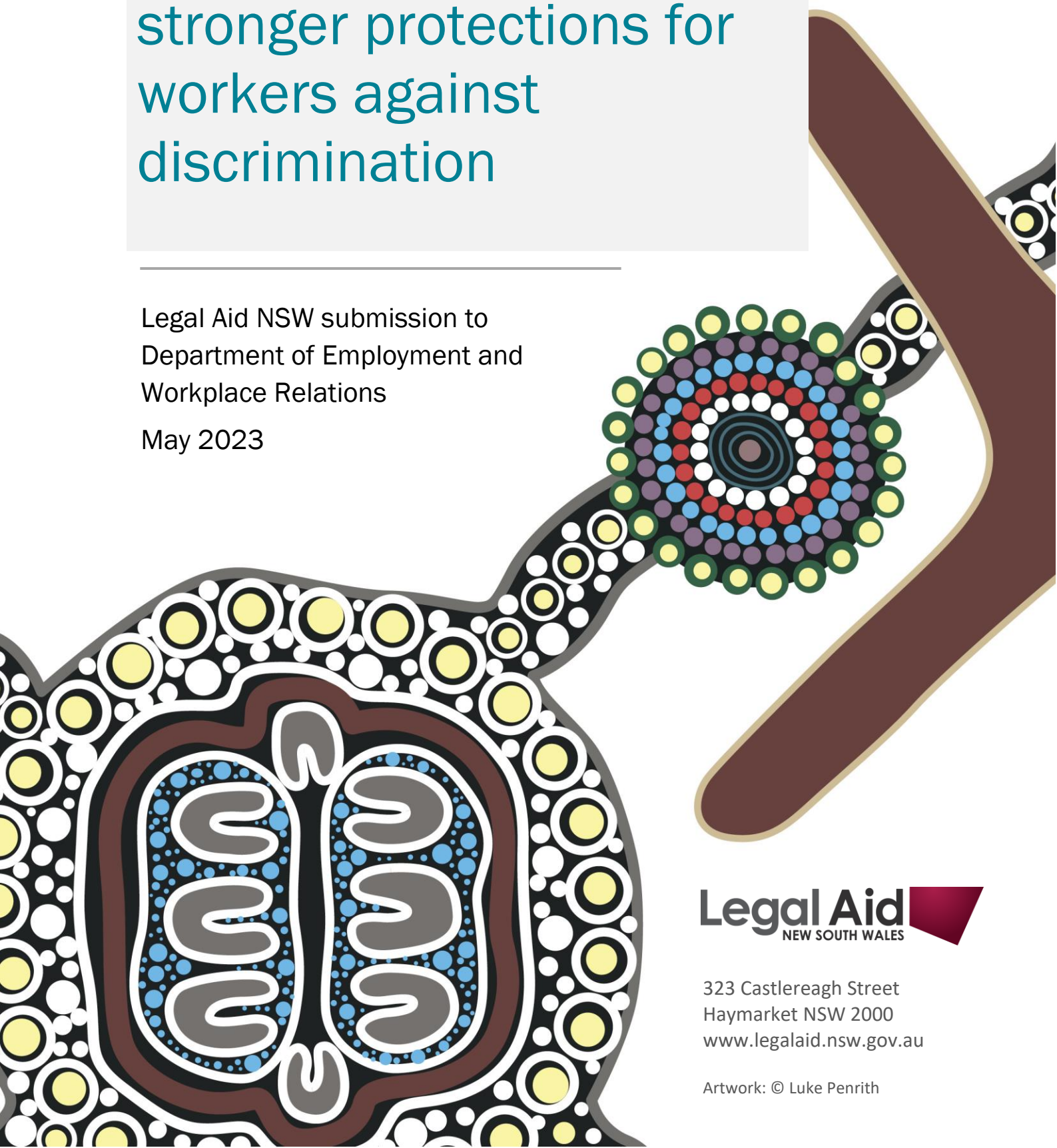
Updating the Fair Work Act 2009 to provide stronger protections for workers against discrimination

Legal Aid NSW submission to Department of Employment and Workplace Relations

May 2023



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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of Family Dispute Resolution Services, family violence services and the early triaging of clients with legal problems through the Family Law Early Intervention Unit.

Legal Aid NSW provides duty services at a range of courts, including the Parramatta, Sydney, Newcastle and Wollongong Family Law Courts, all six specialist Children's Courts and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

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2. Background

Legal Aid NSW welcomes the opportunity to make a submission in response to this important consultation paper. By way of background, we regularly assist clients who could bring multiple claims in relation to their employment.

Case Study

Leila is an accounts payable clerk. She has been employed at an accounting firm for just over a year. Leila's boss, Sam, has repeatedly told her that she is beautiful and tries to hold onto her hand when she passes documents to him. Recently, Leila told Sam that she is pregnant. A month after telling Sam that she is pregnant, Sam told Leila that her position is redundant and that she would need to leave the office immediately. Leila did not receive pay in lieu of notice of the termination of her employment, or a redundancy payment and was not paid out her accrued unused annual leave.

As the law currently stands, Leila could lodge a sexual harassment complaint with the Fair Work Commission (**FWC**), the Australian Human Rights Commission (**AHRC**) or Anti Discrimination NSW (**ADNSW**). In relation to the dismissal, Leila could lodge an unfair dismissal claim with the FWC, or a general protections dismissal claim with the FWC or a pregnancy discrimination complaint with the AHRC or ADNSW. Leila also has an entitlements claim in relation to her unpaid annual leave and pay in lieu of notice of termination.

It is not unusual for Legal Aid NSW to encounter a client with as many legal issues as Leila. It is difficult for practitioners who do not regularly practice in the area of employment law to appreciate the legislative and procedural nuances of multiple legislative options which are broadly similar but not identical. Many Legal Aid NSW clients are from non-English speaking backgrounds, have disabilities, have a low level of education and/or have experienced trauma. Frequently, their appointment with Legal Aid NSW is the first time that they have sought legal advice about their employment. Legal Aid NSW lawyers generally have limited time to provide clients with initial advice. It is thus very difficult for our clients to understand and evaluate all of the pros and cons of taking a particular course of action. This difficulty is compounded by the very short time limit under the FW Act to lodge dismissal related claims.

For the reasons outlined above, any way in which discrimination law can be harmonised makes the discrimination legal framework less complex and easier to navigate. A simpler legal framework is beneficial not just to Applicants but also to Respondents, large and small. Individual respondents or small businesses are often as confused by the discrimination law framework as Applicants. These respondents spend time away from their lives and businesses trying to grapple with the complexity of the law. Respondents who engage lawyers go to considerable expense obtaining advice on the many different claims that may be brought against them.

However, it is essential that where laws are harmonised, that they are harmonised in a manner which provides for the greatest protection of rights, and that Applicants do not lose rights in the effort to create a uniform legislative framework. For example, as noted in response to question two below, the FW Act and the *Disability Discrimination Act 1992* (Cth) (**DDA**) should be harmonised so that both Acts use the same definition of disability. The broader definition of disability in the DDA should be adopted rather than the narrower definition in the FW Act so that those who currently have rights under the DDA because they have a disability within the meaning of that Act do not lose legal protection.

3. Discussion Questions

Q1. Should the Fair Work Act expressly prohibit direct discrimination?

As the consultation paper notes, the case law has generally settled that 'discriminates' in section 342 of the FW Act encompasses both direct and indirect discrimination. However, this is not clear on the face of the provision. If future Federal Courts were to construe section 342 as not encompassing both direct and indirect discrimination, this would cast doubt on the scope of the provision.

The concepts of direct and indirect discrimination are distinct and both have work to do. It is particularly important that section 342 expressly covers indirect discrimination. It is often facially neutral policies or rules that discriminate against our clients rather than more obvious directly less favourable treatment.

As the paper notes, each of the federal discrimination laws has a slightly different proscription of indirect discrimination. It is an essential second step in any project to harmonise federal discrimination law that once section 342 is harmonised with a federal discrimination law, that all federal discrimination laws are then harmonised so that the protection against indirect discrimination is in the same terms in every discrimination act and in the FW Act.

Q2. Should the Fair Work Act be aligned with the DDA and include a definition of 'disability'?

Section 351 of the FW Act should reference the definition of disability in the DDA or adopt the DDA definition. If the DDA definition of disability were used in the FW Act, this would mean that decision makers could have regard to the substantial body of case law interpreting the DDA definition of disability. Given the broad definition of disability in the DDA, it is rare for parties to a proceeding to contest whether the Applicant has a disability within the meaning of the DDA. It is less clear what constitutes a 'physical or mental disability' within the meaning of section 352 of the FW Act. There is no policy reason for a narrower class of disabilities to be protected from adverse action on the ground of disability than those which are protected from discrimination on the ground of disability. This different coverage creates confusion and uncertainty and it is desirable that it is removed.

Q3. Should the inherent requirements exemption in the Fair Work Act be amended to clarify the requirement to consider reasonable adjustment?

Section 351(2)(b) of the FW Act should be amended to clarify the requirement to consider reasonable adjustments. Section 351(2)(b) is inconsistent with the inherent requirements exemption found in section 21A(1)(b) DDA. The inconsistency between the two

provisions creates legal complexity which in turn leads to barriers for disadvantaged and marginalised groups when accessing the law.

In addition to there being no requirement to consider reasonable adjustments under the FW Act, the language of the inherent requirements exemption is different in the FW Act compared to the DDA. The inquiry under section 351(2)(b) FW Act is whether a decision is taken because of the inherent requirements of the particular position concerned, whereas the inquiry under section 21A(1)(b) is whether the aggrieved person would be able to carry out the inherent requirements of the particular work, even if the relevant employer made reasonable adjustments.

The practical effect of differently worded inherent requirements provisions was highlighted in the case of *Shizas v Commission of Police* [2017] FCA 61. Mr Shizas brought proceedings alleging that the Australian Federal Police ('AFP') had taken adverse action against him under the FWA for revoking their offer of employment on the basis of his disability. The Court found that the revocation of the conditional employment was not adverse action under the FWA, as the AFPs' decision was on the basis of a preconception (that Mr Shizas could not safely perform the role) and not the actual circumstance (that Mr Shizas could not perform the role due to his disability).

The Court noted that the inquiry under the FW Act is different to that inquiry that would have been taken had the proceedings been brought under the DDA.[1] Under the FW Act, the inquiry is into the reason for the decision makers decision. Thus, under the FW Act even if a decision maker misunderstands the evidence about whether an individual can perform the inherent requirements of a job, as long as the decision is 'based on' the inherent requirements of the job, the exemption will apply. This is different to the objective inquiry required under the DDA as to whether the Applicant can objectively (and with reasonable adjustments) carry out the inherent requirements of the job.

The inherent requirements exemption in the FW Act should be amended to mirror the inherent requirements exemption in the DDA so that it requires both a consideration of whether reasonable adjustments could have been provided to allow the worker to carry out the inherent requirements, and an objective consideration of whether the worker could perform the inherent requirements of the job.

Q4. Should attribute extension provisions be included in the Fair Work Act?

Attribute extension provisions should be included in the FW Act. Often these clients can make claims under the law as it currently is. However, it is desirable that both the FW

[1] *Shizas v Commissioner of Police* [2017] FCA 61 [174]-[180].

Act and federal discrimination legislation is amended to explicitly provide complete protection from discrimination on the ground of a protected attribute.

Q5. As per the broader Commonwealth anti-discrimination framework, should a new complaints process be established to require all complaints of discrimination under the Fair Work Act (ie both dismissal and non-dismissal related discrimination disputes) to be handled in the first instance by the FWC via conciliation? What would be the benefits or limitation of establishing such a requirement?

There should be a process whereby all general protections claims are handled by the FWC at the first instance by conciliation. Currently, in the case of a non-dismissal general protections claim, Respondents can simply refuse to participate in conciliation. The Applicant is then forced to file their claim in court if they wish to pursue the matter. It is extremely difficult for a non-represented Applicant to pursue his or her claim in court. There is limited assistance that judges can provide to unrepresented litigants, and the process of conducting a case in court, being required to apply the law and have regard to the rules of evidence is technical and difficult.

The Fair Work conciliators are skilled and many matters are able to be resolved by conciliation. This reduces the burden on the courts. There is a benefit to both parties in attempting conciliation facilitated by a skilled conciliator. If a Respondent truly does not wish to resolve the claim, it will not be forced to do so in conciliation. Conciliation is a useful process whereby the parties can hear and assess the opposing case. Conciliation is also an opportunity to resolve a matter early in the process before either party expends significant time and resources. It is also an opportunity for the parties to control the outcome of the dispute rather than have an outcome imposed upon them and to be creative in the terms of settlement.

However, it should be remembered that the general protections are based in the protection from discrimination that is required a result of Australia's ratification of various human rights instruments. In most cases, conciliation conducted by the human rights agencies is different to conciliation of, for example, an unfair dismissal claim. Conciliations at the human rights agencies are typically scheduled for three hours, compared to 90 minutes for an unfair dismissal claim. This allows greater time for discussion of issues prior to negotiation. There is a focus on interest based rather than positional bargaining and it is not uncommon for matters to resolve for non-financial as well as financial compensation. Not all general protections claims are complex or require a conciliation different to that of an unfair dismissal but for those matters that do require it, that process should be available.

There should be compulsory conciliations in all general protections matters and the FWC should be properly resourced to conduct conciliations in a manner that, where required, reflects the human rights basis of the provisions.

Q6. If a new complaints process were to be established, should it attract a filing fee consistent with other similar dispute application to the FWC?

It promotes access to justice when commencing a legal claim is free. However, if the fees for claims to the FWC are to remain, it is essential for Legal Aid's clients that the process for applying for fee waiver due to financial hardship also remains.

Q7. Should vicarious liability in relation to discrimination under the Fair Work Act be made consistent with the new sexual harassment jurisdiction and other Commonwealth anti-discrimination laws? Why or why not?

The vicarious liability provision should be consistent with the new sexual harassment jurisdiction and other anti-discrimination laws. As noted in response to other questions, there is a benefit to all parties in reducing the complexity of the law by harmonising the vicarious liability provisions in all federal discrimination laws and harmonising the FW Act with these laws.

Q8. Should the 'not unlawful' exemption be clarified?

The not unlawful exemption should be clarified to better reflect the intention of the Parliament. It should be clarified that conduct that is 'not unlawful' under section 351(2)(a) is conduct which is covered by a specific exemption, for example those listed in Division 4 of the *Age Discrimination Act 2004* (Cth), rather than that where an exception could be argued, for example where an inherent requirement or unjustifiable hardship argument could be made.

Section 351 should make express that adverse action on all grounds listed in section 351 is unlawful. As the consultation paper notes, despite section 351 prohibiting discrimination on the ground of religion, political opinion and social origin, those protections do not exist in NSW as they might do in other states because NSW anti-discrimination law does not prohibit discrimination on the grounds of religion, political opinion or social origin.

As Legal Aid NSW noted in its submission to the Religious Freedom Review,[2] there is inadequate protection in NSW for discrimination on the ground of religion. Section 772 of the FW Act provides protection from dismissal on the ground of religion and the *Anti-discrimination Act 1977* (NSW) provides protection from discrimination on the grounds of ethno-religion. However, this means that there is no protection from less favourable treatment on the ground of religion that is not dismissal or from discrimination on the ground of a religion that is not an ethno-religion. Protection from adverse action on the ground of religion should apply in NSW as the protection applies on the other listed grounds.

Q9. Should the unlawful termination provision in the Fair Work Act be repealed, and section 351 broadened to cover all employees?

It is extremely rare for Legal Aid NSW to advise a client who needs to make a claim under section 772 of the FW Act, who is a non-national system employee who has been dismissed for a ground outlined in section 772. It is also extremely rare for us to advise a national system employee who has been dismissed on a section 351 ground which is not unlawful in New South Wales, that being a person dismissed on the ground of political opinion, religion or social origin.

The law would be much clearer if section 351 was amended to expressly provide that:

a. the provision applies to national system and non-national system employees; and
b. adverse action on the ground of religion, political opinion and social origin are unlawful in NSW.

Q10. Should experiencing family and domestic violence be inserted as a protected attribute in the Fair Work Act?

Experiencing family and domestic violence should be inserted as a protected attribute under the FW Act.

In our casework experience, victims and survivors of domestic and family violence experience prejudice and exclusion in many areas of public life, which compounds the harm they have experienced. For example, discrimination can occur in employment through employers declining requests to take time off to attend court proceedings or relocate housing or schools.

[2] Legal Aid NSW, Submission to Expert Panel on Religious Freedom, *Religious Freedom Review* (February 2018)

While the FW Act provides some protections to victims and survivors of domestic and family violence, they do not adequately address the direct and indirect discrimination experienced by victims and survivors. For example, the current National Employment Standards provide Fair Work Act employees an entitlement to five days of unpaid domestic and family violence leave. However, there is no specific legal protection for employees to safeguard them from being dismissed for using this leave or for being temporarily absent from work due to domestic and family violence.

Employment, and the financial independence it can provide, are key enablers of escaping violent relationships and beginning a life away from harm. Inserting this protected attribute will address systemic barriers to employment for victims and survivors by providing them with legal protection in the workplace. It also sends a message to both employers and the broader community that not only is domestic and family violence unacceptable, but that victims and survivors should be supported.

Providing protection from discrimination based on experience of domestic and family violence is also consistent with Australia's obligations under the United Nations Convention on the Elimination of All Forms of Discrimination against Women, which requires governments to take appropriate measures to eliminate discrimination against women in all areas of life including in employment, and to ensure that women have access to safe and healthy working conditions.

Q11. Should the Fair Work Act be updated to prohibit discrimination on the basis of a combination of attributes? Why or why not?

The FW Act should be updated to prohibit discrimination on the basis of a combination of attributes. Discrimination can be 'intersectional', that is, occurs for more than one reason. i.e a person may be discriminated against because of, for example, both their sex and race, age and disability or sexuality and race. It should be recognised in the law that the effect of discrimination is compounded where discrimination is experienced on multiple grounds.

As the FW Act currently stands, Applicants can bring general protections claims alleging adverse action on multiple grounds. The FWC handles these complaints as they would claims alleging a single ground of adverse action and many such matters are able to be resolved by conciliation. If a claim alleging adverse action on multiple grounds cannot be resolved and is filed in court, the decision maker will consider the merits of each separate claim but currently there is no mechanism for the decision maker to consider the combined effect of experiencing 'intersectional' discrimination, though of course the Applicant is likely to obtain a remedy for each breach of the FW Act.

There is some recognition in the *Sex Discrimination Act 1984* (Cth) of the relevance of the personal characteristics of the person harassed. When considering what a reasonable person may have anticipated in all the circumstances, the decision maker

must consider a range of personal attributes.[3] This ensures that the intersectionality between sex and other protected attributes are considered when applying the reasonable person test.

[3] *Sex Discrimination Act 1984* (Cth) s 28(1A).