

31 January 2020

Mr Darren Dick  
Senior Policy Executive  
Human Rights and Strategy  
Australian Human Rights Commission

By email

Dear Mr Dick,

**Human rights and federal discrimination law reform**

1. Women's Legal Service NSW (**WLS NSW**) thanks the Australian Human Rights Commission (**AHRC**) for the opportunity to comment on the discussion papers on a model for positive human rights reform in Australia and priorities for federal discrimination law reform.
2. We also understand the AHRC will be using submissions to these discussion papers to help respond to the upcoming Universal Periodic Review (**UPR**). While we understand the focus of these inquiries is federal law reform, we hope the recommendations we make in relation to NSW law and institutions will be useful to the AHRC in responding to the UPR.
3. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.



Women's Legal Service NSW  
PO BOX 206 Lidcombe NSW 1825  
Admin (02) 8745 6900  
Fax (02) 9749 4433

[www.wlsnsw.org.au](http://www.wlsnsw.org.au)  
Women's Legal Resources Ltd.  
ACN 002 387 699  
ABN 88 002 387 699



4. WLS NSW contributed to and endorsed the following submissions and submits the recommendations are relevant to these discussion papers:

- 4.1 The National Association of Community Legal Centres Response to the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper (September 2011) (**Consolidation submission**); and
- 4.2 The National Association of Community Legal Centre, Redfern Legal Centre, Kingsford Legal Centre and WLS NSW submission to the AHRC National Inquiry into Sexual Harassment in Australian Workplaces (#MeToo joint submission).

#### **Discussion paper: A model for positive human rights reform in Australia**

5. For the reasons outlined by the AHRC, WLS NSW supports the introduction of a federal Human Rights Act. We submit it is the best model to protect the human rights of all Australians.
6. We'd like to use this opportunity to raise other human rights issues we are concerned about.

#### ***Domestic violence***

7. Violence against women is one of the most widespread human rights abuses in Australia. A study conducted in Victoria found that domestic violence puts more women aged 15-44 years at risk of ill health and premature death than any other risk factor.<sup>1</sup> Violence against women also comes at an enormous economic cost. PriceWaterhouseCoopers estimates violence against women in Australia costs \$21.7 billion a year with victims-survivors bearing the primary burden of this cost.<sup>2</sup>
8. In 2014-15, 48,262 people used homelessness services, with 33.4% of the clients citing domestic and family violence or sexual abuse as the reason for seeking assistance from homelessness services.<sup>3</sup>
9. It is also our experience that many women who are victims-survivors of domestic violence

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<sup>1</sup> VicHealth and Department of Human Services, *The Health Costs of Violence. Measuring the Burden of Disease Caused by Intimate Partner Violence - A Summary of Findings*, 2004, p 10 [http://www.health.vic.gov.au/vwhp/downloads/vichealth\\_violence%20\\_%20summary.pdf](http://www.health.vic.gov.au/vwhp/downloads/vichealth_violence%20_%20summary.pdf)

<sup>2</sup> PCW, *Economic case for prevention violence against women. A high price to pay*, 2015, p 4 accessed at: <https://www.pwc.com.au/pdf/a-high-price-to-pay.pdf>

<sup>3</sup> Australian Institute of Health and Welfare, 'Specialist homelessness services, NSW supplementary tables, 2014-15', table NSW

remain in a violent home and/or relationship, as they simply have nowhere else to go.

10. We submit that the inadequacy of housing options for victims-survivors of domestic violence stems from systemic failures across emergency, temporary and long-term housing options across public, social and private housing systems.
11. We submit that the failure to adequately address these issues can have devastating consequences. Not only is the safety of women and children at risk but lack of safe housing may also result in a child(ren) being removed from the care of their victim-survivor parent.
12. A high proportion of women in prison have been victims of violent crime prior to coming into custody. The 2015 Network Patient Health Survey found that 70.8% of female inmates in NSW had been involved in at least one abusive relationship and a significant number of female inmates had been subjected to at least one form of sexual violence.<sup>4</sup>
13. Lawrie's 2003 study of Aboriginal women in NSW prisons found that over 75% of Aboriginal women had been sexually assaulted as a child, just under 50% had been sexually assaulted as adults and almost 80% were victims of family violence.<sup>5</sup>
14. Some girls and women, including women being protective of their pregnancy, tell us that it is safer for them to be in custody, as it is an escape from violence, they can access health care and nutrition and they may be supported to address their addiction to drugs.
15. It is an indictment on our society that some children and women see prison as a safe refuge and that this is accepted amongst this group because they feel they have nowhere to turn for support and assistance. This is compounded for women in rural and regional areas where there is very limited social housing stock with highly vulnerable people waiting on priority housing lists for many years.

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<sup>4</sup> Justice Health and Forensic Mental Health Network, 2015 Network Patient Health Survey Report, Sydney, 2017, p72 (74).

<sup>5</sup> Lawrie cited in Natalie Taylor & Judy Putt, "Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia," *Trends and Issues in crime and criminal justice*, Australian Institute of Criminology, September 2007, p2.

16. In NSW, Aboriginal and Torres Strait Islander women represent 33% of women in prison.<sup>6</sup> Aboriginal people are incarcerated at 13 times the rate of non-Aboriginal people<sup>7</sup> and Aboriginal women are the fastest growing group in NSW prisons.
17. Stathopoulos observes, “*the most significant co-occurrence of child sexual abuse sequelae is substance addiction and mental health issues ... [which] is intertwined with mental health problems and pathways to offending*”.<sup>8</sup> As Herman explains, drugs are a coping mechanism, providing relief and a form of escape from reality.<sup>9</sup>
18. Helping women to address their trauma is key to reducing recidivism.
19. The imprisonment of women and particularly pregnant women and women caring for children should be as a last resort. For children under two years of age, bonding with primary carers is important and can affect the child’s personal development. Studies have shown if a mother is able and supported to maintain significant time with her child during the initial time of removal and care planning, this increases the chance of successful restoration.<sup>10</sup>
20. During sentencing, courts should consider primary caregiving responsibilities for a child/ren, any history of violence experienced and any history of mental health and substance abuse. This is consistent with the United Nations Bangkok Rules.<sup>11</sup>
21. Rule 64 of the Bangkok Rules stipulates that:

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<sup>6</sup> Evann Ooi, ‘Recent Trends in the NSW Female Prison Population’, *Crime and Justice Statistics, BoCSaR Issue Paper No 120*, January 2018, p 3 accessed at: <https://www.bocsar.nsw.gov.au/Documents/BB/2018-Report-Recent-Trends-in-the-NSW-Female-Prison-Population-BB130.pdf>

Corrective Services NSW, Facts and Figure Corrections research, Evaluation & Statistics, March 2013

<sup>7</sup> ABS, *4517.0 - Prisoners in Australia*, 2016

<sup>8</sup> Mary Stathopoulos et al, *Addressing women’s victimisation histories in custodial settings*, Australian Centre for the Study of Sexual Assault (2012) 13, p6.

<sup>9</sup> Judith Herman, Trauma and recovery (Pandora, 1994) cited in Mary Stathopoulos, p6.

<sup>10</sup> Child Welfare Information Gateway, ‘Family reunification: What the evidence shows’, *Issue Brief*, June 2011 accessed at: [www.childwelfare.gov/pubs/iisue\\_briefs/family\\_reunification/family\\_reunification.pdf](http://www.childwelfare.gov/pubs/iisue_briefs/family_reunification/family_reunification.pdf)

<sup>11</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, E/2010/30 adopted by the UN General Assembly on 21 December 2010, Rule 41(b) accessed at: <https://undocs.org/A/RES/65/229>

*Non-custodial sentences for pregnant women and women with dependent children shall be preferred where possible and appropriate, with custodial sentences being considered when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children.*

22. Furthermore, Rule 58 of the Bangkok Rules stipulates that:

*Women offenders shall not be separated from their families and communities without due consideration being given to their families and communities. Alternative ways of managing women who commit offences, such as diversionary measures and pre-trial and sentencing alternatives, shall be implemented wherever appropriate and possible.*

23. The over-representation of Aboriginal and Torres Strait Islander women in prison is impacting on the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care. Once the mother is released from custody, she often faces significant difficulty in having the children returned to her care.
24. One challenge is access to safe and appropriate housing, particularly when the children are not currently in the care of the mother seeking such housing.
25. Access to early legal advice and other support can be crucial in supporting family preservation. There may be barriers to families engaging with Department of Communities and Justice (previously FaCS and referred to as FaCS in this submission) or NGO child protection services which could lead to the removal of children which could be overcome through parents/primary caregivers having access to legal advice and support from independent and trusted community legal services such as Women's Legal Service.
26. Access to early legal advice when a primary caregiver may not be able to care for their child but there is another family member who is appropriate and available could mean a matter is diverted to the family law courts rather than waiting for the matter to escalate to the Children's Court and the removal of a child from their family. The benefit in these circumstances is there is an increased likelihood that the child will stay with family members instead of going into "care". Our Indigenous Women's Legal Program play a vital role in conveying this message to communities.
27. Our specialist legal services include the Legal Education and Advice in Prison (LEAP) program for women in custody which was established in 2009 and received the 2009 NSW Law and Justice Foundation Community Legal Centre Award. WLS NSW works

in partnership with Wirringa Baiya Aboriginal Women's Legal Centre and Western Sydney Community Legal Centre (formerly Hawkesbury Nepean Community Legal Centre) to deliver the LEAP program in metropolitan prisons in Sydney. This program was established due to the high levels of unmet need amongst women in custody for civil and family law services, many of whom have experienced child sexual abuse, sexual assault and family violence. LEAP addresses unmet legal need by providing and facilitating access to civil and family legal services for incarcerated women.

28. WLS NSW provides regular face to face and telephone legal advice to women in Silverwater Women's Correctional Centre. We also respond to telephone calls from women in custody across NSW. LEAP does not receive any dedicated funding and operates from the core resources of the services.<sup>12</sup>
29. The Law Council has recommended Commonwealth, State and Territory Governments increase the availability of legal assistance services to prisoners, with a particular emphasis on civil and family law matters.<sup>13</sup>
30. In *Safe State*, the NSW Women's Alliance makes 49 detailed recommendations for policy and law change to prevent and end sexual, domestic and family violence in NSW. Nine recommendations relate to creating cultural change to prevent violence and promote gender equality. These recommendations focus on the need for a co-ordinated approach to primary prevention; making prevention of gender-based violence a key priority in schools through whole of school programs that are evidence based, developed by experts and focus on the drivers of gender-based violence; ensuring education programs address diversity; and the development of an Aboriginal and Torres Strait Islander people led strategy to prevent violence.<sup>14</sup>

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<sup>12</sup> The Law Council of Australia recognised the service gap in funding for specific legal services targeted to women in prison, particularly for civil and family law matters in its consultation paper on prisoners and detainees, as part of the Justice Project: Law Council of Australia, *The Justice Project: Prisoners and Detainees Consultation Paper* (August 2017), p4 (5) accessed at: <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Prisoners%20and%20Detainees.pdf>

<sup>13</sup> Law Council of Australia, *Justice Project Final Report - Recommendation and Guiding Principles*, 2018, p20 accessed at: <https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Final%20Report/03%20-%20202018%2009%20-%20Recommendations%20and%20Group%20Priorities.pdf>

<sup>14</sup> NSW Women's Alliance, *Safe State - Acting to end sexual, domestic and family violence*, 2018 accessed at: [https://d3n8a8pro7vhmx.cloudfront.net/safensw/pages/41/attachments/original/1540514938/A\\_Safe\\_State\\_-\\_Final\\_Policy\\_Platform\\_%28Oct\\_2018-Mar\\_2019%29.pdf?1540514938](https://d3n8a8pro7vhmx.cloudfront.net/safensw/pages/41/attachments/original/1540514938/A_Safe_State_-_Final_Policy_Platform_%28Oct_2018-Mar_2019%29.pdf?1540514938)

*Family Law and family violence*

31. The majority of matters in the family courts involve allegations of family violence. The system is not set up to deal with this.
32. Women's Legal Services Australia (**WLSA**), of which WLS NSW is a member, has recently updated its *Safety First in Family Law Plan*<sup>15</sup> following the Government's actioning of some of its recommendations and to incorporate key recommendations from the 2017 House of Representatives Standing Committee on Social Policy and Legal Affairs inquiry into a better family law system to support and protect those affected by family violence, (**SPLA inquiry**) and the Australian Law Reform Commission *Family Law for the Future: An inquiry into the Family Law System* (**ALRC review**).
33. WLSA's five step plan calls for the Government to:
  1. Strengthen family violence response in the family law system
  2. Provide effective legal help for the most disadvantaged
  3. Ensure family law professionals have real understanding of family violence
  4. Increase access to safe dispute resolution models
  5. Overcome the gaps between the family law, family violence and child protection systems
34. We recommend the Australian Government fully implement WLSA's *Safety First in Family Law Plan* immediately to make the family law system safer for children and adult family violence survivors, who are primarily women.
35. We recommend the following:
  - 35.1 Establish accountability mechanisms to ensure that FaCS and NGO child protection workers must inform parents in a timely manner if there are issues that may lead to the removal of their children and provide culturally safe and appropriate support to them to address those issues.
  - 35.2 When parents have themselves been the subject of significant risk of harm reports when they were children, FaCS and other child protection and support services should have a higher duty of care to support them, including as parents.

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<sup>15</sup> Women's Legal Services Australia, *Safety First in Family Law Plan*, 2019, accessed at: [http://www.wlsa.org.au/uploads/campaign-resources/Safety\\_First\\_in\\_Family\\_Law\\_Plan.pdf](http://www.wlsa.org.au/uploads/campaign-resources/Safety_First_in_Family_Law_Plan.pdf)

- 35.3 Courts are better informed about the pathways to prison for women as a result of child sexual abuse, sexual assault and family violence.
- 35.4 Imprisonment of women and particularly pregnant women and women caring for children should be as a last resort. Flexible and accessible, non-custodial alternatives to prison should be available throughout all states and territories, including in rural, regional and remote areas.
- 35.5 Better promotion and implementation of the Housing Pathways policy which prioritises access to social housing if a parent can provide evidence which demonstrates that the lack of appropriate accommodation is impacting their ability to have children restored to their care.
- 35.6 Fund the services providing Legal Education and Advice in Prison (LEAP) program for women in custody to undertake a pilot project with Corrective Services, FaCS and relevant support services to provide intensive early legal advice, social support and case management to pregnant women in custody and women with primary carer responsibilities prior to entering custody with a focus on family preservation and restoration.
- 35.7 Increase funding of community led, culturally safe, strengths based and trauma informed parenting and other support programs, such as integrated social and legal services, to help parents address issues that may lead to the removal of their children.
- 35.8 Fund health justice partnerships to train health workers to identify family violence and provide appropriate referrals to early legal support and for legal services to refer to counselling and other support services.
- 35.9 Adopt the Safe State recommendations relating to creating cultural change to prevent violence and promote gender equality.
- 35.10 The Australian Government implement WLSA's *Safety First in Family Law Plan*.

**Discussion paper: Priorities for federal discrimination law reform**

***Discussion question 1: Principles guiding discrimination law reform***

36. WLS NSW agrees with the principles identified by the AHRC.

*Discussion questions 2 and 3: Key factors and major challenges*

37. WLS NSW agrees that federal and state and territory discrimination laws are inconsistent, overly complex and contain gaps in protection.
38. We submit that federal discrimination laws should be consolidated and reformed to ensure they are easy to understand and provide comprehensive protection against discrimination. State and territory discrimination laws should also be reformed to ensure they are consistent with federal discrimination laws.
39. We submit that consolidation should be to the highest level of protection currently provided with respect to each provision in federal, state or territorial law and should not be watered down.

*Discussion questions 4 and 5: Protected attributes*

40. We refer you to pages 29 - 40 of the Consolidation submission. We support the following recommendations:
  - 40.1 Discrimination based on the attribute of an associate should be protected across all protected attributes. It should include a non-exhaustive definition of 'associate';
  - 40.2 A non-exhaustive list of protected attributes and the ground of 'other status';
  - 40.3 If 'other status' is not fully protected as an attribute, the AHRC should still be able to receive complaints on this basis. The AHRC should monitor new and emerging trends in relation to discrimination on 'other status' and make recommendations to the Government on the inclusion of new attributes in order to ensure the protection pf new and emerging attributes as protected attributes;
  - 40.4 'Social status' should be included as a protected attribute. 'Social status' should be defined to mean a person's status as homeless, unemployed or a recipient of social security payments;
  - 40.5 Protections from harassment for people on the basis of sex, sexual orientation and gender identity and allow complaints on that basis for malicious and procedural outing;
  - 40.6 Include irrelevant criminal record, religious belief and activity, political belief and activity, industrial activity and status as a victim or survivor of domestic or family violence as protected attributes;

- 40.7 Family and carer responsibilities should be fully protected both from direct and indirect discrimination across all areas of public life. Discrimination in this area should also include a failure to make reasonable adjustments. The definition should be broadened to include domestic relationships and cultural understandings;
  - 40.8 Specific recognition of the characteristics of pregnancy or potential pregnancy, breastfeeding, using an assistive device, being accompanied by an assistant or carer and being accompanied by an assistance animal;
  - 40.9 The definition of 'disability' in section 4 of the *Disability Discrimination Act 1992* should be amended to specifically include obesity.
41. WLS NSW recommends that federal, state and territory governments should prioritise introducing protection against discrimination on the basis of being a victim or survivor of family and domestic violence.

***Discussion questions 6 and 7: Permanent exemptions***

42. WLS NSW supports the AHRC's proposed process for reviewing all permanent exemptions under federal discrimination laws.
43. We refer you to pages 47 - 49 of the Consolidation submission and support the following recommendations:
  - 43.1 A general limitations clause replacing all current exemptions, subject to certain conditions being met, that deems discrimination actions or conduct to be lawful when they are reasonable, necessary and a proportionate means of achieving a legitimate aim; and
  - 43.2 If the conditions cannot be met, that permanent exemptions for religious organisations be removed and religion included as a protected attribute.

***Discussion questions 8 and 9: Compliance***

44. We refer you to pages 53 - 54 and 62 - 63 of the Consolidation submission and support the following recommendations:
  - 44.1 Voluntary action plans should be extended to all protected attributes;
  - 44.2 Extend legally binding standards to all protected attributes under the consolidation bill;

- 44.3 AHRC Discrimination Commissioners should be given the power to investigate and initiate court proceedings in relation to conduct that appears unlawful, without an individual complaint;
- 44.4 The role and powers of AHRC Discrimination Commissioners should be expanded to increase the role of the AHRC and Commissioners in addressing systemic discrimination; and
- 44.5 The AHRC's role should include the ability to conduct formal inquiries into matters relating to state and territory laws or practices.

***Discussion question 10: Positive duties***

45. We refer you to pages 22 - 23 of the Consolidation submission and support the following recommendations:
  - 45.1 A positive duty of equality should be placed on public and private bodies;
  - 45.2 The AHRC should be empowered to facilitate and enforce compliance with a positive obligation without first receiving a complaint.

***Discussion questions 11 and 12: Complaints and litigation***

46. We refer you to pages 22 - 23 and 55 - 62 of Consolidation submission and support the following recommendations:
  - 46.1 A complainant should be able to make an application directly to a court, rather than first going through investigation and conciliation by the AHRC;
  - 46.2 The option for agreements reached in settlement to be made legally binding through registration with the court;
  - 46.3 Complaints to be made to the AHRC and the Federal Court or Federal Circuit Court by groups or organisations on behalf of, or in the interest of, members;
  - 46.4 The Federal Court and the Federal Circuit Court should become no costs jurisdictions in discrimination matters, except for vexatious or frivolous proceedings;
  - 46.5 Remedies available in discrimination matters should include corrective and preventative orders, as well as injunctions;
  - 46.6 A complainant (whether individual or a representative group) should be able to make an application for an injunction when necessary;

- 46.7 A specialist division of the Federal Court and the Federal Circuit Court should be established to hear discrimination law matters. Judicial members should have ongoing training in discrimination issues;
- 46.8 The specialist division should develop rules and procedures that increase the ability of self-represented litigants to conduct their own cases;
- 46.9 There should be increased funding to CLCs and legal aid commissions to provide representation to complainants in discrimination matters.

*Discussion question 13: Harassment and vilification*

47. We refer you to pages 14, 23 - 25 and 55 - 62 of Consolidation submission and support the following recommendations:
  - 47.1 Vilification based on a protected attribute, or the intersection of two or more protected attributes, should be unlawful. The prohibition should be based on Part IIA of the RDA and be subject to the defences set out in that Part;
  - 47.2 Vilification should be made a criminal offence. The offence of vilification should be defined as the incitement of hatred towards, or serious contempt for, or severe ridicule of, a person or group of persons on the basis of any protected attribute or the intersection of two or more such attributes;
  - 47.3 There should be a clear process for the referral of a complaint of vilification from the AHRC to the Australian Federal Police for investigation and prosecution by the Commonwealth Director of Public Prosecutions and a joint investigation framework between the AHRC and the Australian Federal Police;
  - 47.4 It should be unlawful to harass a person with any protected attribute on the basis of that attribute or the intersection of more than one protected attribute in any protected area of life;
  - 47.5 It should be unlawful to sexually harass a person with a protected attribute on the basis of that attribute in any protected area of life;
  - 47.6 Harassment should be defined as a specific, aggravated form of discrimination that includes conduct by a person that a reasonable person, having regard to all the circumstances, would have anticipated would offend, humiliate or intimidate the person harassed; and

- 47.7 Prohibitions against harassment and sexual harassment should not be subject to any exception.
48. We refer you the #MeToo joint submission and support the following recommendations:
- 48.1 The time limit to lodge a complaint of sexual harassment to the AHRC should be extended to 12 months and the onus of establishing why an application should not be accepted out of time should be reversed;
  - 48.2 The AHRC and the NSW Anti-Discrimination Board (**ADB**) should allow a series of events to be considered even if some are out of time, if these events are linked to the last event that is within time.
  - 48.3 Amend the *Sex Discrimination Act (SDA)*, *Fair Work Act (FWA)* and the NSW *Anti-Discrimination Act (NSW ADA)* to make sexual harassment unlawful for all volunteers and unpaid workers;
  - 48.4 Amend the *SDA* and the *NSW ADA* to make it unlawful for one person to sexually harass another person in all circumstances;
  - 48.5 Amend the *FWA* to make it lawful for one person to sexually harass another person in the course of their employment in all circumstances;
  - 48.6 Amend the *AHRC Act* so applicants and respondents in sexual harassment matters must bear their own costs unless an exception applies, that is, the party instituted proceedings vexatiously or without reasonable cause or caused the other party to incur costs by an unreasonable act or omission;
  - 48.7 Amend the *SDA* and *NSW ADA* to shift the onus of proof for sexual harassment claims;
  - 48.8 The *SDA*, *FWA* and *NSW ADA* should make clear that the standard of proof to be applied in claims of discrimination and sexual harassment is the civil standard of the balance of probabilities and that the *Briginshaw* standard should not apply;
  - 48.9 To address systemic sexual harassment, the AHRC and the NSW ADB should be given the power to conduct own-motion investigations of what appears to be unlawful sexual harassment under the law, and the power to commence court proceedings without receiving an individual complaint. Victims should not be compelled to take part in investigations;

- 48.10 Amend the *AHRC Act*, the *SDA* and the *NSW ADA* to clearly provide for group and representative complaints;
- 48.11 Amend the *SDA* and the *NSW ADA* to impose a positive obligation on employers to take reasonable steps to prevent sexual harassment in their workplace. An accompanying civil penalty provision should be introduced for breaches of this duty;
- 48.12 Amend the *FWA* to expressly prohibit sexual harassment. Adverse act should be defined to include sexual harassment as a form of discrimination against a person by reason of the person's sex;
- 48.13 Amend the *FWA* to increase the time limit to lodge a general protections claim involving dismissal to the Fair Work Commission (*FWC*) from 21 days to 12 months;
- 48.14 Amend sub-regulation 1.07(3) of the Fair Work Rules to include sexual harassment as an example of serious misconduct;
- 48.15 Amend the *SDA*, *FWA* and *NSW ADA* to introduce a duty on employers to act where an employee is being sexually harassed by a third party and to hold employers to act where an employee is being sexually harassed by a third party and to hold employers vicariously liable if their fail to take all reasonable steps to protect their employees in the course of their work from sexual harassment by their parties;
- 48.16 Amend the *SDA*, *FWA* and *NSW ADA* to allow courts to order civil penalties for sexual harassment. The quantum of civil penalties should reflect the seriousness of the conduct;
- 48.17 Amend the *SDA* and *NSW ADA* to protect against intersectional discrimination. The definition of discrimination under these acts should specifically include discrimination on the basis of the intersection of two or more attributes;
- 48.18 Conciliators at the AHRC, FWC and NSW ADB should receive extensive training on the relevant sexual harassment legislation and alternative dispute theory and techniques, the nature and dynamics of sexual violence and trauma informed practice;
- 48.19 The AHRC, FWC and NSW ADB should make early referrals to free legal assistance in sexual harassment matters;

48.20 To improve consistency in conciliation, the AHRC, FWC and NSW ADB should have appropriate and publicly-available policies in place to empower parties in conciliations, which should include providing a basic framework for conciliation procedures to the parties and any representatives prior to conciliation, having consistent and transparent practices for legal representation in conciliation conferences, including a presumption that legal assistance lawyers be granted leave to represent complainants in sexual harassment matters and notifying the applicant and respondent about who will be present at the conciliation for both sides;

48.21 Introduce a law to regulate the use of confidentiality agreements in Federal and NSW sexual harassment matters. The law should prohibit confidentiality in settlement agreements in sexual harassment matters, with the exception of allowing a confidentiality provision should the applicant request it, any confidentiality clause that is included at the request of the applicant should be drafted in plain English and have a clear explanation of what information cannot be disclosed, prohibit the use of a confidentiality clause to suppress factual information in sexual harassment claims and allow both parties to request that the settlement amount remain confidential.

If you would like to discuss any aspect of this submission, please contact Kellie McDonald, Senior Solicitor or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,

**Women's Legal Service NSW**

**Philippa Davis  
Principal Solicitor**