Change the Culture, Change the System:

Urgent Action needed to End Sexual Harassment at Work

Victoria Legal Aid

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Submission to the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces

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Executive Summary

Everyone deserves to feel safe and respected at work and to live free from sexual harassment. Sexual harassment causes significant harm to individuals, workplaces and society. We know what the solutions are, but we need governments and employers to draw the line and implement them. We need strong action to prevent and respond to sexual harassment, and we need it now.

Our recommendations have been informed by our practice experience advising and assisting people who have experienced sexual harassment at work to take legal action. In the last five years, the Victoria Legal Aid Equality Law Program has provided over 6,500 legal advices regarding discrimination matters, including 994 advices about sexual harassment and sex discrimination. Eighty-three percent of the clients we assisted with a workplace sexual harassment complaint were women. This submission includes the deidentified stories of 8 of our clients who we have helped to tell their stories in their own words. Their stories highlight a system that fails both to prevent workplace sexual harassment, and to adequately address it when it does occur. In the words of two of our clients:

> "I felt like the process was a battle and afterwards I didn't have anything left in me to keep pursuing my rights. I felt depleted. I was unable to obtain any outcome and in the end I just let the matter go" (**Fiona**).

> "As a result of the harassment, I was diagnosed with depression and I ended my relationship with my boyfriend because I developed a distrust of men. I did not have the emotional resources or social supports needed to go to court and fight my employer, so I settled my claim for a small pay out rather than taking the case further. I felt like there were no consequences for the harasser" (**Alice**).

In addition to the evidence from our legal work, and the insights of our clients, our submission is informed by our research and consultation with leading organisations across the legal, health, community and government sectors. Together, we have worked to make sure our advocacy is informed by best practice and cross-sector perspectives, recognising that sexual harassment is not just a legal issue; sexual harassment is a complex social problem that requires cultural and systemic change.[1]

A flawed regulatory framework that burdens the victim, lacks transparency and fails to prevent sexual harassment

Sexual harassment is experienced by a far greater number of women than men and is often tied to gender inequality at work. Below we outline our practice experience of the drivers and impact of sexual harassment in the workplace.

Through our work, we see the failure of our laws and regulators to address these cultural and systemic drivers of sexual harassment. We see the failure of our laws to require employers to take steps to prevent sexual harassment at work. We also see the inability of our individual

[1] Victoria Legal Aid has facilitated a high degree of collaboration and consultation with key organisations in the legal and community sectors regarding sexual harassment reform. We organized a Roundtable in November 2018 and a full day Forum in January 2019 in Victoria. Attendees included women's health and advocacy organisations, regulators, unions, lawyers, and academics. As a result of this work a Joint Statement has been developed which highlights five key areas for reform and has been endorsed by over 100 organisations and individuals as at 28 February.

complaints system to create sexual harassment-free workplaces. We see the barriers to individuals enforcing their rights by making a complaint, the lack of consequences for employers and perpetrators, and how rarely an individual complaint results in workplace change.

Building a culture and a system that can help protect us all from sexual harassment

In our view the most important reform is for our regulatory system to stop treating sexual harassment as an individual workplace issue and treat it as a cultural, systemic, and health and safety issue.

We consider that the regulators best suited to preventing sexual harassment as a systemic and cultural problem are work health and safety agencies. Our work health and safety legislation already places a positive duty on employers to provide a safe workplace, and our agencies already have the existing powers necessary to enforce this. The essential missing pieces are a framework around sexual harassment prevention that incorporates best practice and draws on primary prevention strategies, and the resourcing and training necessary for our work health and safety agencies to address sexual harassment and do so as a priority.

We also need to recognise and strengthen the key role played by our human rights commissions and ensure they are also empowered and adequately resourced to address sexual harassment as a cultural and systemic issue, including through investigation powers and the ability to enforce compliance with anti-discrimination laws.

Even with these systemic solutions, we know that the existing individual complaints system will remain a key feature of our sexual harassment laws, and it is therefore important to remove barriers to legal claims and maximise the impact of individual claims. As it stands, this system is individualised and not well-suited to redressing harm or generating change that will prevent harassment recurring. Modest changes, including prompting parties to consider settlement outcomes that promote systemic change (such as organisational training and improved policies), as well as improved accessibility of complaint and settlement data, could help identify trends, build deterrence, and encourage measures that tackle sexual harassment as a systemic issue. In addition, barriers to women taking action, including restrictive time limits and prohibitive legal cost orders, should be addressed. Further, holistic services and support should be available to assist women to report and recover from sexual harassment in the workplace.

It is clear that we need a better, stronger way to support victims of sexual harassment and prevent it from occurring in the first place. As the system stands, unaddressed or inadequately addressed sexual harassment in Australian workplaces is stopping women reaching their full potential. It is causing women harm personally and professionally. It is damaging their mental health, their relationships and their futures.

Informed by our work, we recommend 18 reforms to build an environment where women are truly safe in the workplace and can progress in their careers without the lingering threat of sexual harassment. Our reforms propose that when sexual harassment takes place there should be meaningful consequences which reduce the risk of it happening again.

Eventually, we will be part of a community where we don't hear clients say:

> "The traumatic incidents that I dealt with [at work] impacted on my ability to succeed in a personal relationship. My employer failed to support me in the traumatic incidents that I experienced, as I was expected to deal with whatever came my way.
>
> If I had received support and psychological counselling I would not have resigned and would have been able to work through to my retirement age. My employer prevented me from reaching my potential by not providing a safe work environment for me ...
>
> What happened to me had and continues to have a detrimental impact on my mental health and everyday life" (**Emily**).

> "The interplay of bullying, sexual harassment and the subsequent impact this had on my health resulted in a debilitating post-traumatic stress disorder and other related ill health that affects every facet of my life. After 25-years as a confident successful career woman, my health, personal life and career have all been impacted. I've gone from someone who wouldn't think twice of travelling solo around the world to someone who fears walking down my own street after dark.
>
> Situations like mine would occur less in the workplace if companies, management and employees were made more accountable for harassment, homophobia and bullying. The stigma, methods and systems associated with raising complaints doesn't work to protect injured workers, it only causes more damage to workers' health." (**Chloe**).

Summary of Recommendations

Urgent Actions Needed to End Sexual Harassment at Work	
Preventing sexual harassment as a systemic problem	
1.	**Primary prevention**. Governments should invest in dedicated primary prevention efforts to address the underlying gendered drivers of sexual harassment. These efforts should be part of a holistic strategy to prevent violence against women and promote gender equality in line with *Change the story: A shared framework for the prevention of violence against women and their children in Australia*.
2.	**Enforce the positive duty under work health and safety laws**. The Model Work Health and Safety Regulations and Codes of Practice should be amended to create an effective framework to prevent and address sexual harassment, and these amendments should be adopted by all jurisdictions that have adopted the model laws. Victoria and Western Australia should likewise incorporate any necessary amendments into their work health and safety laws to effectively prevent and address sexual harassment.
3.	**Create an enforceable positive duty under anti-discrimination laws**. Commonwealth, State and Territory anti-discrimination laws should impose an enforceable positive duty on employers to prevent sexual harassment supplemented by guidelines for compliance.
4.	**Resourcing and training for work health and safety agencies**. Commonwealth, State and Territory work health and safety agencies should be resourced and trained to effectively address sexual harassment.
5.	**Stronger powers and resourcing for human rights commissions**. Commonwealth, State and Territory human rights commissions should be granted increased powers and resources to effectively address sexual harassment including greater investigation powers, the power to enter into enforceable undertakings, and the power to issue compliance notices.
Increasing the impact of individual complaints	
6.	**Settlement agreements**. Standard form settlement agreements for sexual harassment complaints should include terms requiring duty holders to implement systemic measures to prevent and address sexual harassment.
7.	**Complaints data**. The Commonwealth, State and Territory human rights commissions should be required to regularly record and report deidentified complaint data and information.
Complaint processes must be fairer and more accessible	
8.	**Fair Work Act**. The Fair Work Act should be amended to protect workers from sexual harassment with a stand-alone civil remedy provision to enable the Fair Work Commission to receive complaints and the Fair Work Ombudsman to tackle sexual harassment.

9.	**Public life**. Commonwealth, State and Territory anti-discrimination laws should be amended to expand protection from sexual harassment to all areas of public life.
10.	**Burden of proof**. Commonwealth, State and Territory anti-discrimination legislation should be amended to shift the burden of proof to the employer once the employee has established a prima facie case.
11.	**Time limit on complaints**. Commonwealth, State and Territory anti-discrimination legislation should be amended to extend the time limit for bringing a complaint to 6 years.
12.	**Costs orders**. Commonwealth, State and Territory anti-discrimination laws should be amended to include a costs rule which provides that costs orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation.
13.	**Resourcing for conciliation**. The Commonwealth, State and Territory human rights commissions should be resourced to reduce the current wait times for conciliations.
Better support for victims of sexual harassment	
14.	**Alternative dispute resolution framework**. A basic framework for alternative dispute resolution procedures in courts, tribunals and commissions that deals with sexual harassment complaints should be provided to the parties and any representatives prior to a conciliation or mediation, and should include specific time for individuals to speak about their experience and the impact of the harassment on them.
15.	**Training for conciliators and mediators**. Conciliators and mediators should receive consistent training in alternative dispute resolution theory and techniques from experts in the field, including in how to mitigate power imbalances.
16.	**Protection against retaliation**. Consideration should be given to reforming Commonwealth, State and Territory anti-discrimination laws and the Fair Work Act to improve protection and redress for people who complain of sexual harassment and suffer detriment because the employer or other duty holder fails to respond reasonably or handles an investigation badly.
17.	**Pilot online reporting tool**. Funding should be granted to pilot an accessible and confidential online reporting tool that (a) assists people to report and address problem behaviour and seek support, and (b) identifies trends to assist with prevention and enforcement efforts.
18.	**Specialist support services**. Specialist support services should be funded to assist people who have experienced sexual harassment.

Victoria Legal Aid, our clients and sexual harassment

Victoria Legal Aid

VLA is an independent statutory agency responsible for providing information, advice and assistance in response to a broad range of legal problems.[2] Working alongside our partners in the private profession and community legal centres, we help people with legal problems such as criminal matters, family breakdown, child protection, family violence, fines, social security, mental health, immigration, discrimination, guardianship and administration, tenancy and debt.

Our Legal Help telephone line is a resource for all Victorians to seek information, advice and assistance with legal problems. We also deliver specialist non-legal services, including our Family Dispute Resolution Service and our Independent Mental Health Advocacy service, provide community legal education, and contribute to policy and law reform.

VLA is also the largest provider of family violence legal services in the state, as well as funding several community legal centres across Victoria to deliver family violence legal services. We assist children, victim survivors, and alleged perpetrators of family violence with their legal matters. We recognise that family violence is driven by gender inequality and we are committed to the elimination of violence in the community. We are working to improve the way we respond to family violence and gender inequality and have implemented several initiatives and projects in recent years.

Equality Law Program

VLA's dedicated Equality Law Program promotes and protects substantive equality by addressing individual and systemic discrimination through advice, casework, legal education, and strategic advocacy. We work to enable people to obtain and retain employment, to remain engaged with key service and education providers, to receive fair compensation, and to use the law to help stop discrimination and sexual harassment occurring again in the future.

The Equality Law Program provides advice and representation to clients who suffer discrimination, sexual harassment, victimisation and vilification. We represent clients with complaints of discrimination and sexual harassment in various jurisdictions, including the Federal Court and the Federal Circuit Court, utilising federal anti-discrimination legislation, the *Fair Work Act 2009* (Cth) (**FW Act**) and the *Equal Opportunity Act 2010* (Vic) (**EO Act**).

In the last five years the Equality Law Program provided over 6,500 legal advices regarding discrimination and sexual harassment matters. By helping people seek redress for discrimination and sexual harassment, we seek to promote equality and reduce disadvantage in the community.

[2] See Victoria Legal Aid, *Annual Report 2017–18* (available at: https://www.legalaid.vic.gov.au/about-us/our-organisation/annual-report-2017-18) (**VLA Annual Report**).

Our clients and sexual harassment

Over the past three years, 252 people have sought assistance from VLA specifically in relation to workplace sexual harassment. Of these people:

- The majority – 83% – were women.
- Approximately 50% were between the ages of 25 and 34 years of age.
- Almost 30% disclosed having a disability with the vast majority of these clients (78%) experiencing mental health issues.[3]
- 36% were born overseas.

Through this work, we see the impact of sexual harassment on our clients, as well as the factors that make people more vulnerable to experiencing it. While we represent and advise hundreds of clients regarding sexual harassment matters, we also know that many clients do not make formal or informal complaints to address their sexual harassment. We see directly the need for systemic changes aimed not only at reforming the complaint and compliance system but also cultural and social attitudes that lead to high rates of sexual harassment.

PART 1: DRIVERS AND IMPACT OF SEXUAL HARASSMENT

1.1 Drivers of sexual harassment

We provide legal assistance to people who have experienced sexual harassment at work. Through obtaining instructions of our clients' experiences of sexual harassment and of their workplaces, we have gained an understanding of certain factors that are likely to be present when people experience sexual harassment and that drive the occurrence of sexual harassment.

Our practice-based observations are consistent with the observations of VicHealth,[4] Our Watch[5] and Women's Health Victoria that the prevalence of sexual harassment in Australian workplaces is driven by wider gender inequality and attitudes that condone violence against women in our communities.

In particular, in the past three years 83% of the clients who we assisted with a sexual harassment complaint were women and in the large majority of cases, the perpetrators of the sexual harassment were men. The higher proportion of women who seek our services supports our view that sexual harassment is experienced by a far greater number of women than men and that sexual harassment is often tied to inequality between men and women at work, just as other forms of violence against women are tied to gender inequality more broadly.

[3] While we do not have data which demonstrates whether these clients had existing disabilities at the time of their experiences of sexual harassment, in practice, many clients experience mental health impacts as a result of being sexually harassed. We discuss these impacts further in our submission.
[4] Victorian Health Promotion Foundation (2018) *Submission: Australian Human Rights National Inquiry into Sexual Harassment in Australian Workplaces,* pages 9 and 10.
[5] Our Watch (2018) *Submission to the Australian Human Rights National Inquiry into Sexual Harassment in Australian Workplaces,* pages 8 and 9.

Our practice experience also reflects that rigid gender and sexuality norms in society play a contributing role to driving sexual harassment even though drivers of sexual harassment in the world of work are varied and can be idiosyncratic based on the characteristics of the particular work environment.[6] In Jessica's story below we see how a culture which facilitated inappropriate jokes about violence against women and gender stereotypes at her University was interlinked with her experience of sexual harassment.

Negative gender attitudes: Jessica's story

> I don't have many happy memories of my time at university. I undertook tertiary studies in a male-dominated field of study and I frequently experienced sexist remarks and sexual harassment from both students and staff. It was often done in a joking manner, but I found it very isolating.
>
> **It made me feel unsafe. I would constantly ask people to stop making these remarks, which would include jokes about family violence and gender stereotypes, including women's place being in the kitchen.**
>
> I came very close to withdrawing from my studies because I was worried that the same blokey, sexist culture would continue when I commenced work in the industry.
>
> I spoke up and made an internal complaint. I really wanted to try and change the culture. I asked the University for better policies, awareness training, intervention and help. I spoke to numerous lecturers who did nothing. One lecturer subsequently reprimanded me when I escalated my complaints above them. I did all I could to make the University take it seriously, but I was treated like I was a trouble maker. The victimisation I experienced after speaking up changed me as a person. My mental health suffered significantly and I truly struggled to complete my degree. In the end, my complaints were lodged as a grievance. This was a tiresome, lengthy and mentally tormenting process. Although the University ultimately agreed to introduce new policies to address the behaviour, this wasn't consistently or meaningfully implemented. I had to engage a lawyer to obtain an outcome to address the harm I had suffered.

This experience is consistent with VicHealth's submission to the National Inquiry,[7] which recognises that social norms, including community attitudes towards violence against women generally, influence the prevalence of sexual harassment. Unfortunately, the ANROWS National Survey of Community Attitudes to Violence Against Women 2017 demonstrates that some concerning attitudes to sexual harassment and gender equality are widely held within our community.

Jessica's story also shows that the organisational response to victims once they complain about sexual harassment can contribute to an organisational climate that tolerates sexual

[6] As submitted in Initial Submission to the AHRC's National Inquiry into Sexual Harassment in Australian Workplaces by Professor Paula McDonald, QUT and Professor Sara Charlesworth, RMIT University, page 10.
[7] Victorian Health Promotion Foundation, above footnote 4, page 6.

harassment and discourages other victims from complaining. Jessica experienced victimisation, a lack of organisational support and an arduous and ineffective complaints process, which damaged her mental health and led to her view that the University failed to meaningfully address both her complaint and sexual harassment at the University more broadly. Ineffective organisational responses also signal a culture that is permissive of sexual harassment.

Hulin, Fitzgerald, and Drasgow suggest that 'organisational climate' is a significant predictor of sexual harassment incidents at organisations, and there are three aspects of organisational climate that are of particular importance: perceived risk to victims for complaining; a lack of sanctions against offenders; and the perception that one's complaints will not be taken seriously.[8] This accords with our practice experience that many clients are distressed by the inadequacy of their employer's response to their complaint of sexual harassment and consider this a factor influencing the condoning of the sexual harassment in the workplace.

1.1.1 Demographics of clients who seek assistance with sexual harassment

Victims of sexual harassment in workplaces can come from a broad range of backgrounds and life experiences. Through our client work we know that there are people with certain experiences that make them more vulnerable to sexual harassment. These client experiences support an intersectional approach to understanding the drivers and impact of sexual harassment.

Over the past three years, 252 people have sought assistance from VLA in relation to workplace sexual harassment. As indicated, the majority of these individuals were women (83%).

Clients who sought our assistance for sexual harassment were of various ages. However around half of the clients we saw were between the ages of 25 and 34 years of age.

Of the clients who have sought assistance for sexual harassment in the past three years, almost 30% disclosed having a disability, with the vast majority of these clients (78%) experiencing a mental health issue. While we do not have data which demonstrates whether these clients had existing disabilities at the time of their experiences of sexual harassment, in practice, many clients experience mental health impacts as a result of being sexually harassed. We discuss these impacts further in our submission.

Our clients who seek assistance with sexual harassment come from various cultural backgrounds. Of the clients we have advised on sexual harassment in the past three years, 36% were born overseas.

[8] See Chelsea R Willness, Piers Steel, Kibeom Lee, 'A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment', 60 Personnel Psychology (2007) 127 at page 133, citing Hulin CL, Fitzgerald LF, Drasgow F. (1996). Organizational influences on sexual harassment in Stockdale MS (Ed.), Sexual harassment in the workplace: Perspectives, frontiers, and response strategies. Women and work: A research and policy series, (vol. 5, pp. 127–150). Thousand Oaks, CA: Sage.

Clients who are otherwise in a minority group within their workplace, either due to their sexuality, disability and/or being culturally and linguistically diverse, often describe being easy targets of sexual harassment by perpetrators in their workplaces.[9]

In Nomusa's story, we see that her experience of sexual harassment was combined with being subjected to discriminatory and derogatory comments about her race. Nomusa's experience of sexual harassment was also compounded by her unique isolated work environment – the home of her client, who was also the perpetrator.

Intersection between sexual harassment and other protected attributes: Nomusa's story

I was working in a person's home looking after their children. I was placed there by a service provider. Working in someone's house was a big challenge for me, the first thing that came into mind was "What if a husband or wife works in the house, will something happen to me?" Which something did happen as I was touched inappropriately and subject to racially discriminatory comments.

It made me so uncomfortable when he made discriminatory comments about my skin colour; I didn't want the kids to hear those comments as I was meant to be a role model for those children and it was so awkward. I told him that he can't do that in front the children. Also, each time he touched me inappropriately it made me feel awkward and uncomfortable and I would tell him that it was not nice.

There was no one else that I could turn to for help as I was working in the home, and I thought no one would believe me. Since I was working in a big house, I was scared, I thought what happens if I go downstairs and go to the toilet? What's going to happen to me next? It made me feel awkward and I didn't want to go back to work but I was the sole income earner at the time, so I felt like I had to put the issues behind me. I was also pregnant at the time and knew I wouldn't be able to get a job anywhere else.

I felt like I would've felt safer if the service provider gave me information to help me understand my rights and also provided information to the person that I was placed with about their obligations towards me.

I brought a complaint about the conduct and it was a mentally draining experience. While it was difficult I was glad to have pursued a complaint.

[9] In Our Watch's submission to the National Inquiry, see above footnote 5, the Australian data on sexual harassment reveals that women who live at the intersection of gender inequality and other forms of discrimination and marginalisation are more likely to experience sexual harassment is helpfully summarised at page 12 of the Submission and we confirm this accords with our practice experience.

Chloe's story, below, likewise illustrates the experience of intersecting forms of discrimination, as well as the way in which people who do not conform to norms relating to gender roles and sexuality are at increased risk of sexual harassment. Chloe was subjected to sexualised and derogatory comments from co-workers about her sexuality.

Intersection between sexual harassment and other protected attributes – Chloe's story:

I was employed at a large international company as a Business Development Manager for 10 years. During that time, I was coming to terms with my sexual identity and was steadily sharing this with my friends. I didn't feel able to do this at work after a manager, referring to another gay colleague, told me 'senior staff need to understand they're managers first and gay second'.

A colleague started spreading derogatory rumours about me, making sexual innuendos about lesbians, referring to me to newcomers as the "carpet muncher" and telling workmates they shouldn't eat food I brought in to share. Colleagues changed their behaviour towards me. I felt progressively ostracised.

A male colleague with a volatile temper was hostile, aggressive and sabotaged my work. He was stalking another female colleague and tried to intimidate us by driving dangerously to meetings when he had us alone in his car.

Complaints were made about both employees by multiple team members, but they socialised with management and complaints weren't dealt with adequately or at all.

There were problems countrywide and many made complaints about the culture. Within a year of the new national manager joining, nearly half the team left. This manager summonsed remaining staff and told us 'I won't hear a bad word against my management. You're either on the bus or off the bus'. It was clear nothing was going to be done about the toxic environment.

Left unchecked, the harassment intensified, and my health started to suffer. Following my complaints, I started being undermined and treated in a demeaning way by management. The situation escalated and HR became involved.

Following interviews/statements, HR advised I had a sexual harassment case, but my health was declining and I assumed the company would not take any necessary action. But, despite his manager stating, 'he was too difficult to manage, and he wanted him off the team' the man was kept on because 'we couldn't afford to lose more staff'.

The behaviour escalated and I feared for my safety. It reached a point I'd ask colleagues to walk me to my car at night and advised a manager 'if something were to happen to me at least everyone would know who it was'.

Eventually the man's ongoing conduct resulted in him being fired and the homophobic colleague spreading rumours was disciplined, but by this stage my health had already been impacted.

Due to his own conduct, I was told my manager was to be moved out of his role, but after I'd spoken up to HR about the culture, the harassment and bullying from my manager and the national manager only escalated further. Eventually I had a breakdown.

My doctor recommended I submit a WorkCover claim and after a time I reluctantly accepted his support. I considered making an official harassment claim but worried about my declining health, the associated stigma and I feared managements' reactions. After my breakdown, the company never provided reassurance things would change if I returned and because no official government investigation occurred, those responsible for sexual harassment, bullying and homophobia moved onto new companies without penalty.

The interplay of bullying, sexual harassment and the subsequent impact this had on my health resulted in a debilitating post-traumatic stress disorder and other related ill health that affects every facet of my life.

After 25 years as a confident successful career woman, my health, personal life and career have all been impacted. I've gone from someone who wouldn't think twice of travelling solo around the world to someone who fears walking down my own street after dark.

Situations like mine would occur less in the workplace if companies, management and employees were made more accountable for harassment, homophobia and bullying. The stigma, methods and systems associated with raising complaints doesn't work to protect injured workers, it only causes more damage to workers' health.

1.1.2 Male dominated workplaces and sexual harassment

Further to the specific characteristics of people who experience sexual harassment, there are certain factors evident in workplaces that drive sexual harassment.

In particular, women and non-binary people who work in male dominated workplaces often find that the cultures in their workplaces played a role in allowing or driving the sexual harassment they experienced, as illustrated in Jessica's story above. This phenomenon is supported by extensive research, but as McDonald, Charlesworth and Graham state below, it is the culture and structures of these workplaces that are problematic, rather than their gender composition.

> Cross-sectional and meta-analytic studies consistently demonstrate that SH is more prevalent in male-dominated occupations and work contexts than in gender-balanced or female-dominated workplaces. However, it is not the organizational sex-ratio of the workplace that renders SH problematic, but rather organizational environments that

> are hierarchical, especially those where cultural norms are associated with sexual bravado and posturing and where the denigration of feminine behaviours is sanctioned.[10] (References omitted.)

The harmful effects of such organisational environments and cultural norms are evident in Alice's story, where she talks about the constant sexual harassment she experienced throughout a career working in male-dominated fields.

Sexual harassment in male dominated industries: Alice's story

> I'm a woman who is interested in cars and motorbikes. I have worked in male-dominated fields my whole life and have been subjected to sexual harassment and discriminatory behaviour in almost every job.
>
> I was 15 when I started my first job as a casual petrol station attendant. I worked with an older full-time male who would regularly slap me on my bottom. It made me feel very uncomfortable, but I was too shy and embarrassed to say anything to anyone.
>
> At about age 21, I worked at a truck company. My male co-workers would constantly tell dirty jokes and talk about 'hot chicks' and what they 'do to their missus'.
>
> Among the many offensive comments that were made to me, I recall sitting in a truck and my male colleague sitting next to me saying 'shut your legs, it's smiling at me'. I pretended that I didn't hear him.
>
> In my late twenties, I worked for a retailer. A co-worker regularly made numerous offensive sexual comments to me, such as 'I'd like to tie you up and whip you', and forcefully grabbed my bottom in front of my manager and other co-workers. However, despite seeing this offensive and illegal behaviour take place, my manager would not take action against the harasser and my co-workers were unwilling to support my complaints because they were worried they would be victimised for doing so.
>
> As a result of the harassment, I was diagnosed with depression and I ended my relationship with my boyfriend because I developed a distrust of men. I did not have the emotional resources or social supports needed to go to court and fight my employer, so I settled my claim for a small pay out rather than taking the case further. I felt like there were no consequences for the harasser.

Alice's story highlights a common practice experience VLA sees, namely that cultures and practices within male dominated workplaces and workplaces that do not provide adequate support to workers must be addressed in order to reduce the prevalence of sexual harassment in Australian workplaces.

[10] Paula McDonald, Sara Charlesworth, Tina Graham, 'Developing a framework of effective prevention and response strategies in workplace sexual harassment', 53 Asia Pacific Journal of Human Resources (2015) pages 41 and 45-46.

1.1.3 Insecure work

There is a heightened risk of sexual harassment for employees who are in an insecure work arrangement. In our experience migrant workers are particularly vulnerable to exploitation because of their reluctance to complain for fear of deportation, the lack of alternative employment options, and unfamiliarity with workplace laws and entitlements. We have also had multiple clients who are unable to continue a complaint because they were forced to leave Australia after losing their employment.

Labour hire and other forms of insecure work arrangements, including contracting arrangements, heighten this risk. Our clients report examples of labour hire arrangements being used by employers to evade workplace laws and other legal obligations. Many of our clients report being told that they are no longer required by the host company, without being provided with any reason, after they have raised a complaint about their treatment. While the labour hire agency may know the true reason, it has a stronger commercial interest in maintaining good relations with the host company than with the individual worker. This leaves the worker, who is often unskilled and has limited employment options, in a particularly vulnerable position.

1.2 Impact of sexual harassment

Sexual harassment has ongoing impacts on victims in various aspects of their life including an impact on financial security, mental and physical health, job security and the victim's relationships at work and in their family. These impacts are illustrated in the client stories throughout this submission, including the story of Alice, above, who suffered depression and relationship breakdown as a result of her experiences of sexual harassment.

These impacts can be short term but in many cases of sexual harassment, the impacts can be significant and long lasting.

Sexual harassment can have a major impact on an individual's ability to participate in the workforce. Individuals who are sexually harassed often decide to resign from their work due to feeling unsupported or because they face workplace exclusion. For example, we have seen clients who have experienced sexual harassment not receive further shifts, or experience social isolation from colleagues, or need time off work due to the impacts of the sexual harassment on their health.

People who experience sexual harassment along with other forms of discrimination can have their experiences compounded and the impacts on them can therefore be significant.

In Emily's story, we see that the trauma she experienced as a result of being raped by a colleague was exacerbated by her being subjected to other forms of sexual harassment and discriminatory conduct on the basis of her gender.

Impact on mental health and personal relationships: Emily's story

> I worked in a large male-dominated organisation for many years. During my career I was raped by another employee. I also experienced sexual advances from colleagues and was subject to discriminatory comments and behaviour based on my gender.

I did not receive any support when I reported the rape and was asked to consider the ramifications of going ahead with the complaint. I was never treated like a victim and had to seek my own support. I was told that I shouldn't have reported my colleague. I was ostracised as a result of reporting. I did not make a complaint about this conduct as I did not know who to report it to and was afraid of further repercussions.

The culture at my workplace never varied or changed during my service. The sexual harassment, victimisation, unwanted comments about the rape and other conduct resulted in me not being able to cope as these issues were a constant reminder. As a result, I resigned from my employment as I had reached the point of no return.

The traumatic incidents that I dealt with impacted on my ability to succeed in a personal relationship. My employer failed to support me in the traumatic incidents that I experienced, as I was expected to deal with whatever came my way.

If I had received support and psychological counselling I would not have resigned and would have been able to work through to my retirement age. My employer prevented me from reaching my potential by not providing a safe work environment for me.

Eventually I sought medical attention as I felt that I was on the verge of a breakdown. This led to me being diagnosed with post-traumatic stress disorder. What happened to me had and continues to have a detrimental impact on my mental health and everyday life.

Emily's story also highlights a common experience of our clients who describe that the mental health impacts of the sexual harassment can be exacerbated due to inadequate access to medical treatment or targeted counselling support. In Emily's story, the lack of initial medical and psychological support combined with an unsupportive employer not only had a severe impact on her health and career but also on her ability to maintain personal relationships.

PART 2: PREVENTING SEXUAL HARASSMENT

2.1 Primary prevention measures needed to address the drivers of sexual harassment

The drivers of sexual harassment cannot be effectively addressed by focusing on workplaces and the actions of duty holders alone; a holistic approach aimed at the broader community is required. Australia needs a strong primary prevention strategy to change gendered attitudes that lead to sexual harassment, integrating sexual harassment into existing funding, programs and initiatives that address violence against women. We note Our Watch's submission to the National Inquiry recommends that as part of these strategies for primary prevention there be 'significant investment in the development of an expert primary prevention workforce to lead, support and embed efforts in a range of settings including workplaces' and that this could include identification of workplaces as key settings for primary prevention work[11]. We also note that Our Watch recommends that work should begin on the development of a second *National Action Plan to Reduce Violence against Women and their Children* with a particular emphasis on primary prevention including on strategies to achieve cultural change and structural changes to address the drivers of sexual harassment.[12] We support these recommendations and believe that, if we address these gendered drivers of sexual harassment it will be less likely that people like our clients, Nomusa, Chloe, Jessica, Emily and Alice, will be subjected to sexual harassment in the future.

> **Recommendation 1: Funding should be granted to dedicated prevention efforts to address the underlying gendered drivers of sexual harassment, which should be part of a holistic strategy to prevent violence against women and promote gender equality in line with Change the story: A shared framework for the prevention of violence against women and their children in Australia.**

2.2 A stronger regulatory framework and response to prevent sexual harassment

The greatest flaw in our current regulatory approach to sexual harassment in Australia is the reliance on individuals to fix what is a cultural and systemic problem. This approach isn't working effectively in preventing and/or addressing sexual harassment when it occurs. Despite being unlawful for over 25 years, we continue to see concerningly high numbers of sexual harassment occurring across all industries and jobs.

We recommend that there be stronger and clearer legal duties on employers to take proactive steps to prevent sexual harassment at work, and strong and effective regulators

[11] Our Watch (2018) *Submission to the Australian Human Rights National Inquiry into Sexual Harassment in Australian Workplaces* , page 5.
[12] Ibid, page 6. See also Our Watch, Australia's National Research Organisation for Women's Safety and VicHealth (2015) *Change the Story: A shared framework for the primary prevention of violence against women and their children in Australia*, accessed online on 2 February 2019 at https://www.ourwatch.org.au/getmedia/0aa0109b-6b03-43f2-85fe-a9f5ec92ae4e/Change-the-story-framework-prevent-violence-women-children-AA-new.pdf.aspx

that have the full suite of regulatory tools and resources necessary to effectively tackle sexual harassment, including as a cultural, systemic, and health and safety issue.

It is our view that, subject to our recommendations further below, the regulators best suited to preventing sexual harassment as a systemic and cultural problem are work health and safety agencies. There are two main reasons for this. First, we consider that the existing positive general duty in work health and safety legislation already covers sexual harassment, which undoubtedly causes psychological and physical harm and is therefore a workplace health and safety hazard. Second, as discussed further below, work health and safety regulatory schemes also have the full suite of regulatory powers necessary to effectively prevent sexual harassment as a cultural and systemic issue.

It is important to note that in modern workplaces protection needs to be provided to the full spectrum of employment relationships and not just to the traditional employer and employee relationship. When we refer to "employers" in this submission we mean it in the fullest sense of the word including but not limited to principal and contractor relationships and labour hire relationships.

Why our reliance on individual complaints is not working

2.2.1 People who experience sexual harassment do not complain

Reform is needed to address the fact that our laws and agencies currently place the burden on the individual who has experienced sexual harassment to bring a legal claim to enforce their rights and change their workplace. Our regulatory agencies responsible for addressing sexual harassment either have not been given powers to enforce compliance with the law (i.e. human rights commissions) or do not commonly use their existing powers to do so (i.e. work health and safety agencies).

This reliance on individual complaints means that employers are rarely made aware that sexual harassment is occurring and there are rarely consequences for perpetrators and workplaces in which sexual harassment occurs. As the 2018 Australian Human Rights Commission's (**AHRC**) Fourth National Survey on Sexual Harassment in Australian Workplaces (**AHRC Survey**) confirmed, less than 1 in 5 people who experience harassment take action, and only 1 in 100 make a legal complaint to the AHRC or equivalent State or Territory agency.[13] There are many reasons why victims are reluctant to make a complaint, including the strain it has on their mental health and fears that it will have a negative impact on their reputation and career. This fear is not unfounded, as the 2018 AHRC Survey found that 'almost one in five people who made a formal report were labelled as a trouble-maker, victimised, ostracised or resigned.'[14]

Even when people do make a complaint or come forward and seek advice we often see complainants decide not to proceed with their claim for fear of the consequences to their career and reputation, as evidenced by Lydia's story below.

[13] Australian Human Rights Commission (2018) Everyone's Business: Fourth national survey on sexual harassment in Australian Workplaces, page 9.
[14] Ibid, pages 73-75.

Fear of reprisals for making complaints: Lydia's story

> I worked for a sole proprietor who subjected me to sexual harassment. He touched my bottom, sexually propositioned me, made comments about my appearance and invited me to his home. He also behaved this way to other female employees. There was nobody to complain to about the behaviour. I spoke up and my position was made redundant.
>
> I received legal advice that I had a strong claim but decided not to pursue the complaint. I was worried about my reputation and the risk of defamation.
>
> The boss is very connected in my industry and I knew if I complained that I would have a black mark next to my name.
>
> This experience has set me back in my career and I almost left the industry I am passionate about.

When people like Lydia are deterred from enforcing their rights nothing is done to stop the conduct from happening again. Often the employer is not even aware that sexual harassment has occurred in their workplace.

2.2.2 Sexual harassment complaints do not prevent future sexual harassment

In our practice experience another key flaw in the current reliance on individual complaints is that when an outcome is obtained as a result of a sexual harassment complaint, it rarely requires the employer to take preventative systemic action (such as conducting proper training or staff consultation about preventing sexual harassment, or implementing a policy to prevent harassment occurring again in the future).[15] Further, any consequences are rarely visible as the vast majority of claims resolve with a confidential settlement agreement. This means that sexual harassment claims rarely act as a visible warning or example to others and rarely result in steps being taken to reduce the risk of sexual harassment occurring again in future.

2.2.3 Employers are not required to prevent sexual harassment occurring

In our practice we see many employers who have failed to put any policies or training in place to attempt to prevent sexual harassment. We also see employers who have failed to address the risk of ongoing sexual harassment in the workplace even after becoming aware that it has occurred, as Fiona's story highlights.

Employers' failures to take action on sexual harassment: Fiona's story

> I was subjected to sexual harassment by my manager in my employment. This person would make lewd jokes, call me by sexual nicknames and discuss his

[15] These kinds of outcomes are very rarely obtained at hearing, and despite Victoria Legal Aid pushing for these outcomes in settlements we are only able to obtain them approximately 25% of the time.

sexual fantasies with me at work. He would also sit very close to me and other female staff.

> It was common knowledge in the workplace that he regularly behaved in this way to female staff, but it was never addressed. I initially spoke with the HR manager about the sexual harassment I was experiencing and nothing happened. There were six other women in my area who made complaints. It took six-months for the company to do anything.

The manager only left when the complaints against him became overwhelming as me and the other women were reporting more incidents. When he left the company the HR manager sent an office-wide email thanking him for his service and explaining that he is pursuing a new adventure. That email felt like the company telling us that we weren't valued.

I was treated unfavourably as a result of my internal complaint. I felt I had no choice afterwards but to resign.

I then lodged a legal complaint and I found the conciliation process to be very adversarial and intimidating. The organisation responded to my complaint by attacking my work ethic rather than by acknowledging any wrongdoing or responsibility for what happened. I felt like the process was a battle and afterwards I didn't have anything left in me to keep pursuing my rights. I felt depleted. I was unable to obtain any outcome and in the end I just let the matter go. My manager was never really punished for his behaviour. I ended up feeling like the system favours the perpetrator.

A key reason why employers are failing to prevent sexual harassment is that our regulatory system does not require them to do so.

Anti-discrimination laws

The focus of anti-discrimination law on individual instances of sexual harassment means that employers are not required to consider the broader workplace conditions that increase the risk of sexual harassment occurring and take proactive steps to address them. Our Commonwealth, State and Territory anti-discrimination laws do not require employers to take preventative steps to provide a working environment free from sexual harassment or discrimination.[16] An employer is only prompted to consider whether they took all reasonable steps to prevent the sexual harassment if they seek to avoid vicarious liability for a legal claim made by an employee who was subjected to harassment.[17] This approach means that employers are only held accountable for the steps they took to reduce the likelihood of

[16] Our *Sex Discrimination Act 1984* (Cth) does not impose a positive duty on employers, and while Victoria's *Equal Opportunity Act 2010* (Vic) does impose a positive duty it is not enforceable by direct action, though it can be the subject of a review or investigation by the Victorian Equal Opportunity and Human Rights Commission.
[17] See for example the *Sex Discrimination Act 1984* (Cth) section 106.

sexual harassment occurring after an incident of sexual harassment has already occurred. Given the low number of employees who come forward about sexual harassment this is not an effective mechanism to ensure preventative steps are taken.

Work health and safety laws and agencies

In addition to our anti-discrimination laws failing to require employers to prevent sexual harassment, our work health and safety agencies have failed to ensure employers take preventative steps to address sexual harassment. While our Commonwealth, State and Territory work health and safety laws already require employers to provide a safe working environment so far as is reasonably practicable,[18] this has not resulted in regulations, codes of practice, or significant enforcement activity regarding sexual harassment.[19] Further, our work health and safety agencies have not prioritised sexual harassment as a psychosocial and physical hazard in the workplace.[20] This is despite clear evidence of the significant health impacts for people who are sexually harassed, including psychological harm, [21] indicating that sexual harassment should be treated as a hazard to workplace health and safety.

As a result of the lack of relevant work health and safety regulations, codes of practice, guidance notes or enforcement activity, there is very little guidance for employers as to how they can effectively prevent sexual harassment (as opposed to simply preventing liability for sexual harassment), and little impetus for employers to prioritise sexual harassment prevention over other competing concerns.

From our practice experience the mere existence of a policy and training is not enough to prevent sexual harassment in a workplace. We have assisted clients to bring claims against many employers who try and avoid vicarious liability for the claim by pointing to a policy that is in place. It is often very brief and not accompanied by more than a mention during induction training.

There is significant evidence of the link between gender inequality and violence against women and the need to address it as a cultural issue.[22] Yet there is no framework to ensure that these gendered drivers of sexual harassment are addressed by employers in relation to workplace culture, or to ensure they are addressed at a wider societal level.

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[18] See for example the *Model Work Health and Safety Bill 2016* (Cth) section 19 and the *Occupational Health and Safety Act 2004* (Vic) section 21.

[19] The *Model Work Health and Safety Bill 2016* (Cth) does not define sexual harassment, the *Model Work Health and Safety Regulations 2019* (Cth) do not set out detailed requirements for how employers can comply with their duties in relation to sexual harassment, and there is no model code of practice to provide practical guidance to employers as to how they can comply with their duties regarding sexual harassment.

[20] For example there is no content on the Comcare website about sexual harassment: https://www.comcare.gov.au/preventing/hazards accessed 2 February 2019, nor is there any content on the Victorian Work Safe website about sexual harassment other than to note workers can get advice from a human rights commission: https://www.worksafe.vic.gov.au/topics accessed 2 February 2019.

[21] See for example, Adrienne O'Neil, Victor Sojo, Bianca Fileborn, Anna Scovelle, Allison Milner, 'The #MeToo movement: an opportunity in public health?' (2018) 391 *The Lancet* 2587. O'Neil et al state that, '[v]ictims, witnesses, or bystanders of sexual harassment can have adverse psychological consequences, including depression, anxiety, and post-traumatic stress-disorder (PTSD) – all risk factors for various chronic diseases.' See also, LM Cortina and JL Berdahl, 'Sexual Harassment in Organizations: A Decade of Research in Review', The SAGE Handbook of Organisational Behaviour: Volume 1, Micro Approaches, J Barling and CL Cooper (Eds), 469-497 (2008), 481 and LF Fitzgerald, C Hulin, F Drasgow, 'The Antecedents and Consequences of Sexual Harassment in Organizations: An Integrated Model', in GP Keita and JJ Hurell (eds), *Job Stress in a Changing Workplace: Investigating Gender, Diversity, and Family Issues* (1995) 55-73, 55.

[22] See for example Kim Webster and Michael Flood (2015), *Framework foundations 1: A review of the evidence on correlates of violence against women and what works to prevent it*. Companion document to Our Watch, Australia's National Research Organisation for Women's Safety and VicHealth, above note 12.

How our regulatory system can protect us all from sexual harassment

2.2.4 A clear positive duty that is effective at preventing sexual harassment

It is not enough to tell employers that they have a duty to provide a sexual harassment free workplace, we must tell them how to do so effectively. As outlined above, there is currently no framework around what is required of employers under work health and safety laws in Australia in order to provide a safe workplace in relation to sexual harassment. Further, in anti-discrimination law there is no enforceable positive duty to prevent sexual harassment at all.

As a result of our direct practice experience of a legal system that is ineffective at addressing or preventing sexual harassment, and organisational responses to sexual harassment that are likewise ineffective, we have looked to comparative jurisdictions to better inform our legal services and client advocacy. If we look to comparable jurisdictions overseas we can see examples of positive duties that require specific preventative steps be taken.

In Sweden, anti-discrimination law requires active measures to prevent discrimination and harassment including:

- continually investigating the existence and analysing the causes of discrimination and obstacles to equal opportunity in the workplace
- establishing guidelines and routines to prevent sexual harassment and victimisation and evaluating their effectiveness,
- promoting gender balance in their workplace through education, training, skills development and other appropriate measures, and
- annually documenting and evaluating the measures taken.[23]

These requirements are all enforced by the Equality Ombudsman which can conduct reviews, require access and information, and order compliance subject to financial penalties.

For an example of a positive duty in work health and safety law, we can look to Ontario, Canada where the law requires specific steps be taken by employers in order to comply with their duty to take every precaution reasonable to prevent sexual harassment including:

- developing a policy that is reviewed at least annually and posted at a conspicuous place in the workplace,
- developing a program to implement the policy which covers a range of things including measures and procedures for workers to make complaints and how they will be conducted, and
- providing instruction to employees about the content of the policy and program.[24]

These requirements are enforced by the Ministry of Labour's inspectors who can require access and information, issue compliance orders, and require compliance plans in addition to prosecuting breaches.[25]

[23] *Discrimination Act 2008* (Sweden) chapter 3, sections 1 to 13.
[24] *Occupational Health and Safety Act* 1990 (Ontario, Canada) sections 32.01 to 32.08.
[25] Ibid, sections 55-57.

While these international models are important context, in considering what kind of requirements to place on employers in Australia it is necessary to have regard to the available evidence about what preventative measures are actually effective. A recent taskforce conducted by the United States Equal Employment Opportunity Commission (**EEOC**) completed a comprehensive interdisciplinary review of the current evidence for what works at preventing sexual harassment in the workplace.[26]

Sexual harassment policies

The EEOC found that there is evidence that the existence of a sexual harassment policy is effective at reducing the incidence of workplace sexual harassment,[27] and made recommendations as to what the policy should cover and how it should be communicated to employees. Based on its research the EEOC recommended that a policy generally include:

- "A clear explanation of prohibited conduct, including examples;
- Clear assurance that employees who make complaints or provide information related to complaints, witnesses, and others who participate in the investigation will be protected against retaliation;
- A clearly described complaint process that provides multiple, accessible avenues of complaint;
- Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;
- A complaint process that provides a prompt, thorough, and impartial investigation; and
- Assurance that the employer will take immediate and proportionate corrective action when it determines that harassment has occurred, and respond appropriately to behavior which may not be legally-actionable "harassment" but which, left unchecked, may lead to same."[28]

The EEOC also recommended that the policy be regularly communicated to staff in a variety of forms and methods.[29]

Sexual harassment training

In addition to policies, a common measure to prevent sexual harassment is training. The EEOC established that there was no clear empirical study that proved the effectiveness of sexual harassment training.[30] However there was evidence that training at least increased understanding as to what kind of conduct is unacceptable at work,[31] and can result in employees feeling more confident to make complaints.[32]

Based on evidence from those with experience on the ground, including lawyers, investigators and employers, the EEOC concluded that training is an essential component of

[26] Chai Feldblum and Victoria Lipnic (2016) *Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace,* accessed online on 2 February 2019: https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf
[27] Chai Feldblum and Victoria Lipnic, above footnote 26, page 38.
[28] Ibid, page 38.
[29] Ibid, page 38.
[30] Ibid, page 45.
[31] Ibid, page 46.
[32] Ibid, page 48.

sexual harassment prevention so long as it is part of a holistic effort and has certain content and structural elements. That is, the training should be:[33]

- focused on behaviours not legal standards,
- tailored to the particular workplace using realistic scenarios for that workplace,
- cover how to make a complaint and what the process will be,
- expressly supported by senior leadership, with additional training for managers and supervisors about how to deal with sexual harassment, and
- conducted more than once a year by a live, qualified instructor.[34]

Importantly, the EEOC found evidence that the kind of training currently provided by employers in the US has little impact on attitudes towards sexual harassment.[35] The EEOC recommended that employers consider other forms of training such as bystander intervention training.[36]

Incorporating primary prevention into a positive duty

Given the evidence that the primary driver of sexual harassment is gender inequality,[37] we need to address gender inequality to reduce the prevalence of sexual harassment.

Utilising primary prevention in workplaces has already been the subject of two research-based resources which provide valuable examples of best practice:

1. Our Watch and the Victorian Government have developed the *Workplace Equality and Respect Standards* which outline how workplaces can promote and embed gender equality and respect in the workplace through a comprehensive organisational change process.[38]
2. Women's Health Victoria has developed *Working with Workplaces* which outlines some challenges and opportunities for workplace violence prevention and bystander programs.[39]

Any reforms implementing a positive duty that incorporates a prevention framework should take these primary prevention resources into account.

2.2.5 Clearer guidance for employers and other duty holders

Reform is urgently needed to incorporate the above best practice into our work health and safety and anti-discrimination laws to ensure there is an effective positive duty on employers to prevent sexual harassment.

[33] Chai Feldblum and Victoria Lipnic, above footnote 26, page 49.
[34] Ibid, pages 50-52.
[35] Ibid, page 47.
[36] Ibid, page 59.
[37] Kim Webster and Michael Flood, above note 22
[38] See the *Workplace Equality and Respect Standards* available online at: https://www.ourwatch.org.au/Workplace-Equality-Respect-Hub/Workplace-Equality-And-Respect-Category.
[39] See the Women's Health Victoria *Working with Workplaces* knowledge paper online at: https://whv.org.au/static/files/assets/0b102585/Working_With_Workplaces_May_2018_Knowledge_Paper_Issue_1_reformat.pdf.

Work health and safety laws

Experience shows that even clear empirical evidence about the drivers of sexual harassment has failed to permeate broader societal understanding or organisational practice.[40] It is likely that the evidence-based prevention measures described above will likewise remain largely in the realm of academia and specialised organisations (such as Women's Health Victoria and Our Watch) without a plan and a framework to implement these measures on a large, mainstream scale.

The work health and safety framework must make it clear that the general duty on employers to provide a work environment that is safe and without risks to health includes an obligation to provide a work environment that is free from sexual harassment. Work health and safety agencies must clearly communicate evidence-based measures, such as those described above, that employers and duty holders are required to implement in order to meet this legal obligation. There must also be for a framework for work health and safety agencies to assess and enforce compliance in relation to sexual harassment prevention. We refer to the 'Stop Gendered Violence at Work' report by the Victorian Trades Hall Council which addresses workplace sexual harassment in the context of gendered violence and suggests steps that can be taken within the work health and safety framework for this to occur.[41] If these measures were in place, people like our client Fiona above may never have been subjected to sexual harassment as their employer would have taken action before it was too late.

In order to provide greater guidance for employers the general duty in in the *Model Work Health and Safety Bill 2016* (Cth) should be supplemented by:

- Amending the *Model Work Health and Safety Regulations 2019* (Cth) to map out specific procedural requirements for addressing sexual harassment as a workplace hazard including policies and training that draw on best practice.
- Developing a sexual harassment code of practice which draws on best practice to provide practical guidance to employers as to how to comply with their obligations and which must be taken into account in determining whether a duty has been breached.

We note that Victoria and Western Australia have not adopted the model work health and safety laws however we consider these reforms can be applied to their laws in the same manner.[42]

While it is noted that the *Model Work Health and Safety Bill 2016* (Cth), the *Occupational Health and Safety Act 2004* (Vic) and the *Occupational Safety and Health act 1984* (WA) do not expressly address sexual harassment, it is not necessary to amend the general duty in

[40] For example, see Vicki J. Magley, Taylor D. Barr, Ragan E. Decker, and Courtney J. Pfeifer, '3.3 Appraisal and coping with sexual harassment: Existing and Needed Research', in edited by Ronald J. Burke, and Cary L. Cooper (eds), *Violence and Abuse in and Around Organisations*, (2018): 'Although there is clear empirical evidence that sexual harassment, even at fairly low levels, exacts a negative impact on its targets (c.f., Cortina & Berdahl, 2008) and that it is more likely to occur under three conditions: in male-dominated workplaces, with tolerant supervisors, and in overall tolerant climates (c.f., Fitzgerald, Drasgow, Hulin, Gelfand, & Magley, 1997), this research does not seem to have permeated much beyond the academic realm into a broader societal understanding.'

[41] Victorian Trades Hall Council (2017) *Stop Gendered Violence at Work: Women's Rights at Work Report*.

[42] These jurisdictions also have a general duty supplemented by regulations (see *Occupational Safety and Health Regulations 1996* (WA) and *Occupational Health and Safety Regulations 2017* (Vic)) and codes of practice or compliance codes (see section 57 of the *Occupational Safety and Health Act 1984* (WA), and section 149 of the *Occupational Health and Safety Act 2004* (Vic).

these Acts because it is already broad enough to cover sexual harassment.[43] Further there is a risk that the duty will be inadvertently limited in its application to other forms of harmful discrimination in the workplace if sexual harassment alone is highlighted in this way.

Recommendation 2: The Model Work Health and Safety Regulations and Codes of Practice should be amended to create an effective framework to prevent and address sexual harassment, and these amendments should be adopted by all jurisdictions that have adopted the model laws. Victoria and Western Australia should likewise incorporate any necessary amendments into their work health and safety laws to effectively prevent and address sexual harassment.

Anti-discrimination laws

Our Commonwealth, State and Territory anti-discrimination laws also have a key role to play in protecting workers from sexual harassment, and in addressing sexual harassment outside the workplace. The Victorian *Equal Opportunity Act 2010* imposes a positive duty on employers and other duty holders to take reasonable and proportionate measures to eliminate sexual harassment as far as possible.[44] Unfortunately this positive duty is currently only enforceable through an investigation by the Victorian Equal Opportunity and Human Rights Commission (**Victorian Commission**) which does not currently have the powers to compel compliance.

Commonwealth, State and Territory anti-discrimination laws should be amended to:

- Impose a positive duty on employers to eliminate sexual harassment as far as possible.
- Empower human rights commissions to make guidelines for compliance which must be taken into account in any application under the law and must be reviewed regularly.[45]
- Enable the positive duty to be enforced by the relevant human rights commission with the suite of powers discussed below.

Recommendation 3: Commonwealth, State and Territory anti-discrimination laws should impose an enforceable positive duty on employers to prevent sexual harassment, supplemented by guidelines for compliance.

2.2.6 Regulators empowered and resourced to utilise a full suite of powers to enforce compliance with the law

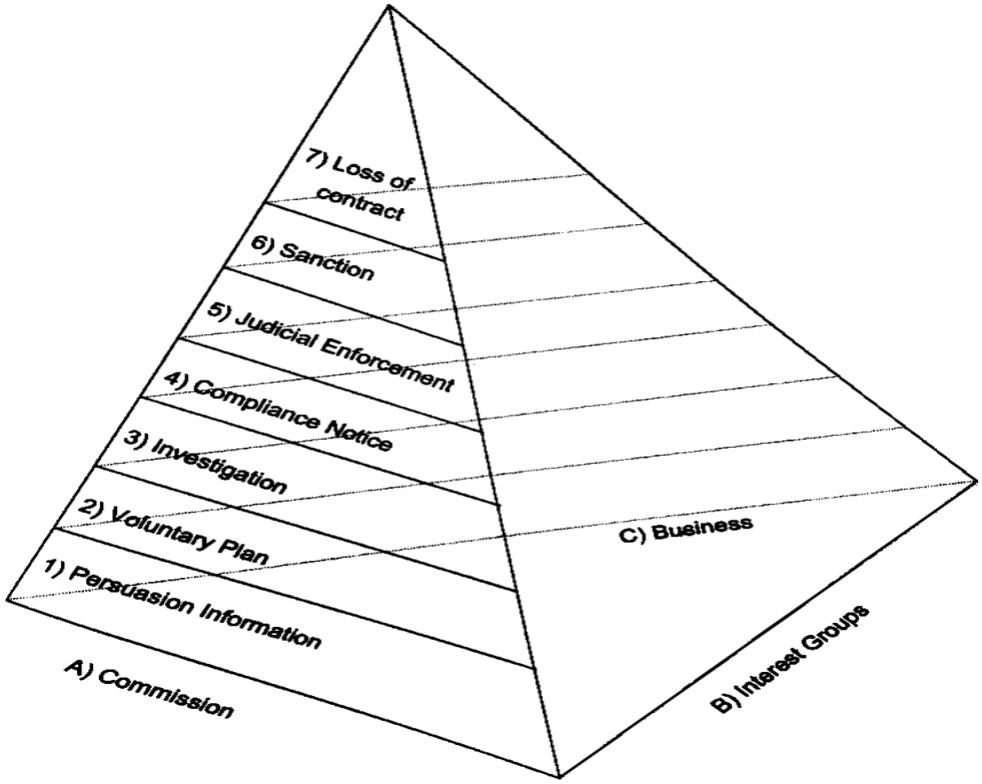
In addition to having clear positive duties in place for employers to prevent sexual harassment, we need a framework to ensure that these duties are enforced. The well-established concept of a regulatory pyramid (see Table 1. below) is based on the idea that efforts to persuade compliance with the law are more effective if they are backed by the

[43] See section 19 of the *Work Health and Safety Bill 2006* (Cth), section 19 of the *Occupational Safety and Health Act 1984* (WA), and section 21 of the *Occupational Health and Safety Act 2004* (Vic).
[44] *Equal Opportunity Act 2010* (Vic) section 15.
[45] The Australian Human Right's Commission currently has the power to make guidelines under both the *Sex Discrimination Act 1984* (Cth) and the *Australian Human Rights Commission Act 1986* (Cth) but they are not enforceable. The AHRC's guidelines regarding workplace sexual harassment, *Effectively preventing and responding to sexual harassment: A code of practice for employers,* were last updated in 2008.

threat of punishment for non-compliance.[46] British academics Hepple, Coussey and Choudhury developed an enforcement pyramid for regulating discrimination and sexual harassment laws:

- At the base of the pyramid is persuasion, including education and training, followed by voluntary action plans.
- Next is an investigation by a Commission which can enter into enforceable undertakings or issue compliance notices.
- At the top of the pyramid is prosecution and sanctions.[47]

Table 1.Regulatory pyramid:[48]



Recent research on the deterrence impact of the activities of the Fair Work Ombudsman supports the need for a full suite of enforcement powers, finding that a greater emphasis on concentrated and sustained enforcement activity can increase compliance with employment standards.[49]

Work health and safety agencies

While our work health and safety agencies already have the full suite of powers in the regulatory pyramid above, they have not utilised these powers to address sexual

[46] See Ian Ayres and John Braithwaite (1992) *Responsive Regulation: Transcending the Deregulation Debate,* Oxford University Press.
[47] Bob Hepple, Mary Coussey and Tufyal Choudhury (2000) *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation*, Hart Publishing, page 58-59.
[48] Ibid, page 59. Note the "loss of contract" category at the top of the pyramid represents an additional sanction on government contractors who are found to be liable for persistent non-compliance.
[49] Tess Hary and John Howe (2017) *Creating ripples, making waves? Assessing the general deterrence effects of enforcement activities of the Fair Work Ombudsman,* Sydney Law Review, volume 39, page 502.

harassment in a regular or systemic way. Given work health and safety agencies have the existing legal powers and investigations framework needed to be effective, it is our view that they must take the lead in addressing sexual harassment in Australian workplaces.

Increased resourcing is required to enable work health and safety agencies to address sexual harassment, and training is required for staff of these agencies as to what constitutes sexual harassment and how to undertake their functions in relation to it.

Human rights commissions

Human rights commissions have a key role to play alongside work health and safety agencies in addressing sexual harassment:

- Work health and safety agencies can only address sexual harassment within workplaces, however sexual harassment is prohibited in other areas of life such as goods and services and education. Approximately 15% of our sexual harassment advice at Victoria Legal Aid is in relation to sexual harassment outside the workplace. Similarly, approximately 18% of complaints under the *Sex Discrimination Act 1984* (Cth) to the AHRC relate to sexual harassment outside the workplace.[50]
- Last year the AHRC received over 14,000 enquiries,[51] which gives it the opportunity to identify systemic issues and repeat offenders. The AHRC and State and Territory human rights commissions should be granted powers to address the systemic issues they identify through their functions under anti-discrimination laws.
- The AHRC and State and Territory human rights commissions have a key role to play in public education. We encounter many employers that do not understand what their obligations are under anti-discrimination law, and many employees do not understand what constitutes sexual harassment. The AHRC National Prevalence survey found that half of participants who said they hadn't been sexually harassed based on the legal definition of sexual harassment did report being subjected to behaviours that constitute sexual harassment.[52]

Our Commonwealth, State and Territory human rights commissions lack the powers that form the top of the regulatory pyramid outlined above. The AHRC and State and Territory Commissions have education and dispute resolution functions, and varying investigation powers, but no power to compel compliance with anti-discrimination laws. Reforms in the original *Equal Opportunity Act 2010* in Victoria would have enabled the Victorian Commission to enter into enforceable undertakings and issue compliance notices, however these reforms were pulled back in 2011 before coming into force.

Our Commonwealth, State and Territory anti-discrimination laws should be amended to:

- Ensure all human rights commissions have the power to investigate acts or practices of their own motion that may be inconsistent with anti-discrimination law, without additional procedural requirements such as those present under section 127 of the Victorian *Equal Opportunity Act 2010*.

[50] Australian Human Rights Commission 2017-2018 Complaint statistics, accessed online on 2 February 2019 at https://www.humanrights.gov.au/sites/default/files/AHRC_Complaints_AR_Stats_Tables_2017-18.pdf.
[51] Ibid.
[52] Australian Human Rights Commission, above footnote 13, page 24.

- Enable all human rights commissions to enforce compliance with anti-discrimination law following an investigation, including entering into enforceable undertakings with employers and issuing compliance notices.

It is essential that increased resourcing be provided to human rights commissions to make these enforcement powers meaningful and to increase the commissions' abilities to undertake their public education and inquiries functions.

Regulatory overlap

While the degree of overlap of regulatory functions of human rights commissions and work health and safety agencies would potentially increase as a result of the above recommendations. In practice, individual victims of sexual harassment would have the option of pursuing both a complaint through a human rights commission and reporting the incident to a work health and safety agency for investigation and potential enforcement or prosecutorial action. This can be managed by memoranda of understanding between the regulators to ensure they share data and coordinate their activities.[53] According to our recommendations, both human rights commissions and work health and safety agencies would have research and educative functions, powers to issue guidance materials, investigative powers, and power to issue enforceable undertakings and compliance notices, and seek court enforcement of such notices. However, only work health and safety agencies would have the power to prosecute and seek penalties for sexual harassment-related contraventions. As indicated above, this limit on the regulatory pyramid of powers of human rights commissions may limit the effectiveness of their other regulatory powers, which lack the ultimate threat of prosecution and penalty. For this reason, we reiterate that work health and safety agencies should play the lead role in addressing workplace sexual harassment.

Recommendation 4: Commonwealth, State and Territory work health and safety agencies should be resourced and trained to effectively address sexual harassment.

Recommendation 5: Commonwealth, State and Territory human rights commissions should be granted increased powers and resources to effectively address sexual harassment including greater investigation powers, the power to enter into enforceable undertakings, and the power to issue compliance notices.

[53] For an example of this in practice, see US Equal Employment Opportunity Commission, Memoranda of Understanding, accessed at https://www.eeoc.gov/laws/mous/index.cfm - on 10 February 2019, which contains a list of Memoranda of Understanding between the EEOC and other State agencies, which "explain how two or more agencies will cooperate and interact when their enforcement responsibilities overlap."

PART 3: REDRESS AND SUPPORT FOR VICTIMS OF SEXUAL HARASSMENT

The sections and recommendations above have largely focussed on systemic measures to address sexual harassment as a cultural problem, including as a significant workplace health and safety issue. It is equally important that the individual complaints-based framework operates as fairly and effectively as possible. Everyone has the right to be safe and healthy at work. When this right is infringed and workers experience workplace harassment and discrimination they are entitled to fair and accessible redress. Further, while limited, there is some scope for individual complaints processes to contribute to systemic change, as discussed below.

Given the harm and distress caused by sexual harassment it is also critical that there are accessible specialist services available to support victims of sexual harassment. This is necessary in order to provide victims of sexual harassment the support necessary to both recover and continue to participate fully in life and work, and also to pursue any avenues for regulatory action or legal redress that are available to them.

3.1 Increasing the impact of individual complaints

Until sexual harassment is eliminated from Australian workplaces individual complaints will always be a key feature of our regulatory system. In jurisdictions that have a positive duty to address sexual harassment and a regulatory body with a range of enforcement powers, such as Sweden, the vast majority of individual claims still settle without enforcement activity from the regulator.[54] Any reforms to our anti-discrimination laws should consider ways in which our individual complaints system can better prevent and address sexual harassment. This should include reforms directed at encouraging systemic outcomes in dispute resolution processes, and improving access to information and data about the nature of sexual harassment complaints that are initiated, and outcomes achieved.

3.1.1 Use of standard form settlement agreements to encourage systemic outcomes

Sexual harassment complaints commonly resolve prior to a final hearing on terms that seek to address the loss or harm caused to the complainant, often through financial compensation. While complaints may also resolve on terms requiring some preventative organisational change on the part of employers, such as undertaking to implement training or policy updates, in our experience these outcomes are infrequent.

The AHRC's 2017-18 annual report notes that 31% of conciliation agreements included 'terms that benefit the community', although it's not clear what proportion of these agreements related to sexual harassment. In the 2017-18 financial year 25% of the matters where VLA assisted complainants to negotiate an outcome by agreement with their employer included terms requiring the employer to make systemic organisational changes aimed at preventing future sexual harassment.

[54] In 2017 in Sweden the Equality Ombudsman received 2,475 complaints and investigated only 204 of them, see Paul Lappalainer (2017) *Country Report: Non-Discrimination, Sweden,* European Commission, page 117.

In our experience of settlement negotiations, employers and their representatives are often taken aback by settlement proposals that require systemic or organisational change and are unwilling to consider such proposals. In one instance, a Respondent expressed surprise that such outcomes were being sought and remarked that this must be 'just a legal aid thing'. Remedies of this nature are also rarely ordered by courts and tribunals. The infrequency of these outcomes severely limits the systemic change that is generated from the individualised complaints process.

One solution is to amend the standard form settlement agreements used by human rights commissions and the Fair Work Commission to include terms aimed at preventing and addressing any future harassment. This could prompt complainants to consider seeking such outcomes and normalise these requests, whilst ultimately leaving the final terms of any agreement to the parties' discretion. Ideally, commission processes would also be appropriately updated to prepare parties to consider these terms, including resources and training for mediators/conciliators. Standard terms relating to release and enforcement should be likewise amended to ensure compliance with these obligations, together with payment of financial compensation.

Recommendation 6: Standard form settlement agreements for sexual harassment complaints should include terms requiring duty holders to implement systemic measures to prevent and address sexual harassment.

3.1.2 Improved access to information and data

There is limited publicly available data and information about complaints of sexual harassment that are initiated. This is due in part to:

- The low numbers of legal complaints that proceed to final hearing, with most settling out of court on the basis that the details of the complaint remain confidential. In our practice experience, these settlement clauses are routine.
- An absence of consistent recording and reporting of deidentified complaints outcome data from relevant statutory commissions. Although the AHRC publishes some deidentified details of complaints proceeding to conciliation, including settlement outcomes, these records are ad-hoc and are not consistently updated.[55]

The impact of this is that the extent of sexual harassment as a wide-spread problem is obscured from the public, employers, governments and regulators. Were this data available it could inform strategies to address systemic sexual harassment by identifying drivers, patterns of abuse and industry trends. It would also provide a resource to evaluate the effectiveness of the current laws and regulatory regime.[56]

Further, this lack of transparency acts as an inhibitor for would-be complainants. Significant wins that might demonstrate the effectiveness and accessibility of the individualised complaints system are not visible to those subjected to sexual harassment. Deidentified information, including the nature of the complaint and settlement outcomes could encourage victims to more readily initiate complaints and provide them with guidance on fair settlement

[55] McDonald, P and Charlesworth, S (2013), 'Settlement outcomes in sexual harassment complaints', Australasian Dispute Resolution Journal, vol.24, no.4, pages 259 – 269.
[56] Ibid.

outcomes. Equally, the reporting of settlement outcomes could act as a deterrent to perpetrators and employers.

Resourcing statutory commissions to consistently record and report publicly on sexual harassment complaints data would address this issue. Ideally both aggregate and disaggregated data would be made available. Kingsford Legal Centre's report 'Having my voice heard: fair practices in discrimination conciliation', recommends available disaggregated data include:

- The nature of the complaint.
- Outcomes achieved.
- How many parties were legally represented.
- The number of complaints accepted, terminated, withdrawn or settled.[57]

Any reforms to the individual complaints process should draw on the findings of the Kingsford Legal Centre's survey of vulnerable applicants' experience of conciliation processes and subsequent report.

We are also of the view that aggregated data on settlement outcomes, both financial and non-financial, would also be a valuable resource for potential complainants. In addition, any reporting and recording mechanism would also ideally capture matters resolved prior to final hearing at the Victorian Civil and Administrative Tribunal, the Federal Court and Federal Circuit Court.

We are aware that internationally there have been moves to regulate confidentiality clauses in settlement agreements to identify repeat offenders and provide for greater transparency.[58] We would urge that this measure be approached with caution. In our experience, confidentiality clauses often serve the complainant's interest by encouraging the early resolution of claims and allowing complainants to avoid the trauma of a public hearing. In some instances, complainants will also have valid reputational concerns, for instance that they may be labelled as litigious. These clauses are often actively sought by our clients and we would be concerned that complainants may be deterred if an early and/or confidential resolution was no longer available.

Recommendation 7: The Commonwealth, State and Territory human rights commissions should be required to regularly record and report deidentified complaint data and information.

[57] Maria Nawaz, Anna Cody & Emma Golledge, 'Having my voice heard – Fair practices in discrimination conciliation' (Report), Kingsford Legal Centre (2018) 37.
[58] See for example Cal Civ Code §1001 (2019), and Wash Rev Code § 49.44.210 (2018).

3.2 Complaint processes must be fairer and more accessible

3.2.1 Include in the Fair Work Act explicit protection against sexual harassment

Unlike discrimination protections, sexual harassment protections are not explicitly included in the *Fair Work Act 2009* (Cth) (**FW Act**).[59]

We recommend that the FW Act be amended to expressly protect employees from sexual harassment for a number of reasons:

- In our practice experience employers have a much stronger understanding of their obligations under the FW Act than they do of their obligations under anti-discrimination law.
- As outlined above sexual harassment often goes hand in hand with other forms of discrimination and unlawful conduct. Incorporating sexual harassment into the FW Act also removes the necessity for employees to bring multiple claims if aspects of their employer's conduct are captured by the FW Act but there is a sexual harassment aspect that falls outside the protection of the FW Act.
- As highlighted below, a significant benefit to claims under the FW Act is the speedy process at the Fair Work Commission. Incorporating sexual harassment protections in the FW Act would enable employees to take advantage of this process where it suits their interests.
- Finally, the Fair Work Ombudsman (**FWO**) has a key role to play in enforcing employment regulations. When the FWO is investigating a workplace it should have the ability to consider the full range of unlawful workplace conduct including sexual harassment.

A stand-alone civil remedy provision in the FW Act would provide clear protection from sexual harassment in the FW Act jurisdiction.

While an alternative would be to clarify that sexual harassment can constitute sex discrimination under section 351 this approach is not recommended because:

- It would not provide a clear outline of what kind of conduct is unlawful, and
- It would be an unnecessarily legally complex protection requiring the victim to prove that the sexual harassment was "because of" the victim's sex, and that the conduct fit into the categories of adverse action.[60]

We appreciate that there may be concerns about complainants duplicating proceedings, however there are already mechanisms in the FW Act to ensure that claims of the same nature are not brought in multiple jurisdictions.[61] Further, the overlap of regulatory functions between the Fair Work Ombudsman, work health and safety agencies and human rights commissions can be managed by memoranda of understanding between the regulators to

[59] Discrimination is prohibited under section 351 of the *Fair Work Act 2009* (Cth).
[60] See *Fair Work Act 2009* (Cth) sections 342 and 351.
[61] See *Fair Work Act 2009* (Cth) sections 725 to 732.

ensure they share data and coordinate their activities. While having multiple avenues available for complaints may be confusing for complainants, this is already the case for discrimination claims and as a result, human rights commissions and the Fair Work Commission already have processes in place to provide information to people with multiple legal options, and identify and respond to people who have lodged multiple complaints.[62] We consider that the existence of funded specialist legal services can also significantly assist complainants to navigate their legal options.

Recommendation 8: The Fair Work Act should be amended to protect workers from sexual harassment with a stand-alone civil remedy provision to enable the Fair Work Commission to receive complaints and the Fair Work Ombudsman to tackle sexual harassment.

3.2.2 Extend the coverage of protections against sexual harassment

In our practice experience the limitation of sexual harassment protections to certain areas of public life can leave employees without protection in circumstances related to their employment. For example, we have seen more than one client who has been sexually harassed by their boss's husband in a workplace context. Because the boss's husband was not an employee or other workplace participant captured by the SDA, it was not possible for these clients to bring a sexual harassment claim in relation to conduct which they found incredibly distressing.

Queensland has extended protection from sexual harassment to all areas of public life, making it unlawful for any person to sexually harass another person.[63] The vicarious liability provision remains and ensures employers would only be held responsible for conduct of their employees or agents while acting as an agent.[64]

Recommendation 9: Commonwealth, State and Territory anti-discrimination laws should be amended to expand protection from sexual harassment to all areas of public life.

3.2.3 Share the burden of proving sexual harassment

Under Commonwealth, State and Territory anti-discrimination laws the burden of proving sexual harassment rests solely with the applicant.[65] This means that our sexual harassment laws do not start from the position of believing victims of sexual harassment, rather the victim must prove that they are telling the truth. In our practice experience many people are deterred from taking legal action about sexual harassment due to difficulties proving the conduct, including due to lack of access to documents and other information held by the employer,

[62] For example, the complaint form of the Australian Human Rights Commission asks whether a complaint has already been made to another organisation (https://www.humanrights.gov.au/complaints/make-complaint/complaint-form), and section 46PH of the Australian Human Rights Commission Act 1986 (Cth) enables a complaint to be terminated if it has already been or could be adequately dealt with by another statutory authority.
[63] *Anti-Discrimination Act 1991* (QLD) section 118.
[64] Ibid, section 133.
[65] For example, under the *Sex Discrimination act 1984* (Cth) the onus lies with the applicant and only shifts to the respondent to prove that a requirement, condition or practice is reasonable under section 7C.

and witness reluctance to give evidence. These problems have been referred to as the employer's 'monopoly on knowledge'.[66]

The significant power imbalance resulting from the respondent's monopoly on knowledge is recognised by the General Protections provisions in the FW Act. Under section 361 of the FW Act an employer has the burden of proving a non-discriminatory reason for an action taken if a General Protections claim is lodged. The Explanatory Memorandum to the Fair Work Bill 2008 (Cth) outlines that this section "recognises that, in the absence of such a clause, it would often be extremely difficult, if not impossible, for a complainant to establish that a person acted for an unlawful reason". The Courts have held that this first requires the applicant to establish a prima facie case that the discriminatory conduct occurred before the burden of proof shifts to the respondent. This approach is in line with the approach of comparative jurisdictions such as the United Kingdom.

Our experience in FW Act discrimination claims is that shifting the burden of proof to the employer improves the prospect of the matter resolving by agreement at a mediation as well as at hearing. This is because an employee can shift the focus of a mediation to what evidence the employer has that its actions were lawful, rather than focusing solely on the limited evidence available to the employee. We need to amend anti-discrimination laws to ease the evidentiary burden on victims of sexual harassment and remove this barrier to victims pursing complaints.

Recommendation 10: Commonwealth, State and Territory anti-discrimination legislation should be amended to shift the burden of proof to the employer once the employee has established a prima facie case.

3.2.4 Extend the time limits for making a legal complaint

In our practice experience it is difficult for many people who have experienced sexual harassment to seek advice and take action within the current 6 month time limit under the *Australian Human Rights Commission Act 1986* (Cth). There are many reasons for this including the mental health impacts of sexual harassment which can be severe, and reluctance of some employees to report complaints while they are still employed. The case study of Penny below illustrates this, where Penny needed time to make sense of what happened and work through feelings of shame and guilt before she could take action. For some clients the knowledge that their claim may be rejected because it is outside the time limit is enough to prevent them from making a claim at all. Further, the time delay can be used by employers responding to a claim to delay proceedings and increase costs with interlocutory jurisdictional proceedings.

If we look to overseas jurisdictions for comparison Ontario, Canada has recognized the barriers to early reporting and completely removed the limitation period for civil sexual harassment lawsuits.[67]

[66] Margaret Thornton, The Liberal Promise: Anti-Discrimination Legislation in Australia (1990) 180 and Laurence Lustgarten, 'Problems of Proof in Employment Discrimination Cases' (1977) 6 Industrial Law Journal 212, 213. See also Dominique Allen, 'Reducing the Burden of Proving Discrimination in Australia' [2009] 31 Sydney Law Review 579, 583.

[67] CBC Radio (2018) *Civil cases for sexual harassment — a new avenue for women seeking justice?* Accessed online on 1 February 2019: https://www.cbc.ca/radio/thecurrent/the-current-for-january-08-2017-1.4475517/civil-cases-for-sexual-harassment-a-new-avenue-for-women-seeking-justice-1.4475519.

Comparing to other employment related rights of action in Australia the time limit for all non-dismissal related civil remedy provision protections in the *Fair Work Act 2009* (Cth) is 6 years.[68] This represents a much fairer time limit on claims than 6 or 12 months and would enable more people who have experienced sexual harassment to come forward and hold perpetrators to account.

Recommendation 11: Commonwealth, State and Territory anti-discrimination legislation should be amended to extend the time limit for bringing a complaint to 6 years.

3.2.5 Reduce the risk of prohibitive costs orders

As indicated above, many clients are deterred from pursuing a meritorious legal complaint as a result of the evidentiary burden of proving their claim and the employers 'monopoly on knowledge'. This deterrent effect is significantly compounded by the risk of incurring an adverse costs order in the event that they lose their case. The principle that 'costs follow the event' acts as a strong disincentive against taking legal action, particularly given the economic power imbalance between most complainants and perpetrators in the area of employment.

While there is discretion to not award costs under the SDA, Courts have not considered claims arising under other Federal discrimination legislation to warrant any departure from the ordinary rule in that jurisdiction that costs will follow the event.[69] The approach to costs is contrary to the approach to legal costs in the relevant provisions of the FWA and State and Territory laws. Under the Victorian *Equal Opportunity Act 2010* (Vic), for example, costs may be ordered at the Tribunal stage but only where one party has unreasonably caused the other to incur unnecessary costs. The Victorian Civil and Administrative Tribunal has ruled that costs orders should not be made lightly in the human rights jurisdiction so as not to deter applicants from using the method of redress provided by the law.[70] Unfortunately, however, the reality is that the failure to reward successful applicants with a favourable costs order is having the opposite effect due to the risk that their own legal costs will be equal or greater than the compensation awarded.

The deterrent effect of the current costs rule could be ameliorated by allowing costs orders against an unsuccessful defendant, but limiting costs orders against unsuccessful applicants to instances where the application is frivolous, vexatious or without foundation. This is the approach taken in discrimination cases in the United States.[71] The US Supreme Court has held that there are at least two strong equitable considerations favouring this approach, being that discrimination law is a law that Congress considered of the highest priority, and when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law. Under section 43 of the *Federal Court of Australia Act 1976* (Cth) and section 79 of the *Federal Circuit Court of Australia Act 1999* (Cth) the Courts' costs powers are subject to any restrictions placed by other Acts. The *Australian Human Rights Commission Act 1986* (Cth) could be amended to insert a provision adopting this approach.

[68] *Fair Work Act 2009* (Cth) section 544.
[69] *Hollingdale v North Coast Area Health Service (No.2)* [2006] FMCA 585 per Driver FM.
[70] *Tan v Xenos* [2008] VCAT 1273 per Judge Harbison VP.
[71] *Christianberg Garment Co v EEOC* 434 US 4012 (1978).

Recommendation 12: Commonwealth, State and Territory anti-discrimination laws should be amended to include a costs rule which provides that costs orders against an unsuccessful defendant are allowed, but costs orders against unsuccessful applicants are limited to instances where the application is frivolous, vexatious or without foundation.

3.2.6 Increase resourcing of human rights commissions to enable the early resolution of sexual harassment complaints

The reported average time from receipt to finalisation of a complaint at the AHRC in 2017-18 was approximately 4.6 months, indicating a delay between the lodgement of a complaint and the conciliation.[72] This delay prolongs the dispute as well as the stress associated with the dispute. This is particularly concerning for complainants who remain employed in the workplace where the harassment occurred and wish to maintain harmonious working relationships and retain their employment.

The AHRC should be properly resourced to provide a more timely complaints process, with consideration of more ambitious targets for the time between the initiation of a complaint and a conciliation. The Fair Work Commission sets a target of providing a conciliation for unfair dismissal applications within 34 days of a complaint being lodged,[73] and in 2017-18 the median time between lodgement and conciliation of general protections claims involving dismissal was 40 days.[74] By comparison, the AHRC aims to finalise 85% of complaints within 12 months.[75]

We appreciate that there will be circumstances where it is appropriate to take a slower approach to resolution, such as when either party is experiencing ill-health. However, most parties desire a resolution of their dispute as soon as possible, and for some people a swift resolution will mean that they can save their working relationship and stay employed.

Recommendation 13: The Commonwealth, State and Territory human rights commissions should be resourced to reduce the current wait times for conciliations.

3.2.7 Improved alternative dispute resolution processes

We routinely represent clients with complaints of sexual harassment and discrimination in alternative dispute resolution processes (**ADR**) across various jurisdictions, including the Fair Work Commission, the AHRC, the Victorian Commission, as well as Courts and Tribunals. These processes include mediations, conciliations and compulsory conferences in the Victorian Civil and Administrative Tribunal (overseen by a member of the Tribunal).

Our experience of these processes reflect the findings of Kingsford Legal Centre's recent survey; that there is a lack of consistency within and between jurisdictions.[76] There are some discernible differences in the models of dispute resolution adopted by the commissions[77] that

[72] While the date when a complaint is finalised does not necessarily coincide with the conciliation date, in our experience most matters that finalise do so on the day of conciliation or shortly thereafter.
[73] Fair Work Commission annual report 2017-18 online, Fair Work Commission: https://www.fwc.gov.au/annual-report-2017-18
[74] Fair Work Commission, above footnote 73
[75] Australian Human Rights Commission (2018) *Annual Report 2017-2018*, page 27.
[76] Maria Nawaz, Anna Cody & Emma Golledge, above note 57, page 45.
[77] See the discussion of models of ADR in Maria Nawaz, Anna Cody & Emma Golledge, above footnote 57, page 6.

we have identified through practice experience. For instance, the Fair Work Commission has minimal wait times between lodgement and conciliation, although its ADR processes are generally outcomes focussed.

In many instances, however, our clients want the opportunity to explain to the respondent their experience of the harassment and its impact on them. When not provided with this opportunity clients often leave feeling that their dispute and related feelings remain unresolved, even though the parties may have reached a settlement agreement. In some cases, an outcomes focussed process can impede resolution because a party is unwilling to agree to settle their dispute in the absence of feeling heard.

In our experience, the ADR processes across jurisdictions will not always provide a forum for this and the process often turns heavily on the individual style of the mediator or conciliator. In particular, some mediators will be engaged with the issues and informed of the relevant legislative provisions, whilst others will take a hands-off approach and allow the process to be driven by the legal representatives. Inconsistences in these processes makes it difficult for us to prepare clients for what to expect and can compound their distress. In many cases, clients will feel pressured to resolve their claim on terms that do not meet their interests.

The Kingsford Legal Centre recommends that 'a basic framework for conciliation procedures should be provided to the parties and any representatives prior to conciliation, similar to the conciliation agenda provided by AHRC to parties'.[78] We agree and consider that a key part of the framework should include providing the parties with an opportunity to speak about their experience. It is our view that providing a clear structure and framework for conciliations would reduce inconsistencies in individual conciliator or mediator styles and clarify the expectation of everyone involved, including the expectation that conciliations and mediations are a restorative process.

Recommendation 14: A basic framework for alternative dispute resolution procedures in courts, tribunals and commissions that deal with sexual harassment complaints should be provided to the parties and any representatives prior to a conciliation or mediation, and should include specific time for individuals to speak about their experience and the impact of the harassment on them.

Recommendation 15: Conciliators and mediators should receive consistent training in alternative dispute resolution theory and techniques from experts in the field, including in how to mitigate power imbalances.

[78] Maria Nawaz, Anna Cody & Emma Golledge, above footnote 57, pages 45-46.

3.3 Better support for victims of sexual harassment

3.3.1 Better protections of complainants within their employment

We have seen many clients suffer punitive consequences at work as a result of making a complaint about sexual harassment, echoing the AHRC Survey findings.[79] These consequences include "being labelled a troublemaker, being victimised or ignored by colleagues, being disciplined or resigning."[80]

While there is some legal protection if the negative consequences amount to unlawful victimisation under anti-discrimination law[81] or adverse action under the *Fair Work Act 2009* (Cth),[82] there are no explicit legislative standards regulating employer responses to complaints of sexual harassment. Employers will avoid liability for a claim of sexual harassment if they can show they took reasonable precautions,[83] or all reasonable steps to prevent the conduct. However, this will not necessarily include responding appropriately to the complaint that precipitated the legal claim.

As a result, our clients have experienced the following detriment without any legal redress: [84]

- deeply flawed workplace investigations, for example investigations that:
    - lacked procedural fairness,
    - inappropriately applied a criminal standard of proof, or
    - failed to communicate the outcome of the investigation to the complainant; and
- unacceptable employer responses to their complaint, for example:
    - inaction or long delays,
    - conduct deterring the complainant from making a formal complaint,
    - isolating the complainant,
    - requiring the complainant to work in close proximity to the perpetrator, or
    - standing the complainant down.

The result is that complainants feel demoralised, perpetrators of sexual harassment may not face appropriate sanction and ongoing employees may be deterred from speaking up.

There is also a lack of regulation of external workplace investigators who are often engaged by employers to investigate complaints of sexual harassment, with no requirements to undertake specific training or hold a particular license.[85]

Although complaint handling processes and investigations will always cause some degree of tension or stress, there should be a mechanism for individuals to hold employers and

[79] Australian Human Rights Commission, above footnote 13.
[80] Ibid.
[81] Section 103 *Equal Opportunity Act 2010* (Vic), Section 93 *Sex Discrimination Act 1984* (Cth).
[82] Section 342, *Fair Work Act 2009* (Cth).
[83] Section 110*, Equal Opportunity Act 2010* (Vic).
[84] Case law demonstrates that the requirement to show that the punitive conduct was taken *because of* the complaint in order to prove a claim of victimisation has proved insurmountable for complainants in many instances, with Courts and Tribunals unwilling to make a finding of victimisation: *Lazos v Australians Workers Union & Anor* [1999] VCAT 635, *Besley v National Aikido Association Inc* [2005] VCAT 245. Similarly, attempts to frame onerous requirements imposed in investigation processes as claims of indirect discrimination on the basis of sex have failed: *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334, 376.
[85] Although statutes regulating the private security industry, such as the *Private Security Act 2004* (Vic) *may* apply to workplace investigators, but this has not been judicially considered: see Adriana Orifici, *Workplace Investigations and Regulation: A Preliminary Map*, Presentation at the Australian Labour Lawyers Association Conference (9 November 2018).

investigators accountable for conduct that falls well below an agreed standard, such as in the examples outlined above. This issue could be addressed by amending the law to provide a legal claim for complainants subjected to an inadequate employer response to their complaint.

Providing complainants with the option to initiate an action against employers for such conduct would allow the individualised complaints system to do more to incentivise employers to take appropriate action to respond to sexual harassment, as well as encouraging more complainants to come forward.

Recommendation 16: Consideration should be given to reforming Commonwealth, State and Territory anti-discrimination laws and the Fair Work Act to improve protection and redress for people who complain of sexual harassment and suffer detriment because the employer or other duty holder fails to respond reasonably or handles an investigation badly.

3.3.2 Confidential online reporting tool for victims of sexual harassment

As outlined above, there are a number of barriers to people who have experienced sexual harassment coming forward and only 1 in 5 people make a complaint about sexual harassment. In our experience many victims of sexual harassment who do seek advice decide not to take the matter further. This is for many reasons including fear that they will not be believed, concerns about retaliation and fear about the impact on their career and reputation. It is important to look at a range of ways in which we can support people to come forward about their experiences.

Over the last few years a range of online reporting tools have been developed informed by the barriers to reporting sexual assault. Project Callisto in the United States targets sexual assault on University Campuses and provides an online trauma informed platform for students to document and report their sexual assault.[86] Its three year report confirms that it significantly increases the chances that a victim of sexual assault will report it, increases access to support services, and enables schools to detect repeat offenders.[87] There are a variety of models for online reporting tools that can:

- Provide information about legal protections and options for addressing problem behaviour;
- Notify the employer and/or regulator when a report is made;
- Link victims of the same perpetrator;
- Link victims with support services; and/or
- Enable identification and reporting on trends.

In Australia, South Eastern CASA has developed the Sexual Assault Report Anonymously (**SARA**) mobile website.[88] SARA enables victims to report what happened to them and elect if they would like to be contacted by a sexual assault counsellor. Anonymous data is provided to police to help identify trends. Clients are also given the option to make a supported report to the police. SARA has been a user centred, trauma informed design pilot

[86] Project Callisto 2017-2018 Academic Year Report, accessed online on 4 February 2019 at: http://www.projectcallisto.org/Callisto_Year_3_final.pdf
[87] Ibid page 3.
[88] See https://www.sara.org.au/

which has grown substantially, receiving 604 reports last financial year.[89] While this tool has not yet been officially evaluated, it is our view that it creates a framework aimed at providing a safe and supportive space to encourage people to share experiences they otherwise wouldn't share.

A similar tool could be developed for victims of sexual harassment. We consider that, like SARA, such a tool should also commence as a small user centred design pilot that can be scaled following iterative development. We would urge careful consideration of various factors required for a successful online reporting tool and management of that tool, such as:

- the ownership, use and sharing of data collected through the tool;
- accessibility, including for people with a disability and people who cannot read or write well in English due to language or literacy skills;
- confidentiality and privacy needs of those reporting sensitive information;
- the skills, sensitivity and training required to communicate safely and effectively with people who have experienced sexual harassment and assault, and may be traumatised by their experience;
- the training and support required to ensure the safety of staff who manage the tool and provide support to victims; and
- protocols for referrals to service providers and agencies.

We note that a victim-centric confidential online reporting tool is quite different to other anonymous online reporting tools that are marketed towards employer organisations and aimed primarily at assisting those organisations to identify problem 'hot-spots' and patterns.

Recommendation 17: Funding should be granted to pilot an accessible and confidential online reporting tool that (a) assists people to report and address problem behaviour and seek support, and (b) identifies trends to assist with prevention and enforcement

3.3.3 Accessible support for victims of sexual harassment

In our practice experience it can be very difficult for our clients to access appropriate and affordable counselling support. There is no free and widely accessible counselling service tailored to the needs of people who have experienced sexual harassment. While the Victorian Centres Against Sexual Assault do provide counselling for sexual harassment they prioritise their waiting lists based on the severity of the sexual assault. As a result the primary option for psychological support for victims of sexual harassment is to be granted a mental health care plan and find a psychologist who is willing to bulk bill for sessions and has availability within an accessible distance. Unfortunately it is often the case that our clients struggle to access support within this system with few psychologists who bulk bill and significant wait times for those who do.

Victims of sexual harassment should have access to appropriate and timely specialist support when they need it, including access to information and counselling that is

[89] South Eastern Centre Against Sexual Assault (2018) *Annual Report 2017-2018,* accessed online on 4 February 2019 at: https://www.secasa.com.au/assets/Documents/annual-report-2017-2018.pdf

appropriately resourced and coordinated. Penny's story below highlights how difficult it can be to take action about sexual harassment without the necessary supports.

Lack of appropriate counselling support for victims: Penny's story

> I worked as a retail assistant at a clothing store. I was sexually assaulted by my manager after work hours. He also sent me text messages containing sexual comments that were quite controlling and confronting.
>
> I complained, and my employer investigated the conduct. I felt that at the time I was not supported as I had to tell the story a few times to different people. It felt like an interrogation. I told them that I was anxious and unwell as a result. I said I hadn't asked for anything, I just didn't want him to work there anymore.
>
> They came back with a decision that there wasn't enough evidence to support my complaint, but they would relocate him. I knew I would still have contact with him through the work phone and email. I told them that they haven't provided me with a safe workplace and I put in a letter of resignation as I could no longer work here.
>
> The way that management handled the situation highlighted that the workplace did not have the framework to handle complaints as I felt dehumanised from the investigation process and it turned me off wanting to pursue legal matters further. It was all too much, even living at that point was a struggle. Nothing that I said was believed.
>
> If there wasn't a timeframe on sexual harassment complaints I would probably do something about it now. At the time I was trying to make sense of what happened. I felt a lot of shame and guilt.
>
> It would be good if, after speaking to a lawyer, there was an option to be transferred through to a counsellor to debrief about it afterwards. This would've helped me as it was triggering speaking about it and I felt alone after hanging up on the phone. I would have liked to have someone tell me that I haven't done anything wrong and to let me know what I could have done for self-care and referral to some doctors. Kind words are appreciated as it was hard to survive.

We need to make sure that people like Penny are supported in the future to minimise the ongoing harm caused by speaking up about sexual harassment.

> **Recommendation 18: Specialist support services should be funded to assist people who have experienced sexual harassment.**