REGULATING HARASSMENT
RELATED TO A PROTECTED ATTRIBUTE

1. Introduction

Bullying and harassment continues to be a serious and pervasive issue in many Australian workplaces and other aspects of public life.[1] Further, the development of new technologies and social media platforms has meant that, in addition to traditional forms of harassment involving verbal or physical conduct, or offensive material, there is now also the potential of bullying and harassment being experienced in new, digital and electronic forms.[2]

The concepts of bullying and harassment overlap, and are potentially very broad. Both bullying and harassment are concerned with behaviour which is humiliating or intimidating,[3] and which offends the dignity of the person being bullied or harassed. In addition, case law has developed the concept of a 'hostile work environment' arising from attribute-based harassment.[4] This submission is concerned with harassment, including which results in hostile work environments, which is either related to a 'protected attribute' or constitutes sexual harassment.

There is an intersection of different legislative regimes and common law principles which are relevant to bullying and harassing conduct. Laws which apply regardless of whether or not the harassment relates to a protected attribute include occupational health and safety laws,[5] workers' compensation, the common law of tort (in the context of employers' duty of care to employees),[6] the law of contract, certain public sector

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[1] See for example: Australian Public Service Commission *State of the Service Report 2010-11* (24 November 2011); Australian Human Rights Commission, *2008 Sexual Harassment: Serious Business – Results of the 2008 Sexual Harassment National Telephone Survey* p 1; Australian Bureau of Statistics *4125.0 Gender Indicators, Australia* (July 2011); Australian Human Rights Commission *Annual Report 2010-2011* (30 September 2011) ('***HREOC Report***'), pp 25-30, 103-119; Productivity Commission *Performance Benchmarking of Australian Business Regulation: Occupational Health & Safety* (March 2010), pp 279-301. Safety, Rehabilitation and Compensation Commission *Compendium of OHS and Workers' Compensation Statistics* (December 2009), p 24. For premium payers, work related harassment/bullying represented second most significant sub group of mental stress claims after work pressure. It is acknowledged that the definitions of bullying and harassment may not be consistent across these studies and reports.

[2] See *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) ('***SDA 2011 Amendment***') Explanatory Memorandum, p 10.

[3] Safe Work Australia, *Preventing and Responding to Workplace Bullying Draft Code of Practice* (September 2011) ('***Bullying Code***'). SDA, s28A.

[4] See the discussion in Part 1 below.

[5] *Inspector Maddaford v Coleman (NSW) Pty Ltd & Or* [2004] NSWIRComm 317; *Naidu v Group 4 Securitas Pty Ltd & Anor* [2005] NSWSC 618 ('***Naidu***'), [188]; Café Vamp case.

[6] *Naidu*, [186].

legislation or codes of practice,[7] industrial laws and consumer protection laws.[8] More specifically, where the bullying and harassment relates to a protected attribute or constitutes sexual harassment, and occurs in certain areas of public life, then the conduct may also constitute discrimination under anti-discrimination laws or industrial laws,[9] or vilification.[10]

Notwithstanding the myriad of legal regimes that may cover attribute-based harassment, there are very limited *express* provisions relating to attribute-based harassment at the Federal level.[11] It is therefore timely that the Federal Government's review of the current Federal anti-discrimination laws[12] (as part of the Federal Government's proposal to consolidate existing Commonwealth anti-discrimination legislation into a single, comprehensive law (**Consolidation**)) includes a discussion of the extent to which the Consolidation should regulate harassing conduct related to a protected attribute. The issues that are being considered in the review (as set out in the Discussion Paper[13]) are, first, whether there should be an express prohibition against harassment which covers all protected attributes.[14] Second, if there is to be an express prohibition, then how would this be most clearly expressed?[15]

This is not the first time that these questions have been raised. A number of Federal and State reviews of discrimination laws have considered these issues, both in relation to specific attributes such as sexuality[16] and disability,[17] as well as generally.[18] These reviews have considered various arguments, including, in particular, the sufficiency of

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[7] *Public Service Act 1999* (Cth), s13(3); Australian Public Service Commission, *Respect: Promoting a Culture Free from Harassment and Bullying in the APS* (2009).
[8] *Australian Consumer Law*, s 50.
[9] See the discussion in section 2 below.
[10] The overlap between vilification and harassment is outside the scope of this submission.
[11] See the discussion in Part 1 below.
[12] This term is used in this submission to refer to the *Disability Discrimination Act 1992* (Cth) ('***DDA***'); *Racial Discrimination Act 1975* (Cth) ('***RDA***'); *Sex Discrimination Act 1984* (Cth) ('***SDA***'); *Human Rights and Equal Opportunity Act 1986* (Cth) ('***HREOA***'); *Age Discrimination Act 2005* (Cth) ('***ADA***').
[13] Attorney General's Department *Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (September 2011) ('***Discussion Paper***').
[14] *Discussion Paper*, pp 18-9. Given the Government has committed to a principle that the consolidation exercise will not lead to a reduction in existing protections in Federal anti-discrimination legislation, it is assumed that at least sexual harassment and disability harassment will continue to be expressly prohibited under the proposed single Federal anti-discrimination law: see *Discussion Paper*, p 6
[15] *Discussion Paper*, pp 18-9.
[16] Senate, Legal and Constitutional Affairs Committee *Inquiry into Sexuality Discrimination* (December 1997) ('***Senate Report***'), [2.5], [2.36]-[2.59].
[17] Productivity Commission *Inquiry Report: Review of the Disability Discrimination Act 1992* (Report number 30, 30 April 2004) ('***PC Report***'), pp 50, 319-325.
[18] New South Wales Law Reform Commission *Review of the Anti-Discrimination Act 1977 (NSW)* (Report 92, 1999) ('***NSWLRC Report***'), [7.8]-[7.49]. West Australian Equal Opportunity Commission *Review of the Equal Opportunity Act 1984 Report* (May 2007) ('***WAEOC Report***'), pp 12, 14-5, 27-30.

existing regulation and issues of regulatory burden, evidence-based issues, and constitutional issues.[19] Additional relevant issues include the normative and educative functions of regulation, and the concept of dignity underpinning the notion of equality.

In this submission, I will address the questions posed in the Discussion Paper in relation to regulating harassment. I will begin by providing a brief overview of the current regulatory framework in relation to attribute-based harassment at a Federal level, both in the Federal anti-discrimination laws and case law. This discussion will demonstrate that express provisions relating to attribute-based harassment at the Federal level are very limited and inconsistent. It will also show that, notwithstanding this, case law has recognised harassment (including the creation of a hostile environment) as a form of discrimination.

I will then explore whether the current Federal provisions proscribing harassment related to a protected attribute should be amended, clarified or extended in the Consolidation. In this discussion, I will evaluate the key arguments which have been raised in previous reviews and the concept of dignity, and conclude that given the nature of discrimination legislation as beneficial, it is important that a key concept such as harassment is clearly and expressly articulated, even if it is already captured by the existing concept of discrimination. I will argue that this would ensure individuals and businesses to better understand their rights and obligations and, at the same time, serve a normative and educative function.

Finally, I will consider the nature of the prohibition on harassment which ought to be included in the Consolidation. I will focus on the issue of whether harassment should be defined and, if so, how should it be defined? I will argue that, consistent with the rationale for regulating in this area to clarify the rights and obligations for business and individuals, harassment should be expressly and consistently defined.

In relation to the definition, I will consider whether a single act should be sufficient to constitute harassment, and the nature of the definition. In this discussion, I will draw on the provisions in the United Kingdom ('***UK'***), and the concepts of dignity and 'hostile environment', to argue that Australia should adopt a similar, albeit slightly modified, approach to the UK in its definition.

[19] See the discussion and references below.

2. The current Federal regulatory framework

There are currently very limited express prohibitions on harassment at the Federal level. In the Federal anti-discrimination laws, only the *Sex Discrimination Act 1984* (Cth) ('***SDA***') and *Disability Discrimination Act 1992* (Cth) ('***DDA***') expressly prohibit harassment. However, as noted in the Discussion Paper, these express provisions vary considerably in their nature and scope. These prohibitions are discussed in more detail below.

Notwithstanding this legislative gap, there are a number of other provisions at the Federal level which may be contravened by harassing conduct. For example, whilst neither the *Racial Discrimination Act 1975* (Cth) ('***RDA***'), nor the *Fair Work Act 2009* (Cth) ('***FW Act***'), expressly prohibit attribute-based harassment, such conduct may fall within the scope of the offensive behaviour provisions in the RDA,[20] or the concept of '*adverse action'* in the FW Act.[21] Additionally, courts have long recognised that harassment and the creation of a hostile environment can amount to less favourable treatment on the ground of a protected attribute, and therefore direct discrimination. A number of these cases are discussed below.

2.1. Express prohibitions on harassment

a) Nature of the prohibitions

In the case of the SDA, the express prohibition is limited to 'sexual harassment'. Sexual harassment is distinct from attribute based harassment, as its focus is on conduct of a sexual nature, rather than conduct related to a protected attribute.[22] The SDA defines sexual harassment in section 28A. There are three main elements to the definition:[23] first, the conduct must be an unwelcome sexual advance or unwelcome request for sexual favours, or other unwelcome conduct of a sexual nature;[24] second,

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[20] *RDA*, s 18C. See also *Horman v Distribution Group Ltd* [2001] FMCA 52 ('***Horman***'), [60]. A detailed consideration of the offensive behaviour provisions is outside the scope of this submission. However, similarities between those provisions and the harassment provisions are noted throughout this submission.

[21] A discussion of the nature of 'adverse action' is outside the scope of this submission. However, to date no decision has held that attribute-based harassment offends the adverse action provisions in s 351 of the FW Act. But see *Ramos v Good Samaritan Industries (No.2)* [2011] FMCA 341, [51]-[54]; *ALAEA v Qantas Airways Ltd* [2011] FMCA 58, [29]; *Cavar v Nursing Australia* [2011] FMCA 929, [23], [40]-[43] (harassment alleged as discrimination, but not found on the facts); *Birch v Wesco Electrics (1966) Pty Ltd* [2012] FMCA 5, [81]-[83].

[22] *SDA*, s 28A. See for example *Hill v Water Corporation* [1985] EOC 92-127. Cf *Anti-Discrimination Act 1998* (Tas), s 17. See also Thornton, Margaret, 'Sexual Harassment Losing Sight of Sex Discrimination' (2002) 26 *Melbourne University Law Review* 22.

[23] For a critique of the elements of the definition see Mason, Gail and Chapman, Anna, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' (2003) 31 *Federal Law Review* 195.

[24] *SDA*, s 28A(1)(a) or (b).

the sexual advance or request must be directed to, or the sexual conduct must be in relation to, the person harassed;[25] and third, the conduct must take place 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.[26]

The circumstances to be taken into account are set out in section 28A(1A), although the list is not intended to be exhaustive of all the circumstances which may be relevant to this assessment.[27] The definition is limited to particular conduct with a particular effect, and does not also capture conduct with a particular purpose or intent.[28] The relevant effect is similar to the offensive behaviour provisions in the RDA, except that the RDA also includes the term '*insulted'* and the effect must be '*reasonably likely'* rather than an anticipated '*possibility'*.[29]

The DDA prohibition on harassment is expressly linked to the relevant protected attribute of '*disability'*.[30] The DDA makes it unlawful for certain persons to harass certain other persons with a disability, '*in relation to the disability'*.[31] The prohibition on disability harassment in the DDA therefore also has three elements. First, the conduct must be '*harassment'*. Second, it must be directed to a person who has a disability. Note that case law has interpreted this more narrowly than the sexual harassment provisions, so that conduct about a person to another person has been held not to be sufficient to contravene the disability harassment provisions, although it did amount to disability discrimination.[32] Third, the harassment must be '*in relation to*' the person's disability.[33]

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[25] See *Perry v State of Queensland* [2006] QADT 46 ('***Perry***'), [124]; *Kennedy v ADI Ltd* [2001] FCA 614, [29]-[35]; *Hunt v Rail Corporation of New South Wales* [2007] NSWADT 152 ('***Hunt***'), [115]-[116]; *A v B* [1991] EOC 92-367; Mason and Chapman, above n 23, 216-7. See also the discussion below in relation to hostile work environment claims.
[26] *SDA*, s 28A(1).
[27] *SDA 2011 Amendment*, Explanatory Memorandum p 13.
[28] Cf *Anti-Discrimination Act 1992* (NT), s 22(2); *Anti-Discrimination Act 1991* (Qld), s119(e).
[29] *RDA*, s18C.
[30] In relation to the definition of disability, see *DDA*, s4. Note the definition is broad and captures extensions to the attribute, such as where the disability previously existed but no longer exists, may exist in the future (including because of a genetic predisposition to that disability), is imputed to a person, or behaviour that is a manifestation of the disability.
[31] *DDA*, ss 35, 37, 39.
[32] *McDonald v Hospital Superannuation Board* [1999] HREOCA 13 ('***McDonald***'); *Orlowski v Sunrise Co-operative Housing Inc* [2009] FMCA 31 ('***Orlowski***'), [21].
[33] *DDA*, ss 35, 37, 39. Cf *WA EOA*, ss 49A(3); 49B(2); 49C(2), which define racial harassment.

Further, section 7 of the DDA operates so that the prohibition on harassment applies to a person who has an associate with a disability in the same way as it applies in relation to a person with a disability. Section 8 of the DDA operates in a similar way in relation to having a carer, assistant, assistance animal, or disability aid.

The use of the words '*in relation to*' the person's disability have been found to be broad and require no more than a relationship, whether direct or indirect, between the conduct and the relevant disability.[34] This is in contrast to the words '*on the ground of*' used in the context of direct discrimination under the DDA and SDA, and '*because of*' in the RDA offensive conduct provisions, which have been found to require a causative link.[35] In this regard, the harassment provisions are broader than direct discrimination and racially offensive conduct.

Where multiple reasons are present, conduct may still be related to the disability, particularly where the disability is being used as part of a campaign to effect the cessation of the disabled employee's employment.[36] This is consistent with discrimination provisions, where multiple reasons do not preclude a finding of unlawful discrimination, so long as the prohibited reason is one of the operative reasons.[37]

Unlike the SDA, the DDA does not define harassment. The term '*harass'* has been considered by case law. However, the jurisprudence is limited and to date there has not been a detailed consideration of what type of conduct constitutes harassment, whether the intent or purpose of the harasser is relevant, or whether the effect is relevant, and if so, the nature of the effect. This may because many cases have been decided on the basis that the conduct did not relate to the disability, and have therefore not needed to consider whether the conduct constituted harassment.[38] Additionally, the cases have turned to the ordinary dictionary meaning of the term, but not expanded on this concept, and have not drawn on the existing express provisions in the SDA in relation to sexual harassment, or the offensive behaviour provisions in the RDA.[39]

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[34] *McCormack v Commonwealth of Australia* [2007] FMCA 1245 ('***McCormack***'), 33-4, applying *O'Grady v The Northern Queensland Company Limited* (1990) 169 CLR 356, 376 (McHugh J). Followed in *Sluggett v Commonwealth of Australia* [2011] FMCA 609 ('***Sluggett***'), 31-2.
[35] *DDA*, s 5; *SDA*, s 14; *RDA*, s 18C; *HREOC v Mount Isa Mines Ltd* (1993) 46 FCR 301, 321-2 (Lockhart J); *Purvis v New South Wales* ((2003) 217 CLR 92, 163 (Gummow, Hayne and Heydon JJ); *Toben v Jones* (2003) 129 FCR 515 [149]-[155] (Allsop J).
[36] *McDonald*, as cited in *Sluggett*, [138].
[37] *SDA*, s 8; *DDA*, s 10; *RDA*, s 18; *ADA*, s 16.
[38] E.g. *Zoltaszek v Downer Edi Engineering Pty Ltd (No 3*) [2011] FMCA 141; *Clack v Collins (No 1)* [2010] FCA 513; *Orlowski*; *Vassallo v Jetswan Pty Ltd* [2010] FMCA 708.
[39] *McCormack*, 32-4; *Penhall-Jones v State of New South Wales* [2008] FMCA 832 ('***Penhall***'), 25-8.

Interestingly, actions which demonstrate a tactless and unprofessional manner, including exhibiting frustration,[40] or a requirement to perform ad hoc tasks, all of which were part of the applicant's normal duties, have been found not to constitute harassment.[41]

The key principle that has emerged is that, for conduct to constitute harassment, it must be repetitious or occur on more than one occasion.[42] In contrast, it is clear that a single act of the type proscribed can constitute a breach of the sexual harassment provisions in the SDA.[43] However, whether a single act would constitute 'sexual harassment' in relation to the remaining elements of the definition will depend on the nature and quality of the conduct.[44] In *Hall v Sheiban*, both Wilcox J and French J considered that the legislative provisions relating to sexual harassment altered the ordinary dictionary definition, which suggested that repetition was required.[45]

A similar approach was adopted by Raphael FM in *Penhall-Jones v State of New South Wales*, when His Honour distinguished the concept of sexual harassment from disability harassment, noting that the legislature had specifically altered the ordinary meaning of the term and contemplated that a single act or incident could amount to sexual harassment, but that this did not apply to disability harassment.[46] The requirement of continuous or repeated conduct has meant that a single act of harassing behaviour in relation to a person's disability has been found not to have the necessary character to constitute unlawful disability harassment.[47]

In contrast, the Disability Standards relating to education clearly contemplate a single act being sufficient to amount to harassment, in the use of the words:

> *an action* taken in relation to the person's disability that is reasonably likely, in all the circumstances, to humiliate, offend, intimidate or distress the person.[48]

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[40] *Sluggett*.
[41] *Gluyas v Commonwealth of Australia* [2004] FMCA 224.
[42] *McCormack*, 32-4; *Penhall-Jones v State of New South Wales* [2008] FMCA 832 ('***Penhall***'), 25-8. Cf. *Bullying Code*, p 7.
[43] *Johansen v Blackledge* (2001) 163 FLR 58, 75; *Leslie v Graham* (2002) EOC 93-196; *Hall v A&A Sheiban Pty Ltd* (1989) 20 FCR 217 ('***Hall***'), 231 (Lockhart J); 247 (Wilcox J); *O'Callaghan v Loder* [1984] 3 NSLWR 89 ('***O'Callaghan***'), 103. See also Mason, Gail and Chapman, Anna, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' (2003) 31 *Federal Law Review* 195, 207-8.
[44] *Cooke v Plauen Holdings* [2001] FMCA 91 ('***Cooke***'), [25]; *Noble v Baldwin* [2011] FMCA 283 ('***Noble***'), 63-4.
[45] *Hall*, 247 (Wilcox J); 279 (French J).See also, 231 (Lockhart J).
[46] *Penhall*, 27-8.
[47] See for example *Maxworthy v Shaw* [2010] FMCA 1014, 28.
[48] Emphasis added. *Disability Standards for Education 2005* (Cth), s 8.1. Note these are currently under review by the Department of Education, Employment and Workplace Relations.

The Disability Standards are enforceable under section 32 of the DDA. There are currently no Disability Standards in force in relation to the work context. However, section 10.2 of draft Disability Standards for employment provides that:

> [Harassment] means *acting* with an intent to humiliate, offend, intimidate or distress an employee because they have a disability ... It also includes *acting* in a way that might reasonably be expected to be humiliating, intimidating or distressing to an employee because they have a disability.

The use of the word '*acting*' is ambiguous in relation to whether the verb applies in the context of a single or multiple occasions. The definition of harassment is examined in more detail below.

b) Scope of the prohibitions

Under the SDA, the sexual harassment provisions cover the same areas of activities as the discrimination provisions, including work.[49] Under the DDA, whilst the discrimination provisions and disability harassment provisions also apply in the work context, the disability harassment provisions are much narrower in scope and do not cover other areas of activities in which the disability discrimination provisions apply.[50] I note that the offensive behaviour provisions in the RDA, while potentially broader in that they apply to conduct otherwise than in private, rather than to specified areas of activity, nevertheless may not apply in the work context if the conversation is not characterised as public.[51]

The express relationships which are regulated within the areas of work and education are broader in the prohibition on sexual harassment as compared to the discrimination provisions under the SDA.[52] In relation to workplaces, the prohibition on sexual harassment extends to sexual harassment by fellow employees, commission agents or contract workers; sexual harassment by employees, commission agents or contract workers against prospective employees, commission agents or contract workers; and sexual harassment as between different classes of workplace participants not covered by paragraphs 28B(1) to (5) of the SDA, which occurs at the workplace of at least one

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[49] *SDA*, ss 4; 14-27; 28A-28L.
[50] *DDA*, ss 15-29 (discrimination applies to Work; Education; Access to premises; Provision of goods, services and facilities; Accommodation; Land; Clubs and incorporated associations; Sport; Administration of Commonwealth laws and programs); ss 35, 37, 39 (harassment only applies to Work, Education and the Provision of goods, services and facilities). A similar position exists in Western Australia in relation to racial harassment: *Equal Opportunity Act 1984* (WA) ('***WA EOA***'), ss 49A-49C.
[51] E.g. *Noble*, 45-8.
[52] Note the vicarious liability provisions may lead to a similar result in relation to conduct of employees. Cf *Gilroy v Angelov* (2000) 181 ALR 57.

of the workplace participants.[53] In contrast, the DDA provisions are again much narrower in scope. Unlike the SDA and disability discrimination provisions, the disability harassment provisions do not cover partnerships, qualifying bodies, registered organisations or employment agencies.[54]

Further, whilst the relationships in relation to employment, commission agents and contract workers are consistent with the discrimination provisions, they are much narrower than the sexual harassment provisions, in that they do not apply as between different classes of workers, for example an employee and contract worker working at the same workplace.[55] The disability harassment provisions are also narrower than the sexual harassment provisions in the context of education, in that the disability harassment provisions do not apply to adult students, or in relation to staff harassing students, or adult students harassing students or staff, of other institutions in certain circumstances.[56]

c) Relationship with discrimination

Each of the prohibitions on sexual harassment and disability harassment are separate, stand-alone prohibitions, and do not form part of the definition of discrimination.[57] Further, the provisions do not contain the same elements as discrimination, in that there is no reference to '*less favourable treatment'* or causation. Notwithstanding this, the concept of harassment is intricately linked to discrimination, in that the structure and headings of the SDA and DDA indicate that the concept is considered to be a subset of discrimination.

For example, the express prohibitions on sexual harassment and disability harassment sit within the Part entitled '*Prohibition of discrimination'* and '*Prohibition of disability discrimination'* respectively, as do the sex discrimination and disability discrimination provisions.[58] In addition, both the long title of the SDA and its objects in section 3 expressly refers to sexual harassment as a form of discrimination in the use of the words to '*discrimination … involving sexual harassment'*. Similarly, the heading of the Division which prohibits disability harassment refers to '*Discrimination involving harassment'*.[59]

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[53] *SDA*, 28B.
[54] *DDA*, ss 35, 37, 39. Compare *DDA*, ss 18-21.
[55] *DDA*, s 35. Cf *SDA*, s 28B.
[56] *SDA*, s 28F. Note
[57] Cf the *Anti-Discrimination Act 1992* (NT), s 20(1), which defines 'discrimination' to include '*harassment on the basis of an attribute*'; *SLCAC Report*, Recommendation 1, [2.41].
[58] *SDA*, Pt II; *DDA*, Pt 2.
[59] *SDA*; *DDA*, Pt 2, Div 3.

This recognition within the legislative framework of sexual harassment and disability harassment as a form of discrimination is consistent with the position in case law, which is considered below.

2.2. Case law position in relation to attribute-based harassment

a) Harassment as a 'species'[60] of discrimination

The interrelationship between harassment and discrimination has been examined in a number of cases. The majority of the jurisprudence on this issue arises in the context of sexual harassment and sex discrimination. A number of decisions have drawn on the structure and objects of the anti-discrimination statutes to confirm that sexual harassment is a form of discrimination on the grounds of sex.[61] These cases have considered that sexual harassment can constitute less favourable treatment on the ground of sex and constitute a detriment, or discrimination in the terms and conditions of employment.[62]

In some cases, the court has been prepared to accept that sexual harassment, by its nature, is conduct which is less favourable and causally linked to the ground of sex, and a '*detriment'* for the purposes of the discrimination provisions in the SDA. In particular, in *Hall v Sheiban*, French J noted that sexual harassment was a '*species'* of discrimination, which did not embody any distinct requirement that there be a discriminatory element in the employer's behaviour, as this was implicit in the very nature of sexual harassment.[63] His Honour went on to state that the requirements in the discrimination provisions relating to discriminatory treatment in the terms and conditions of employment or subjection to detriment are subsumed in the nature of the prohibited conduct.[64] His Honour's approach has been followed in a number of cases.[65]

However, in a separate judgment, Wilcox J observed that the causation and comparator elements in the sex discrimination provisions were not present in the sexual harassment provisions in the SDA.[66] His Honour considered that conduct which constituted sexual harassment may not also amount to sex discrimination, if there was

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[60] *Hall*, 274-7 (French J).
[61] *Aldridge v Booth* (1988) 80 ALR 1 ('***Aldridge***'), 16-7 (Spender J); *Hall*, 274-7 (French J); *Elliott v Nanda* (2001) 111 FCR 240 ('***Elliott***'), 281-2 (Moore J).
[62] *O'Callaghan,* 94-6; 103-5; *Aldridge*, 16-7; *Hall*, 274-7 (French J). See also *Elliott*, 281-2; *Horman v Distribution Group Ltd* [2001] FMCA 52 ('***Horman***'), [57]; *Dee v Commissioner of Police, NSW Police & Anor (No 2)* [2004] NSWADT 168 ('***Dee***'), [52], [60]; *Font v Paspaley Pearls* [2002] FMCA 142 [136]-[140]. Cf *Kraus v Menzie* [2012] FCA 3, 43 (no detriment found).
[63] *Hall*, 274-7.
[64] *Hall*, 274-7. See also *O'Callaghan,* 94-6; *Aldridge*, 16-7.
[65] *Elliott*, 281-2; *Horman*, [57]; *Wattle v Kirkland* (No.2) [2002] FMCA 135, [67].
[66] *Hall*, 246. A similar approach was taken in *Dee*, [54].

no relevant comparator, or the person was treated no differently to other persons, for example if the harasser acted unreasonably and offensively to all people, regardless of their sex.[67]

Other attribute-based harassment has also been found to constitute discrimination. For example, gender or sex-based harassment can constitute sex discrimination on the basis of less favourable treatment.[68] Similarly, harassment linked to perceived sexuality may also amount to discrimination.[69] However, harassment not casually linked to a protected attribute will not amount to discrimination.[70]

In the context of the RDA, the test of discrimination is different to the SDA, DDA and ADA, in that it does not require less favourable treatment.[71] Rather, the test is whether there has been an act,

> involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[72]

In *Qantas Airways Limited v Gama* ('***Gama***'), the Full Federal Court affirmed the trial judge's finding that three derogatory remarks made to Mr Gama consisted of a distinction based on race and impaired Mr Gama's enjoyment or exercise of his right to work and to just and favourable conditions of work which would include the right to work free of discriminatory comments from his workmates.[73]

b) Hostile work environments, harassment and discrimination

A number of cases have drawn on jurisprudence from the Unites States and Canada to recognise the concept of a '*hostile work environment'*.[74] These and subsequent cases[75] have concluded that persistent harassment, or even a single act,[76] which results in a '*hostile working environment'* may also amount to a discriminatory term or condition of employment, or a detriment for the purposes of direct discrimination. Whilst the concept of a '*hostile work environment'* has been applied primarily in the

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[67] *Hall*, 246, 250.
[68] *Hill v Water Resources Commission* (1985) EOC 92-127 ('***Hill***'); *Cooke*, [31]-[33].
[69] *Daniels v Hunter Water Board* [1994] EOC 92-626.
[70] *Gould v The Director-General NSW* [2011] NSWADT 35, [39]-[40]; *Surti v Queensland* [1993] HREOCA 3 (the dominant reason was not race).
[71] *RDA*, s 9.
[72] *Ibid.*
[73] (2008) 167 FCR 537, 563-4 (French and Jacobsen JJ); 573 (Branson J agreeing).
[74] *O'Callaghan*, 103-5. *Hall*, 274-7 (French J).
[75] *Ibid*; *Borg v Department of Corrective Services* [2001] NSWADT 42, [118]-[119]. *Hill*; *Fenwick v Beveridge Building Products Pty Ltd* (1985) 62 ALR 275, 281; *Sharma v QSR Pty Ltd* (2010) EOC 93-566; *Freestone v Kozma* (1989) EOC 92-249
[76] Cf *Linnell v Seachem Australia Pty Ltd* [2011] NSWADT 61, [33].

context of sexual or sex-based harassment and sex discrimination, it has also been referred to in respect of other attribute-based harassment, including racial harassment[77] and disability harassment.[78]

The notion that the quiet enjoyment of one's employment is a condition of employment has formed the basis of the concept of a discriminatory hostile work environment. In *R v Equal Opportunity Board; Ex parte Burns*, Nathan J held that:

> [a] benefit of employment is the entitlement to quiet enjoyment, that is the freedom from physical intrusion, the freedom from being harassed, the freedom from being physically molested or approached in an unwelcome manner.[79]

His Honour considered that such conduct constituted a detriment to those employees who suffered such conduct as against those who did not.[80] In *Horne v Press Clough Joint Venture*, the WA Equal Opportunity Tribunal stated that the concept also '*extends to not having to work in an unsought sexually permeated work environment'*.[81] A number of other cases have also recognised this concept as underpinning the detrimental nature of discriminatory conduct.[82]

However, in this context too, the element of less favourable treatment must be established to enable a finding of unlawful discrimination. In some cases, the nature of the sexually hostile environment as being particularly hostile to women has been held to constitute less favourable treatment.[83] In other cases, the conduct has been characterised as 'indirect discrimination', on the basis of disparate effect on women.[84] Further, in *Hunt v Rail Corporation of New South Wales,* the NSW Anti-Discrimination Tribunal wholly rejected the sex discrimination claim on the basis of a hostile work environment, as it considered the oppressive and dysfunctional nature of the workplace was a result of the general poor management, organisational and staffing issues and the complainant was not targeted by reason of her sex.[85]

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[77] *Barake v Red & White Star Cabs Co-operative Limited* [2011] NSWADT 222, 43. *Metwally v University of Wollongong* [1984] EOC ¶92-030, 75 560–2. *Vella v DEVETIR (Qld)* [1994] HREOCA 22.
[78] *Sluggett* (alleged but not found); see also *Zhang v Blinds Pty Ltd trading as Blinds by Peter Meyer* [2008] NSWADTAP 24, [33]-[34].
[79] (1985) VR 317.
[80] (1985) VR 317.
[81] (1994) EOC 92-591.
[82] *O'Callaghan, Hall, Candan v Holden Ltd & Ors* [2000] VCAT 2300 ('***Candan***'), [39]. *Bennet v Everitt* (1988) EOC 92-244; *Horne v Press Clough Joint Venture* (1994) EOC 92-556 ('***Horne***'), *F v L* [1999] HREOCA 18, 10-1.
[83] *Carter v Linuki Pty Ltd (EOD)* [2005] NSWADTAP 40 ('***Carter Appeal***'), [24]. *Hopper v Mount Isa Mines Ltd and others* [1998] QSC 287 ('***Hopper***').
[84] *Perry v State of Queensland* [2006] QADT 46 ('***Perry***'), [134]. *Candan*, [110].
[85] *Hunt*; [104].

Finally, it should be noted that there is a divergence of opinion on whether a hostile environment which is 'independent' of the complainant (for example, posters, magazines, graffiti or a topless waitress) can amount to sexual harassment.[86] What is clear, is that conduct which is addressed to, or about, or done with the complainant in mind, will have the necessary nexus;[87] whereas conduct which is independent of or merely affects the complainant (but does not amount to a hostile environment being a feature of employment) is unlikely to satisfy the requirement that it is '*to'* or '*in relation to'* the complainant.[88]

2.3. Conclusion

The above discussion illustrates that there are limited and inconsistent express Federal legislative provisions in relation to attribute-based harassment. These provisions have, in part, been supplemented by case law recognising attribute-based harassment and the existence of a hostile work environment as a form of unlawful discrimination. This raises the question of whether the existing regime is sufficient, or whether the Consolidation should expressly regulate attribute-based harassment?

3. Should the Consolidation expressly regulate attribute-based harassment?

3.1. Arguments against an express prohibition

a) Sufficiency of existing discrimination provisions and other regimes

As noted above in the introduction, a number of reviews of anti-discrimination legislation have previously considered whether to expressly regulate attribute-based harassment. The key argument raised in these reviews against including an express prohibition on harassment related to a protected attribute in all areas of activity covered by discrimination law was that the existing discrimination legal regime was sufficient to enable persons suffering harassment to bring claims.[89] Certainly the case law discussed above makes it clear that the discrimination provisions can be utilised by complainants to bring claims in respect of attribute-based harassment, both in the context of individual or multiple acts, or in cases where the harassment results in a hostile work environment.

This was the view taken by the NSW Law Reform Commission ('***NSWLRC***') in its review of NSW anti-discrimination legislation. It noted the significant overlap in the

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[86] Compare *Carter v Linuki Pty Ltd* [2004] NSWADT 287 ('***Carter***'), [24]-[40]; *Carter Appeal*, [24]. *G v R* [1993] HREOCA 20; *Noble*, 66-8. *Hopper*; *Perry*, [134]; *Candan*, [110].
[87] *Hill*, *Djokic v Sinclair* (1994) EOC 92-643; *Noble*, 66-8. *Hunt,* [115]-[119].
[88] *Noble*, 66-8. *Carter*, [24]-[40]; upheld in *Carter Appeal*, [8]-[18].
[89] *WAEOC Report*, p 11, 27; *NSWLRC Report*, [7.22]; pp 319-20.

concepts of discrimination and harassment,[90] and whilst it accepted that sexual harassment required a separate prohibition, it concluded that the existing discrimination provisions were sufficient in respect of attribute-based harassment.[91] The basis for this distinction by the NSWLRC was that it considered there were difficulties in establishing less favourable treatment in the context of sexual harassment directed at persons of either sex (what it called the 'bisexual defence');[92] whereas it considered these difficulties would not arise in the context of attribute-based harassment, because of the requirement to establish that the protected attribute was the basis for the harassment.[93] However, as the NSWLRC recognised itself, this is more a problem with the definition of discrimination.[94] Indeed, there may well be situations in which an individual or environment is generally hostile, for example, to persons of both sexes or all races on the basis of sex or race, where causation is established, but less favourable treatment is not.

A related argument is that other legal regimes, which cover bullying and harassment more generally, as outlined above in the introduction, also provide sufficient protection to persons experiencing such conduct. This issue was considered by the WA Equal Opportunity Commission ('***WAEOC***') in its consideration of whether to add an additional ground of '*bullying'* into WA anti-discrimination legislation.[95] However, whilst some submissions had been made against inclusion of bullying on the basis that existing OSH regulation was sufficient, the WAEOC concluded that there was broad support for its introduction, that some submissions had noted the lack of adequate remedies in the industrial sphere, and that including bullying would allow complainants to make use of the conciliation system in the anti-discrimination legislation.[96]

However, the WAEOC did not discuss the interaction between harassment and its new bullying ground. Rather, in respect of the question of whether to extend the sexual and racial harassment provisions to cover other protected attributes, it concluded that existing regulation and self-regulation by 'responsible employers' was sufficient.[97]

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[90] *NSWLRC Report*, [7.3]; [7.10]; [7.12].
[91] *NSWLRC Report*, [7.22].
[92] *NSWLRC Report*, [7.14]. This is the point made by Wilcox J in *Hall v Sheiban* discussed above, see above n 67.
[93] *NSWLRC Report*, [7.22].
[94] *NSWLRC Report*, [7.14]. A consideration of the limits of the comparator element in discrimination legislation is outside the scope of this submission, but is being considered as part of the Discussion Paper.
[95] *WAEOC Report*, p 14-5. Note, whilst the WAEOC suggested '*bullying'* should be an additional ground, I assume what is meant is that it be an additional *prohibition*.
[96] *WAEOC Report*, p 14-5
[97] *WAEOC Report*, p 27.

The Productivity Commission ('***PC***') also referred to the overlap between the concepts of discrimination and harassment, the fact that other States and Territories legislation include harassment and vilification provisions, and self-regulation measures in its conclusion that the disability harassment provisions should not be extended to other areas of activity beyond those currently proscribed.[98]

In the context of the recent review of occupational health and safety ('***OSH***') laws, the Workplace Relations Minister's Council also considered this issue in determining whether to recommend that discrimination provisions be inserted into the model OSH Act.[99] The Council's reasons for recommending the inclusion of discrimination-related provisions in the model OSH Act in relation to health and safety representatives, included that this would directly support involvement in OSH activities and roles, by making it clear in the model OSH Act (rather than elsewhere) that this type of conduct is proscribed; and the model Act could provide clarity and detail not present in other legislation.[100] This issue of clarification and accessibility of rights is discussed below in the context of arguments supporting the inclusion of express harassment provisions.

b) Evidence-based approach

A related argument is that there is no evidence that harassment is a problem to warrant express regulation. Without undertaking empirical research, it is difficult to determine whether there is a problem in relation to attribute-based harassment, which is not being dealt with effectively by existing regulation. However, this is one of the two priority areas of the Australian Human Rights Commission ('***HREOC***').[101] Further, evidence of harassment submitted to the Senate Legal and Constitutional Affairs Committee ('***SLCAC***') *was* one of the reasons specified by it in support of including sexuality harassment provisions in the inquiry into sexuality discrimination.[102]

In its review of the DDA in 2004, the PC noted that HREOC had submitted that at that time, HREOC received comparatively few harassment complaints and there had been no judicial decisions considering the provisions.[103] However, the PC also noted that many participants gave personal examples of significant harassment and supported

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[98] *PC Report*, pp 319, 324-5.
[99] Workplace Relations Minister's Council, *National Review into Model Occupational Health and Safety Laws: Second Report* (January 2009) ('***OSH Review***'), [29.7]-[29.37]. See also Maxwell, Chris, *Occupational Health and Safety Act Review* (March 2004), 213-4.
[100] *OSH Review*, p 193.
[101] *HREOC Report*, p 30. See also above n 1.
[102] *SLCAC Report*, [2.4], [2.10]-[2.12], [2.36]-[2.41].
[103] *PC*, p 320.

extending the provisions.[104] It is unclear as to why the disability harassment provisions have only been utilised to a very limited extent by complainants to date.[105] Whilst it may indicate there is little harassment in public life in Australia, this may not necessarily be true. Other answers may include a lack of awareness of rights, uncertainty in relation to what constitutes harassment (given the limited jurisprudence in the area), or the necessity for proof of more than one occasion of harassing conduct. It has also been suggested in the sexual harassment context, that complainants may find it difficult to voice their concerns in relation to the conduct they are experiencing.[106] This has been used as a basis to argue positive and preventative measures are more appropriate to address these issues than a complaints-based model.[107]

What lies at the heart of this and the argument that existing regulation is sufficient is that regulation of the same conduct in multiple regimes may give rise to inconsistent remedies or treatment in relation to the same circumstances, and increases the regulatory burden for employers and businesses in that they need to be aware of multiple regimes. Additionally, these arguments are underpinned by neo-liberal views regarding regulation, which emphasise the free market and require justification for imposing regulation on market participants, in terms of legitimate regulatory objectives, which can be achieved effectively and efficiently.[108] Such arguments were put to the EOCWA in the following way: before extending the scope of existing regulation there should be a demonstrated need for regulation and a conclusion that there is a lack of appropriate existing legislation.[109]

c) Constitutional limitations

Finally, the principle reason for the PC not recommending an extension to the disability harassment provisions in the DDA was the perceived constitutional limitation on the Federal Government's ability to legislate in this area.[110] The PC considered the issues of harassment and vilification provisions together, and with respect, incorrectly conflated the two issues in the context of its discussion on the constitutional validity of any extensions to the harassment provisions.[111] The advice referred to by the PC as justification for not recommending an extension to the harassment provisions was

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[104] *PC*, p 320-1.
[105] *HREOC Report*, p 75. Of 2,176 complaints received under the *DDA*, 8 were based on harassment.
[106] Thornton, above n 22.
[107] *Ibid.* This issue is outside the scope of this submission.
[108] Collins, H, 'Justifications and Techniques of Legal Regulation of the Employment Relation', in Collins, H, Davies, P and Rideout, R (eds.) *Legal Regulation of the Employment Relation* (Kluwer Law, 2000), p 3-27.
[109] See Chamber of Commerce and Industry Submission as cited in *WAEOC Report*, p 11.
[110] *PC Report*, p 323-5.
[111] *Ibid.*

clearly focussed on the issue of vilification, not harassment, although a comparison of the concepts of harassment and vilification was undertaken.[112]

Indeed, there are already Federal disability harassment provisions in three areas of activity, as discussed above.[113] Further, the cases discussed above have established that harassment is a form of discrimination, and that to the extent the harassment provisions are limited application provisions relying on the external affairs power, they are valid as enshrining relevant international human rights instruments dealing with discrimination. Additionally, it is now well established that the Commonwealth has a wide range of powers on which it can rely to legislate in relation to a broad cross-section of the Australian population and business.[114]

3.2. Arguments supporting the inclusion of an express prohibition

The countervailing, and I would suggest more persuasive, arguments in favour of including an express prohibition on harassment are set out below.

a) Nature of the harm

First, the nature of the harm that is being addressed by express harassment provisions is distinct from the wider concept of discrimination, in that, as the NSWLRC has observed, the humiliation and intimidation that is intrinsic in the concept of harassment may not always be prevalent in discrimination.[115] Mason has argued that this applies equally in the context of sexuality harassment,[116] and I would agree, and argue that it extends to all attribute-based harassment.

In her analysis of various cases relating to sexuality harassment, Mason has also argued that sexuality and sex-harassment is distinct from sexual harassment, in that the crucial elements of sexuality harassment, which help shape the law's understanding of the '*harm*' suffered by persons experiencing such conduct, include the hostile, anti-homophobic sentiment of the harassment; and the exposure or visibility of the person's sexuality, and associated vulnerability to potential persecution.[117] Express attribute-related harassment provisions would allow a focus on *harassing conduct*, which is related to an *attribute,* which would exist in, which would, in turn, allow the enquiry into whether unlawful conduct has occurred to address the specific

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[112] Australian Government Solicitor, *Advice regarding Productivity Commission's inquiry into the Disability Discrimination Act 1992: 'vilification'* (1 March 2004).
[113] *DDA*, s 35 (work); 37 (education); 39 (provision of goods, services and facilities).
[114] See for example the application provisions in the FW Act.
[115] *NWSLRC Report*, [7.16].
[116] Mason, Gail, 'Harm, Harassment and Sexuality', (2002) 26 *Melbourne University Law Review* 21.
[117] Mason, above n 116.

nature of the harm caused by this type of conduct. Indeed, the SLCAC's clear view in its inquiry was that:

> the existing legislation was not sufficiently specific to address many of the major problems experienced by non-heterosexuals and transgender persons.

This analysis also allows a move away from the notion that other regimes already provide sufficient regulation and scope for redress. The focus is then on a human-rights based approach, with an emphasis on the dignatory harm suffered by the individual, rather than a work-related injury, or risk to a person's health and safety.[118] Indeed, the notion of dignity as underpinning equality has been notably absent from the debate in the previous reviews. Attribute-based harassment is fundamentally a challenge to the dignity of the person who is experiencing such conduct. Dignity and respect are at the core of ensuring equality of persons within modern Australian society. Therefore, recognising and promoting dignity and respect, as underlying the concept of equality, provides a further argument for expressly regulating attribute-based harassment.

b) Clarification, consistency and accessibility

A related argument for including express provisions is that, even if the existing regime provides an adequate remedy in respect of attribute-harassment, this is far from clear on the face of the legislation. Rather, individuals seeking to enforce their rights need to turn to case law. Further, other legislation does not clearly or expressly proscribe harassment. As discussed above, the FW Act's provisions relate to 'adverse action' and the Draft Code of Practice relating to bullying distinguishes between bullying and attribute-related harassment, although it acknowledges some conduct may fall within both concepts.[119]

Including express harassment provisions in the Consolidation in the same Part as the discrimination provisions (as is the case with the sexual and disability harassment provisions, as discussed above), would do no more than enshrine existing case law principles in a clear way, clarifying expressly for both individuals and business the nature and kind of conduct which constitutes unlawful harassment as a form of discrimination. Additionally, ensuring that all express harassment provisions, and that the discrimination and harassment provisions, are consistent, would reduce complexity and inconsistency in regulation. This would make it easier for individuals and business to understand rights and obligations under the legislation. As Branson J pointed out in *Gama,*

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[118] Thornton, Margaret, 'Corrosive Leadership (Or Bullying by Another Name): A Corollary of the Corporatised Academy?' (2004) 17 *Australian Journal of Labour Law* 1, p21-3.
[119] *Bullying Code*, p 7.

> the practical implications of human rights principles are not always well understood by members of the Australian community.[120]

Finally, the inclusion of an express, separate prohibition would play a normative and educative function in providing an express statement that this type of conduct is unacceptable in modern Australian workplaces and public life. Thornton notes that the bullying discourse has become clearly audible over the last decade, and that sexual harassment is now taken more seriously since being first proscribed over 20 years ago, because of a concern about damages and potentially adverse publicity.[121] The notion of naming a harm, which can be recognised and understood, and thus exposed and addressed, plays an important normative and educative function. Whilst it is true that many workplace policies already refer to harassment together with other 'inappropriate workplace behaviour', the lack of specificity in legislation undermines the importance of eradicating this conduct from Australian public life.

3.3. Conclusion

Whilst there are arguments in respect of both positions, in my view, there are clear and strong reasons for ensuring the Consolidation expressly proscribes attribute-based harassment, in relation to all attributes and in all areas of activity covered by the discrimination provisions, in a consistent manner. In particular, given the beneficial nature of the anti-discrimination legislation, which is based on human rights principles underpinned by the notion of dignity, it is important to ensure there is a clear and express prohibition on attribute-based harassment, which addresses the specific nature of the harm suffered by persons experiencing such conduct. This will also clarify the existing position, and ensure individuals and businesses understand their rights and obligations in respect of such conduct, by making the law more accessible. In turn, this will lead to the law playing a normative and educative function. This leads us to the question of what should this proscription look like? I turn to this issue next.

4. How should the prohibition on harassment be expressed?

4.1. Should harassment be defined?

The key question which arises in a consideration of the nature of the express prohibition on harassment is should the very concept of harassment be defined and, if so, what should constitute 'harassment' for the purposes of the Consolidation? In this regard, the reasons outlined above in relation to expressly proscribing attribute-based harassment apply with equal force. In particular, given that rights and liability will

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[120] *Gama*, 575.
[121] Thornton, above n 118, pp 21-2.

potentially attach to certain conduct, if it is found to be harassment, employers and employees should have certainty and a clear understanding of what conduct would be covered by the prohibition. This is also likely to make the Consolidation more effective in terms of the normative and educative aims discussed above, because there will be a clear statement of the nature of the conduct which Parliament considers is unacceptable.

A further argument in support of including a definition of harassment is that, as discussed above, there is currently an inconsistent approach between sexual harassment and disability harassment, as the SDA defines the former, but the DDA does not define the latter. In particular, as outlined above, under the current formulation in case law, a single act cannot constitute disability harassment; whereas both sexual harassment and the Disability Standards for education contemplate a single act of harassment, depending on the nature of the act. The Consolidation is an opportunity to harmonise the concepts of sexual harassment and harassment in relation to all attributes.

At the same time, what constitutes harassment may take many forms and may change over time. In *O'Callaghan*, Matthews DCJ warned that:

> It would be wrong for this tribunal to attempt an exhaustive list, as human inventiveness would almost certainly find other activities or approaches, equally unwelcome and unpleasant, which might then be denied the label of harassment.

If a definition of harassment is to be included in the Consolidation, then it must be broad enough to capture new and emerging forms of harassment. For example, the concept of harassment by social media posts could not have been contemplated at the time the sexual harassment provisions were originally introduced into the SDA. In view of this, the 2011 amendments to the SDA included a specific recognition of the potential role that new technologies may play in harassing conduct.[122]

The UK has recently consolidated its anti-discrimination legislation, which includes an express regulation and definition of harassment. It is therefore useful to consider how the UK has dealt with this issue and whether the Consolidation should adopt a similar approach.

[122] Refer above n 2.

4.2. UK prohibition on harassment

The UK provisions relating to attribute-based harassment were introduced for the first time into anti-discrimination legislation in the *Equality Act 2010* (‘***EA***’).[123] The provisions draw on the definition in the European Union Council Directive 2002/73/EC.

The definition of harassment is threefold. First, there is a general prohibition consisting of unwanted conduct, which is related to a relevant protected characteristic,[124] which has the purpose or effect of wither (a) violating the person’s dignity; or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.[125] In determining the requisite effect, the following matters must be taken into account: the perception of the person harassed, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.[126]

The second part of the definition is the same as the general prohibition, but relates to ‘*unwanted conduct of a sexual nature,*’ and effectively constitutes the sexual harassment definition.[127] The third part of the definition, is sexual, sex-based or gender reassignment-based harassment, which has the same purpose or effect as the general prohibition, but with the additional element that there is less favourable treatment because the person rejects or submits to the conduct (effectively a victimisation-type harassment).[128]

A key element of the UK definition is that employees can complain of harassment not actually directed at them, but rather, where a hostile work environment has been created for them. This addresses the difficulties discussed above in relation to Australian case law on hostile environment claims.[129] Additionally, a single act of harassment is sufficient to constitute harassment.

A controversial element of the harassment provisions is the liability for third party harassment in the employment context, where an employer is aware of at least two previous occasions of harassment and fails to adequately deal with the issue.[130]

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[123] Note the *Protection from Harassment Act 1997* contains both civil and criminal provisions in relation to broader types of harassment and related conduct.
[124] The harassment provisions apply to age, disability, gender reassignment, race, religion or belief, sex and sexual orientation, but not to pregnancy and maternity, or marriage and civil partnership. However, harassment based on these attributes may fall within sex or sexual orientation harassment. See *EA*, s 26(5).
[125] *EA*, s 26(1).
[126] *EA*, s 26(4).
[127] *EA*, s 26(2).
[128] *EA*, s 26(3).
[129] See the discussion in section 2.2 b) above.
[130] *EA*, s 145. *Sheffield City Council v Norouzi* (EAT); *Conteh v Parking Partners* (EAT).

However, the Government is consulting in relation to removing the third party harassment provisions.[131]

The first two parts of these definitions are very different to the current definition of sexual harassment, or that contemplated by the disability harassment case law. Neither the express prohibitions on harassment, nor other provisions in the Federal anti-discrimination legislation, refer to the concepts of dignity or a hostile work environment. Notwithstanding this, both concepts have been referred to in case law relating to harassment, and discrimination involving harassment. Whilst these concepts are not new to Australian case law, it is important to analyse them to determine whether a similar approach should be adopted in the Consolidation.

4.3. Dignity and harassment in the Australian context

The concept of dignity and self worth were noted in the context of disability harassment in the case of *McDonald v Hospital Superannuation Board*. Commissioner Johnston noted that:

> To address a derogatory comment to a fellow worker about aspects of another worker by reference to a disability of the latter, and thereby to lower the dignity and regard of other persons toward that worker is to treat the latter differentially.

Similarly, in *Gama*, French and Jacobsen JJ stated:

> Undoubtedly remarks which are calculated to humiliate or demean an employee by reference to race, colour, descent or national or ethnic origin, are capable of having a very damaging impact on that person's perception of how he or she is regarded by fellow employees and his or her superiors. They may even affect their sense of self worth and thereby appreciably disadvantage them in their conditions of work. Much will depend upon the nature and circumstances of the remark.[132]

Dignity has also been considered as underpinning the offensive behaviour provisions in the RDA. Most recently, in *Eatock v Bolt*, Mansfield J observed that:

> At the heart of any attempt to secure freedom from racial prejudice and intolerance is the protection of equality and the inherent dignity of all human beings ... A manifestation of racial discrimination is inequality of treatment by the denial or diminishment of access to the fundamental rights of democratic citizenship. Without such access, both equality and human dignity are denied.[133]

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[131] Williams, Audrey, 'Third party harassment – here to stay?' *Lexology* (13 October 2011).
[132] *Gama*, 564.
[133] [2011] FCA 1103, [212], [214].

The notion of the inherent dignity and worth of all peoples is derived from the Charter of the United Nations and human rights principles.[134] Anti-discrimination laws, in their partial reliance on international human rights conventions for constitutional validity, are based on and enshrine basic human rights principles, including the notions of equality and dignity.[135]

However, as Fredman has argued, the risk with adopting the concept of dignity in legislation, is that it becomes an additional burden which complainants must establish.[136] Fredman refers to Canadian law in this context.[137] The UK harassment definition was only been recently enacted in 2010 and there has not been sufficient jurisprudence to determine whether a similar problem will arise. For Fredman, whilst dignity is a fundamentally important concept underpinning dignity, it must be only one of the key principles in the pursuit of equality.[138]

Indeed, the difficulty in defining human rights and the concept of dignity was also recognised by Brennan J in *Gerhardy v Brown*, where His Honour stated:

> But an attempt to define human rights and fundamental freedoms exhaustively is bound to fail, for the respective religious, cultural and political systems of the world would attribute differing contents to the notions of freedom and dignity and would perceive at least some differences in the rights and freedoms that are conducive to their attainment.[139]

The difficulty in defining the concept of dignity may therefore ultimately not provide any certainty or clarity for business and individuals in relation to whether conduct will be unlawful harassment for the purposes of the Consolidation. Certainty and clarity are important in relation to the effectiveness and accessibility of legislation, as discussed above.

However, the concept of dignity has already been recognised as forming part of the definition of the word '*insult'* in the offensive behaviour provisions of the RDA. In *Bropho v HREOC*, French J referred to the ordinary dictionary definition of the term which provided '*to assail with scornful abuse or offensive disrespect; to offer indignity*

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[134] *United Nations Charter*, Preamble.
[135] See the Preambles of each of *International Covenant on Civil and Political Rights; Convention on the Rights of the Child; Convention Against Torture; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention on the Rights of Persons with Disabilities*.
[136] Fredman, Sandra, *Discrimination Law* (Clarendon Press, 2011), p 119-21.
[137] *Ibid.*
[138] *Ibid*, chapter 1.
[139] (1985) 159 CLR 70, [20], citing Donnelly, 'Human Rights and Human Dignity' (1982) 76 *The American Political Science Review*, 303.

to; to affront, outrage...'[140] This definition appears to capture the notion of dignity and is a concept that is already recognised in Australian jurisprudence. However, when the term was initially introduced in 1995 by the *Racial Hatred Act 1995*, it was noted that UK courts had equally had trouble interpreting the word *'insult'* in relation to public order legislation and the problem with this term, along with the terms '*offended'*, '*humiliated'*, and '*intimidated',* is that they import a subjective valuation of the conduct.[141]

This is a notoriously difficult area in which to regulate. The harm which the legislation is aimed at redressing can be difficult to capture in words, and in a few defined terms. Nevertheless, the tribunals and courts have been doing precisely that for the last approximately 15 to 25 years in the context of racially offensive behaviour and sexual harassment respectively. Whilst the Consolidation provides an opportunity to emphasise the fundamental importance of the concept of dignity underpinning equality and the affront to a person's dignity which harassment can bring, I would argue that the place to do so is in the objects of the legislation, rather than the definition of harassment. This is particularly so given the vagueness and potentially broad nature of the term, and the fact that it is also captured within related provisions in the RDA.

Therefore, I would argue that the general prohibition on attribute harassment should be consistent with the current sexual harassment provision, but with the additional element that the words may be '*insulting'*. Additionally, the Disability Standards refer to the person harassed being '*distressed'* and I consider this is also a useful term in identifying the harm experienced by persons subjected to harassment.

4.4. Hostile work environment

As noted above, the notion of a hostile work environment has been recognised in Australian anti-discrimination case law from as early as 1983.[142] The express recognition of the concept in UK law is something which Australia can draw on to address the conflicting case law position discussed above in the context of 'independent' hostile work environments. Additionally, including this definition will clarify and make clear that such conduct is unlawful and employers and businesses should take steps to ensure such cultures are changed and enhanced for the benefit of all.

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[140] (2004) 135 FCR 105, [67]
[141] Parliamentary Research Service *Racial Hatred Act Bills Digest* (14 November 1994), p 11.
[142] Matthews DCJ first considered the concept in *O'Callaghan v Loder*, 103-5.

5. Conclusion

In this submission, I have demonstrated that there are currently very limited express prohibitions on harassment in Federal anti-discrimination laws; namely, those relating to sexual harassment and disability harassment. Further, within these express provisions, I have shown that there are significant inconsistencies in the nature of the conduct which is prescribed and the scope of the provisions. In addition, whilst the harassment provisions are largely consistent with the discrimination provisions, there are also some differences, particularly in terms of scope, the nature of conduct proscribed and the elements which need to be established.

Despite the legislative gap in relation to harassment related to other attributes, the cases discussed in this submission establish that both sexual and attribute-based harassment have been found to amount to discrimination. However, the requirement to establish less favourable treatment and causation may preclude such a finding in some cases. Additionally, Australian cases have drawn on international jurisprudence to develop the principle that a hostile environment may be both harassment and/or discrimination in the terms and conditions of, or a detriment in, employment. However, the cases also indicate that a hostile environment, in which conduct is independent of the complainant, may not be sufficient to amount to 'harassment'.

In light of this existing framework, I have explored arguments in relation to whether to expressly regulate in this area in relation to all attributes covered by discrimination provisions. Whilst regulation in relation to the same matters across different regimes is undesirable, particularly if it results in inconsistent approaches to the same set of circumstances, there are equally strong reasons for clarifying expressly that harassment is a form of discrimination and unacceptable. These include the normative and educative function of regulation, and clarifying or assisting users of the regime to understand their rights and obligations.

I have also shown that given the nature of harassment as a form of discrimination, the constitutional limitations which may apply to the concept of vilification do not apply. Finally, I have argued that the concept of dignity, as underpinning human rights principles, is an important and fundamental aspect of beneficial legislation, such as anti-discrimination laws, particularly in its recognition of the type of harm which harassment may cause.

In the context of form of the prohibition, I have also suggested that the same arguments apply to the issue of whether harassment should be defined, and concluded that it should.

In the final part of this paper, I have drawn on both Australian Federal laws and UK laws to argue that the definition should recognise within it the concept of dignity, but not expressly refer to it, given the term's inherent breadth and vagueness. However, I have argued that the use of the word '*insult*' captures the concept adequately. I have also argued that the concept of a hostile work environment should be expressly captured in the definition.

Recommendations:

1. **That the Consolidation include an express prohibition on sexual harassment and harassment related to any protected attribute covered by the discrimination provisions, in all areas of activity covered by the discrimination provisions, as a stand-alone prohibition, within the same Part as the discrimination provisions.**
2. **That the relationships covered by the sexual harassment provisions apply equally to the general prohibition.**
3. **That the concept of harassment be defined as follows:**

   *A person harasses another person (**the person harassed)**, if the first person:*

   (a) engages in unwelcome conduct related to a protected attribute; or

   (b) makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or

   (c) engages in other unwelcome conduct of a sexual nature in relation to the person harassed,

   either:

   (d) 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, insulted, distressed or intimidated; or

   (e) which has the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the person harassed.
4. **That the Consolidation include in its objects a reference to the notion of dignity and equality.**

Olga Klimczak

1 February 2012