



# Impact Analysis Statement

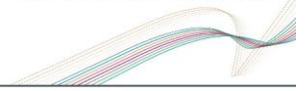
## Summary IAS

### Details

|  |   |
|--|---|
| <b>Lead department</b>                                       | Department of Justice and Attorney-General            |
| <b>Name of the proposal</b>                                  | Amendments to the <i>Anti-Discrimination Act 1991</i> |
| <b>Submission type</b>                                       | Summary IAS   |
| <b>Title of related legislative or regulatory instrument</b> | Respect at Work and Other Matters Amendment Bill 2024 |
| <b>Date of issue</b>   | June 2024   |

| Proposal type  | Details  |
|--|--|
| <b>Regulatory proposals where no RIA is required</b> | Amendments to the offences in Chapter 7A of the Criminal Code (Serious vilification and prohibited symbols) relate to general criminal laws. No regulatory impact analysis is required under the Better Regulation Policy. |

| <b>What is the nature, size and scope of the problem? What are the objectives of government action?</b>   |
|---|
| <p>In June 2018, the Australian Human Rights Commission (AHRC) was tasked with reviewing and reporting on workplace sexual harassment and making recommendations on its prevalence and nature, as well as the various legal frameworks around sexual harassment.</p> <p>The <i>Respect@Work: Sexual Harassment National Inquiry Report</i> (Respect@Work Report), published in March 2020, set out the AHRC’s findings and recommendations following its inquiry into workplace sexual harassment.</p> <p>The Respect@Work Report noted that, as well as having a devastating and profound impact on individuals, workplace sexual harassment also undermines workplace productivity and imposes a significant economic cost to Australian society.</p> <p>Consultations and submissions described the complex and interconnected ways in which experiencing and reporting workplace sexual harassment can affect individuals, including through:</p> <ul style="list-style-type: none"> <li>• negative impacts on health and wellbeing;</li> <li>• negative impacts on employment (both day-to-day and in relation to career progression); and</li> <li>• significant financial consequences.</li> </ul> <p>The Respect@Work Report also noted that sexual harassment represents a cost to Australian employers through:</p> <ul style="list-style-type: none"> <li>• lost productivity;</li> <li>• staff turnover;</li> <li>• negative impact on workplace culture;</li> <li>• resources associated with responding to complaints, litigation and workers’ compensation; and</li> <li>• reputational damage.</li> </ul> |



Broadly, the Respect@Work Report found that workplace sexual harassment remained prevalent, and that the current system for addressing sexual harassment was complex and confusing for victims and employers to understand. The AHRC recommended a number of improvements to the *Sex Discrimination Act 1984* (Cth) (SD Act), including the introduction of a positive duty on employers to take reasonable and proportionate measures to eliminate unlawful sex discrimination, including sexual harassment, as far as possible, along with new regulatory powers for the AHRC to enforce that positive duty.

On 28 November 2022 the Federal Parliament passed the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) which implements outstanding recommendations from the AHRC, including introducing a positive duty on employers to prevent workplace sexual harassment, sex discrimination and victimisation, with accompanying regulatory powers for the AHRC. While the positive duty commenced in December 2022, the regulatory powers did not commence until December 2023.

The Respect@Work Report noted that there is merit in having consistency in sexual harassment (and sex discrimination) provisions across federal, state and territory anti-discrimination legislation. The AHRC accordingly recommended that the Australian Government work with state and territory governments to amend state and territory human rights and anti-discrimination legislation with the objective of achieving consistency, where possible, with the SD Act, without limiting or reducing protections (**recommendation 26**).

An objective of government action is to implement key reforms by amending the *Anti-Discrimination Act 1991* (AD Act), broadly based on recommendations of the Respect@Work Report but adjusted appropriately for Queensland. These include amending the AD Act by:

- incorporating the concept of substantive equality as a purpose of provisions of the Act and updating the preamble and purposes of the Act to refer to promoting equal opportunity and equitable outcomes for everyone (**recommendation 16(a)**). This would help clarify the underlying purposes and foundational principles and provide guidance to the community, the Queensland Human Rights Commission (QHRC) and courts and tribunals.
- prohibiting 'sex-based harassment' within a work context (**recommendation 16(b)**). This will obviate the need for a complainant to meet separate and more onerous tests of unlawful direct or indirect sex discrimination, promote clarity and certainty of the law and support access to justice.
- prohibiting 'creating or facilitating an intimidating, hostile, humiliating or offensive environment on the basis of sex' within a work context (**recommendation 16(c)**). This will provide clarity and certainty to the law and assist in setting clear boundaries around what is and is not acceptable.
- introducing a positive duty to take reasonable and proportionate measures to eliminate discrimination, sexual harassment, sex-based harassment and other objectionable conduct as far as possible - with certain factors that must be considered when deciding whether a duty-holder complies with the duty (**recommendation 17**). This would shift the burden away from individuals making complaints by requiring duty holders to take proactive and preventative action, provide duty holders with a greater incentive to comply, and improve the effectiveness of the AD Act;
- providing new powers for the QHRC to investigate compliance with the new positive duty, and issue compliance notices and enter into enforceable undertakings to achieve compliance with the positive duty (**recommendation 18**). This will support compliance with the positive duty;
- providing new powers for the QHRC to investigate systemic sex discrimination, sexual harassment, sex-based harassment or subjecting a person to an intimidating, hostile, humiliating or offensive environment on the basis of sex, within a work context (**recommendation 19**). This will enable the QHRC to investigate into and report on range of issues around systemic contraventions;
- increasing the time period for complaints for sex discrimination, sexual harassment, sex-based harassment or subjecting a person to an intimidating, hostile, humiliating or offensive environment on the basis of sex, within a work context, to two years (**recommendation 22**). This will better recognise the complex reasons for delay in making a complaint immediately following an alleged incident; and
- allowing unions to bring representative complaints for work-related matters (**recommendation 23**), and clarifying that a costs order may only be made against a person or union who makes a



representative complaint, rather than class members (**recommendation 25**). This will enable unions with a legitimate interest in particular subject matter to bring a complaint and overcome difficulties and costs for persons subject to alleged contraventions, supporting access to justice.

Amendments will ensure that there is greater consistency with the *Industrial Relations Act 2016* (Industrial Relations Act) around limiting who may be an agent and who may represent a party for work-related complaints, which are limited to registered employee and employer unions.

An objective of government action is to update and expand the attributes protected by the AD Act in line with certain recommendations made by the *Building Belonging – Review of Queensland’s Anti-Discrimination Act 1991* (Building Belonging Report) that was tabled on 1 September 2022. New attributes include expunged conviction, homelessness, irrelevant criminal record, irrelevant medical record, physical appearance, and subjection to domestic or family violence). The relevant amendments to the AD Act will provide further protection against discrimination for people in the community.

The Legal Affairs and Safety Committee (LASC) report on the *Inquiry into serious vilification and hate crime* (Report No. 22, 57th Parliament) (LASC Vilification Report) was tabled on 31 January 2022.

The *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Vilification and Hate Crimes Act), that commenced on 29 April 2024, responded to various recommendations in the LASC Vilification Report (including moving the offence of serious vilification to the Criminal Code, introducing circumstances of aggravation relating to vilification motivating certain criminal conduct, and prohibiting the display of hate symbols). The LASC report on the *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023* (Report No. 49, 57th Parliament) (LASC Vilification and Hate Crimes Bill Report) was tabled on 3 October 2023.

An objective of government action is to implement recommendations from the LASC reports by making amendments:

- updating and expanding the list of protected attributes for both criminal and civil vilification to include age, impairment, gender identity, race, religion, sex, sex characteristics or sexual orientation (**recommendation 4** of the LASC Vilification Report and **recommendation 2** of the LASC Vilification and Hate Crimes Bill Report);
- clarifying that the test for civil vilification does not require a complainant to show that another person was actually incited, but instead that the public act was ‘likely’ to incite (that is, an objective incitement test) (recommendation 5 of the LASC Vilification Report);
- introducing a new ‘harm-based provision’ for civil vilification, which focuses on the harm caused to people who are members of a group with a protected attribute (**recommendation 5** of the LASC Vilification Report); and
- a new definition of ‘public act’ for both criminal and civil vilification which encompasses social media and other online communication as well as conduct which occurs in closed environments, such as schools and hospitals (**recommendation 6** of the LASC Vilification Report and **recommendation 3** of the LASC Vilification and Hate Crimes Bill Report).

**What options were considered?**

Two broad options were considered:

- Status quo (no action). This involves retaining the existing AD Act in its current form and maintaining the status quo.
- Legislated response. This involves a legislated response in the form of the Respect at Work and Other Matters Amendment Bill 2024 implementing the measures described above.

**What are the impacts?**

Option 1 – Status quo (no action)

As the status quo option, option 1 represents the base case against which option 2 is compared. As this option entails no further government action, it has no cost and produces no additional benefit. It also does not address the identified objectives of government action.

Option 2 – Legislated response**Positive duty and new investigation and enforcement powers**

The introduction of a new positive duty to take reasonable and proportionate measures to eliminate, as far as possible, discrimination, sexual harassment, harassment on the basis of sex, and other objectionable conduct as far as possible will:

- stop discrimination, sexual harassment, harassment on the basis of sex and other objectionable conduct before it happens, rather than addressing conduct that has already happened;
- share the responsibility of enforcement with duty holders, rather than imposing the burden of enforcement primarily on the people the AD Act is designed to protect; and
- support more systemic change to provide better protection from such conduct.

The new positive duty will have costs for duty holders who will be required to understand and comply with it, and investigations will require cooperation from persons providing relevant information. Persons conducting a business or undertaking in Queensland are already subject to a positive duty under the SD Act, as state and federal anti-discrimination laws operate concurrently. There will be some overlap in relation to what is required to comply with the two duties. Persons conducting a business or undertaking in Queensland are also already subject to positive duties under workplace health and safety laws, and all persons are required to take reasonable steps to prevent their workers or agents contravening the AD Act in order to avoid being held vicariously liable for contraventions.

There will also be impacts on the QHRC associated with providing education and guidance on the new positive duty, and exercising new investigation and enforcement powers. The Queensland Industrial Relations Commission (IRC) and the Queensland Civil and Administrative Tribunal (QCAT) will be impacted as a result of new jurisdiction in relation to review of decisions to issue compliance notices, and hearing applications by the Human Rights Commissioner seeking orders in relation to compliance with enforceable undertakings and compliance notices.

There are expected to be benefits to the community as a result of shifting the burden from individuals making complaints (which is currently the principal way that obligations are enforced under the AD Act) to duty holders taking proactive and preventative action. This shift, supported by the QHRC's new investigation and enforcement powers, is expected to provide duty holders with a greater incentive to comply with the Act and to improve the effectiveness of the Act. Investigations powers will also enable the QHRC to investigate a wide range of issues related to systemic contraventions.

**New prohibitions on sex-based harassment and creating or facilitating an intimidating, hostile, humiliating or offensive work environment on the basis of sex**

Conduct that creates an intimidating, hostile, humiliating or offensive work environment on the basis of sex, although not routinely recognised by individual and organisations as sexual harassment, may be sexual harassment in certain circumstances and may also be captured by discrimination based on the attribute of sex. The amendment to prohibit this would be a clarification and provide certainty to the law and assist in setting clear boundaries around what is and is not acceptable. It would not be expected to create a substantially new or increased burden for duty holders in Queensland.

Sex-based harassment would capture conduct that is currently unlawful under the direct sex discrimination provisions.

There will also be impacts on QHRC in providing education and guidance in relation to the new prohibitions and managing complaints in relation to alleged breaches of the new prohibitions, and for IRC in hearing complaints referred by the QHRC.

However, there are expected to be benefits to the community in ensuring that there is certainty for all parties captured by the new prohibitions and those who may be subject to alleged contraventions of them.

### **Changes to complaints, changes to vilification and new attributes**

Increasing the time period to make complaints about sex discrimination, sexual harassment, sex-based harassment or subjecting a person to an intimidating, hostile, humiliating or offensive environment on the basis of sex, within a work context, to two years, subject to extension with good cause, will expand the possibility of a complaint being made by a complainant against a respondent.

Expanding the scope of civil vilification under the AD Act to include new protected attributes, the clarification of the objective incitement test, the introduction of a new 'harm-based provision, and a new definition of 'public act', will make a broader range of circumstances unlawful and therefore subject to a complaint for an alleged contravention under the AD Act.

The expanded scope of protected attributes relevant to discrimination will provide further protection against discrimination for people in the community, and make it possible for a complaint to be made by a complainant about alleged discrimination by a respondent on the basis of the new attributes.

Allowing unions to bring representative complaints about work-related matters will also increase the likelihood that complaints will be made about a work-related matter against a respondent by expanding the basis on which it can be brought.

Complainants and respondents for complaints may be required to provide information to the QHRC, and if accepted by the QHRC, may be required to participate in a conciliation process. If a complaint is not resolved through conciliation, it may be referred to IRC (which has jurisdiction for work-related complaints) or QCAT for hearing.

These changes will also impact on QHRC, IRC and QCAT, in terms of engaging in dispute resolution and hearing complaints. There will also be impacts on QHRC in providing education and guidance in relation to the changes.

There will continue to be grounds on which the QHRC can reject a complaint, including, for example, if the Human Rights Commissioner is of the reasonable opinion that the complaint is frivolous, trivial or vexatious or misconceived or lacking in substance. It is also the case that the time period in which complaints may be accepted under the existing AD Act is already subject to extension by the Human Rights Commissioner with good cause.

There are expected to be benefits to the community in:

- providing better recognition of the complex reasons for delay in making a complaint immediately following an alleged incident;
- expanding vilification to capture a broader range of circumstances;
- providing further protection against discrimination based on new protected attributes;
- enabling unions with a legitimate interest in particular subject matter to bring a complaint, and
- overcoming difficulties and costs for persons subject to alleged contraventions, which will better support access to justice.

### **Who was consulted?**

Consultation was undertaken with the Queensland Council of Unions in relation to the amendments to the AD Act to implement recommendations from the Respect@Work Report. The amendments to introduce a broad positive duty (consistent with the Building Belonging Report recommendations), the majority of



proposed amendments to protected attributes and the amendments to the vilification provisions (to implement various recommendations of the LASC Vilification Report and the LASC Vilification and Hate Crimes Bill Report) were included in a draft exposure version of the Anti-Discrimination Bill 2024 that was subject to broad public consultation between 1 March 2024 and 22 March 2024 and were broadly supported by stakeholders.

**What is the recommended option and why?**

The legislated response is the preferred option to achieve the objectives of government action. It is considered that the recommended option generates the greatest net benefit to the community as compared to the status quo.

**Impact assessment**

**All proposals**

|   | First full year | First 10 years |
|---|-----------------|----------------|
| <b>Direct costs – Compliance costs*</b> | Not estimated   | Not estimated. |
| <b>Direct costs – Government costs</b>  | Not estimated   | Not estimated. |

**Signed**

Jasmina Joldić PSM  
 Director-General  
 Department of Justice and Attorney-General

Date: 12/06/2024

Yvette D'Ath MP  
 Attorney-General and Minister for Justice and  
 Minister for the Prevention of Domestic and  
 Family Violence

Date: 13/06/2024