceedings involving sexual harassment issues in which a court has granted leave for the AHRC to intervene, prior to the commencement of this item, will continue to be governed by paragraph 48(1)(gb) as if it had not been amended by this Act.

230. This would ensure any leave granted by courts remains effective, preserving the AHRC's leave to intervene, and be involved in, any proceedings to do with sexual harassment.