
National Inquiry into Sexual Harassment in Australian Workplaces

Submission by Unions NSW
to the Australian Human Rights Commission

28 February 2019



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This submission has been endorsed by:

Rape and Domestic Violence Services Australia

UTS Jumbunna Research Indigenous People and Work Research and Practice Hub

Women's Electoral Lobby

INTRODUCTION

Unions NSW is the peak body for trade unions and union members in NSW and has been fighting for the rights of working people in Australia since 1871. It has over 65 affiliated unions and Trades and Labour Councils, representing over 550,000 workers across the State. Affiliated unions cover the spectrum of the workforce in both the public and private sectors.

Unions NSW welcomes the opportunity to make a submission to the National Inquiry into Sexual Harassment in the Workplace.

This submission focusses on a wide range of reforms that Unions NSW believes are required to end sexual harassment in the workplace. The submission is split into 3 sections. The first section looks briefly at the problem and prevalence of sexual harassment. The second section looks at union specific surveys conducted by some of our affiliates and highlights industry specific issues. The third section focuses on reforms (both legal and non-legal) which, if implemented, would help to prevent sexual harassment in the workplace, provide better complaints processes, provide greater protection to particularly vulnerable groups, and give greater support to people who have experienced sexual harassment.

The nature of this issue does not lend itself to a single solution; rather a multi-pronged approach to reform is necessary. The current anti-discrimination framework which deals with sexual harassment as an individualised complaints process is clearly not working. The burden must be shifted from individuals (who currently have to report sexual harassment, enforce their individual rights, and hold harassers and employers to account) to employers (who should be required to prevent sexual harassment occurring in the first place) and regulators (who should be empowered and resourced to enforce the law).

SUMMARY OF RECOMMENDATIONS

PREVENTION OF SEXUAL HARASSMENT

Recommendation 1: Amend the Model Work Health and Safety Regulations and Codes of Practice to include an obligation to provide a work environment free from violence and harassment, including sexual harassment. These amendments should be adopted by all jurisdictions that use the model laws, and Victoria and Western Australia should incorporate the amendments into their own WHS legislation.

Recommendation 2: Resource WHS Regulators (Commonwealth, State and Territory) so that they have the appropriate skills and expertise and can enforce the law. This could be done through the establishment of a new Directorate which would develop codes of practice and guidance materials, investigate and prosecute breaches, and ensure that training given to HSR's and HSC's includes training regarding sexual harassment.

Recommendation 3: Empower unions to take prosecutions for a failure to meet WHS duties and claim a moiety for costs to assist with the enforcement of WHS laws.

Recommendation 4: Amend anti-discrimination laws across Australia (Commonwealth, State and Territory) to impose a positive duty on employers and directors (and other entities with obligations under the Act) to prevent discrimination and sexual harassment by or of their employees as far as is possible (including third party sexual harassment). Breach of this duty should be subject to enforcement by the relevant anti-discrimination bodies and should attract substantial financial penalties. The duty should be supported by a code of practice that would set out the steps required to be taken by employers to meet the duty and this should be reviewed and updated on a regular basis.

Recommendation 5: Give anti-discrimination bodies (Commonwealth, State and Territory) increased powers and resources to enforce anti-discrimination legislation and codes of practice. This should include stronger investigation powers, such as the ability to conduct own motion inquiries, the ability to issue compliance notices, and the ability to impose fines for non-compliance.

Recommendation 6: Amend anti-discrimination legislation to include a prohibition on sexual harassment in all areas of public life and to expand the definition of workplace participant to match definitions used in WHS and anti-bullying laws to capture anyone who performs work in any capacity, including volunteers, trainees, interns, students, and those on site as part of the supply chain.

BETTER COMPLAINTS PROCESSES

Recommendation 7: Amend the *Fair Work Act 2009* to explicitly prohibit sexual harassment in a standalone civil remedy provision, and enable workers to bring sexual harassment and discrimination claims to the Fair Work Commission. The Fair Work Commission should be given broad powers to deal with these matters, including to make urgent orders that conduct stop, to conciliate, arbitrate, to order reinstatement and award compensation. Unions and other interested parties should be given the ability to bring representative complaints on behalf of groups of workers. The jurisdiction should be made available to all workers.

Recommendation 8: Resource the Fair Work Commission so that it has the necessary expertise to deal effectively with these matters, including by establishing an expert Gender Equality panel and providing training to Commission members.

Recommendation 9: Give unions enhanced right of entry powers to enable union representatives to enter workplaces in relation to suspected cases of sexual harassment and other workplace exploitation. Empower unions to enforce laws and prosecute all forms of worker exploitation.

Recommendation 10: Amend anti-discrimination laws across Australia to abolish time limits for bringing a complaint, or extend the timeframe to at least 6 years to align with other employment related claims.

Recommendation 11: Resource anti-discrimination bodies to reduce wait times for conciliations, mandate statutory timeframes for having complaints dealt with and require filing of replies by employers and respondents.

Recommendation 12: Amend state based anti-discrimination laws in NSW, Tasmania, WA and NT to abolish caps on damages in sexual harassment and discrimination matters.

Recommendation 13: Amend anti-discrimination laws across Australia to allow people to bring sexual harassment and discrimination complaints to anti-discrimination bodies where they have also raised these matters as a work health and safety issue.

Recommendation 14: Consider how to give better protection to government sector workers in NSW. Options include amending the *Sex Discrimination Act* to give them access to the AHRC; making the Fair Work provision accessible to all workers in Australia by giving effect to a relevant ILO Convention; requiring state government agencies to use external complaint and investigation processes; amending the *NSW Industrial Relations Act* to include provisions regarding sexual harassment; and ensuring Parliamentary staff have access to the Industrial Relations Commission.

Recommendation 15: Improve the quality of investigations by requiring investigators to disclose who they have previously conducted investigations for, requiring investigators to make their report available to both the complainant and the accused, developing a Code of Practice regarding the conduct of internal and external investigations, and requiring investigators to be trained and accredited.

Recommendation 16: Develop an alternative dispute resolution framework which can be used by any employer, court, tribunal or agency that deals with sexual harassment complaints that includes effective alternatives to adversarial processes and draws on restorative justice concepts.

Recommendation 17: Require the use of standard, approved plain English confidentiality clauses which ensure that disclosures made under whistleblowing laws, to police and to regulators are protected and cannot be prohibited by confidentiality or non-disparagement clauses.

Recommendation 18: Create a centralised forum for the reporting and publication of de-identified settlement data that includes data from the AHRC, state based anti-discrimination bodies, the Fair Work Commission and private settlements.

PROTECTING LOW INCOME AND VULNERABLE WORKERS

Recommendation 19: Resource and fund legal services such as Legal Aid, Community Legal Centres, and Working Women's Centres, as well as specialist support and counselling services to properly support people who have experienced sexual harassment.

Recommendation 20: Reform the visa system to address the systemic exploitation of workers on temporary visas, including the following measures: a deportation amnesty for visa holders who experience workplace exploitation where reporting it could result in cancellation of their visa; remove the requirement for 417 (working holiday) visa holders to undertake 88 days farm work to obtain a second year visa and extend the period they can remain with the same employer to 12 months; remove the 40 hour fortnight working restriction for international students; establish a complete firewall between the Fair Work Ombudsman and the Department of Home Affairs regarding visa status and prohibit sharing the personal data of temporary migrant workers; allow a grace period for the life of the visa for Temporary Skill Shortage visa holders who have been subject to workplace exploitation to find a new sponsor; and create a new category of visa that allows victims of workplace exploitation to stay in Australia whilst they are cooperating with investigations or court cases.

Recommendation 21: Reform industrial laws to provide greater job security and employment entitlements for people in insecure work, including the option of conversion to permanent work for workers on rolling fixed-term contracts and casual workers who have been working on a regular and systematic basis for six consecutive months; and gig economy workers should be considered to be employees with rights to basic entitlements.

PROTECTION AND SUPPORT FOR PEOPLE WHO HAVE EXPERIENCED SEXUAL HARASSMENT

Recommendation 22: Expand whistleblower protections for workers in the private sector to include a breach of any Commonwealth, State or Territory law; ensure protected disclosures override confidentiality clauses in employment contracts and settlement agreements; develop a single private sector Whistleblower Act, and establish an independent whistleblower protection authority.

Recommendation 23: Establish and fund a national independent and confidential reporting tool for reporting incidents of sexual harassment, available both online and through an app.

Recommendation 24: Consider reforms to defamation laws across Australia such as placing the legal burden on the person who claims to have been defamed to prove that the allegations are false, rather than the burden being on the publisher to prove that the allegations are true; or introducing a public interest defence for serious journalism.

ENHANCED REQUIREMENTS AND OVERSIGHT FOR EMPLOYERS

Recommendation 25: Template settlement agreements used for sexual harassment complaints should include certain requirements of employers, such as training and education of staff, and development or review of policies.

Recommendation 26: Require employers to formally report sexual harassment complaints and statistics, as well as compliance with terms of settlement requiring organisational change, to both their boards and to the Workplace Gender Equality Agency. The reporting requirements should include the existence of any Deeds of settlement.

PART ONE THE PROBLEM

1.1 Prevalence of Sexual Harassment

Despite Australia having legislation making sexual harassment unlawful for over 30 years, its prevalence has not reduced over this time.¹ It remains a widespread and commonplace problem. Data collected by the ABS indicates that one in two women and one in four men will be sexually harassed in their lifetime.² A survey conducted by the Australian Human Rights Commission (AHRC) in 2018 found that 72% of Australians have been victims of sexual harassment at some point in their lives, with 85% of women and 57% of men aged 15 and older having been sexually harassed.³ This is a huge increase from one in five (21%) of people in 2012, including one third (33%) of women and 9% of men.⁴ Sexual harassment is widespread in the workplace, with one in three people (33%) having experienced sexual harassment at work in the last five years.⁵

Aboriginal and Torres Strait Islander people, young adults (18-29), those with a disability, and LGBTI people are particularly vulnerable to sexual harassment.⁶ This indicates how different forms of discrimination, including discrimination based on attributes such as race, ethnicity, religion, sexuality, gender identity and/or expression and disability, can intersect with and increase vulnerability to sexual harassment.

The AHRC has conducted four national sexual harassment surveys, one every 5 years since 2002 (results published in 2003, 2008, 2012 and 2018). The 2018 survey found that 39% of women and 26% of men have experienced sexual harassment at work in the last 5 years.⁷ This result shows a significant increase compared to figures collected in 2012 that found one in four women (25%) and one in six men (16%) experienced sexual harassment.⁸ This increased prevalence suggests there has been an increase in reporting, despite the ongoing significant barriers that exist in relation to making complaints. These barriers make it extremely likely that sexual harassment is still being underreported. When harassment happens at work, most people will not report it or seek support. They fear retaliation, or they simply do not know what to do or where to go for help. Only 17% of people make a formal report or complaint (down from 20% in 2012), and only 18% seek support or advice (down

- 1 Good L, and Cooper R (2016) 'But It's Your Job To Be Friendly': Employees Coping With and Contesting Sexual Harassment from Customers in the Service Sector, *Gender, Work and Organization*, 23 (5), 447-469.
- 2 Australian Bureau of Statistics, *Personal Safety Survey* (2016).
- 3 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018).
- 4 Australian Human Rights Commission, *Working without fear: Results of the Sexual Harassment National Telephone Survey* (2012).
- 5 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018).
- 6 *Ibid.*
- 7 *Ibid.*
- 8 Australian Human Rights Commission, *Working without fear: Results of the Sexual Harassment National Telephone Survey* (2012)..



of Australians have been sexually harassed at some point in their lives – which includes 85% of women and 57% of men.



or one in three people, have experienced sexual harassment at work in the last five years.

from 29% in 2012).⁹ The concerns regarding victimisation are backed up by the data, which shows that more people are experiencing negative consequences as a result of reporting sexual harassment. In 2018 43% of respondents who reported sexual harassment indicated that their complaint had a negative impact on them (eg., victimization, ostracism).¹⁰ This was a significant increase from 2012 (29%) and 2008 (22%).¹¹ Almost half (45%) of the 2018 survey respondents who made a complaint said that nothing changed in their workplace after the complaint.¹²

The 2018 survey provides for the first time data on sexual harassment within major industry sectors. The rates of sexual harassment were notably high in the information, media and telecommunications industry (81%), arts and recreation services (49%), electricity, gas, water and waste services (47%) and retail (42%).¹³

1.2 Our Current Framework Is Not Working

The huge increase in the prevalence of sexual harassment between the 2012 and 2018 AHRC surveys show how little our current framework is doing to address the causes of sexual harassment and generate systemic solutions to the problem.

Anti-discrimination legislation is currently the primary legislative framework that applies to sexual harassment.

Anti-discrimination legislation is based on a highly individualised complaints process and relies on individuals who have been subject to sexual harassment to report it and to

9 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (2018).

10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid.



of people make a formal complaint
(down from 20% in 2012)



seek support or advice
(down from 29% in 2012)

hold harassers and employers to account.¹⁴ There are major problems with this framework, including:

- It places a large and unreasonable burden on people who have suffered sexual harassment, with little responsibility placed on employers to take proactive or preventative action to ensure that sexual harassment does not occur in their workplaces.
- As a result, there is little incentive for employers to take robust action to tackle and prevent sexual harassment in the workplace
- The anti-discrimination bodies which oversee the legislation are not empowered to enforce the law or act as regulators.
- It is often retraumatising for people who make complaints, who have to repeatedly tell their story and relive the experience.
- There is a lack of appropriate support for people who make complaints within the workplace. Many do not make a complaint for fear of victimisation, lack of trust in the process, or because the complaints system is inaccessible.
- It is very costly to take a complaint beyond conciliation through to a hearing in a court, meaning it is unaffordable for many people.
- It is slow and inefficient, and the length of time it takes to resolve complaints puts many people off lodging a complaint at all.
- It is focused on addressing individual instances of sexual harassment, and not on systemic solutions or collective responses.

In summary, anti-discrimination legislation has very limited capacity to challenge incidents of sexual harassment and transform workplace cultures to prevent it occurring in future because:

¹⁴ "Put harassment regulation on same footing as OHS laws: Expert", Workplace Express, 30 July 2018.

- It imposes a negative prohibition rather than a positive duty to prevent;¹⁵
- It is only enforceable by individual victims, mostly through a private, confidential and often costly conciliation process (with the implication that incidents of sexual harassment are isolated and private interpersonal disputes rather than part of a wider cultural and behavioural problem that warrant systemic attention and public scrutiny);¹⁶
- The remedies that are available largely consist of individual compensation, and there are no sanctions available such as penalties, punitive damages, or corrective orders;¹⁷
- It is inaccessible for many people, and the people who do access it cannot use it to generate systemic change due to its focus on individual harm; and
- Even with significant reforms to the complaints process to make it more efficient, accessible and affordable, individualised legal avenues will always be inaccessible for the most vulnerable people in society.

We need a fundamental shift in emphasis – the onus should be placed on employers and properly resourced and empowered regulators to tackle and prevent sexual harassment in the workplace.¹⁸

15 Belinda Smith, 'A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can It Effect Equality or Only Redress Harm?', in Christopher Arup et al. (eds.), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Sydney Federation Press, 2006a).

16 Belinda Smith, 'Fair and Equal in the World of Work: Two Significant Federal Developments in Discrimination Law', *Australian Journal of Labour Law*, 23/3 (2010), 199-219.

17 Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia* (Cambridge University Press, 2017).

18 This was also the conclusion of a recent report of the UK House of Commons: House of Commons, Women and Equalities Committee, *Sexual Harassment in the Workplace*, Fifth Report of Session 2017-19, 25 July 2018.

PART TWO INDUSTRY SPECIFIC ISSUES

Surveys undertaken by specific unions highlight both industry specific problems and cultures, as well as common themes that appear to run across all industries. The problem of third party sexual harassment (ie sexual harassment perpetrated by third parties) is a problem in many industries, including hospitality, retail, medicine, nursing, teaching and customer service roles. There is also remarkable consistency in findings that the majority of people do not report sexual harassment, their reasons for not reporting, and what the experiences of people who do report are.

2.1 Hospitality

Sexual harassment is a huge problem in the hospitality industry. A recent survey by Hospo Voice found that 89% of hospitality workers (with women making up 90% of those surveyed) have been sexually harassed at work, and 19% have been sexually assaulted.¹⁹

The prevalence of sexual harassment in hospitality is likely influenced by two key factors - the role of alcohol in fuelling unlawful behaviour and the unequal power relationship between customers and the employees serving them. The imbalance in power makes it very difficult for employees to complain, including because they fear retribution from their managers.²⁰ There are obvious difficulties in addressing the issue as it is hard to identify perpetrators and take action as they may not be seen again. The SDA's current approach is to recommend reporting the incident, follow up the company to ensure support is provided, and request that a banning notice be issued where possible or appropriate.

A number of pubs and clubs have taken steps to try and prevent sexual harassment of patrons, like providing reporting mechanisms for staff and encouraging staff to observe any instances of harassment.²¹ However, this often overlooks the problem of staff experiencing harassment from customers and patrons.

In a 2016 Australian study,²² hospitality employees considered the enforcement of RSA laws, where drunken behaviour from patrons is treated with zero tolerance. Due to the existence of heavy fines that can be issued during on-the-spot inspections, licensees take their responsibility very seriously. Some interviewees in the study working in bars cited harassment as a sign of intoxication and as such could form a basis for the removal of patrons under RSA laws.

One way to tackle the prevalence of sexual harassment in the hospitality industry would be to include sexual harassment within the RSA training, and an explicit recommendation in

19 United Voice Victoria survey, 2017.

20 Good L, and Cooper R (2016) 'But It's Your Job To Be Friendly': Employees Coping With and Contesting Sexual Harassment from Customers in the Service Sector, *Gender, Work and Organization*, 23 (5), 447-469.

21 Fileborn, B, (2017) 'Staff can't be the ones that play judge and jury: Young adults' suggestions for preventing unwanted sexual attention in pubs and clubs, *Australian & New Zealand Journal of Criminology*, 50(2) 213-233.

22 Good L, and Cooper R (2016) 'But It's Your Job To Be Friendly': Employees Coping With and Contesting Sexual Harassment from Customers in the Service Sector, *Gender, Work and Organization*, 23 (5), 447-469.

that training for zero tolerance of this behaviour, and the removal of patrons who engage in that behaviour towards staff or other patrons.

2.2 Live Performance

A recent national survey conducted by the Media, Entertainment and Arts Alliance (MEAA) of sexual harassment, misconduct and bullying in the live performance industry²³ highlighted the prevalence of these behaviours in this industry, and also highlighted the issue of men experiencing sexual harassment from other men.

In relation to male experiences of sexual harassment, 38% of male respondents to the survey had experienced sexual harassment, and most of these reported multiple instances. The results included a number of instances of criminal sexual assault at work, including anal rape.

The general findings of the survey included:

- At least 40% of respondents had experienced at least one form of sexual harassment
- About the same number of respondents had witnessed or heard reliable reports of workplace sexual harassment
- 14% had been sexually assaulted
- 21% had witnessed or were reliably aware of a person being sexually assaulted in connection with work
- 58% said they were rarely or never made aware of relevant policies or process for reporting allegations of sexual harassment
- 53% said they had never reported their experiences to the company
- 60% of those who say they have witnessed sexual harassment did not report it. The most common reasons for not reporting were
 - * Fear of the professional repercussions (43%)
 - * Fear that reporting would worsen the situation (40%)
 - * Didn't think anything could be done (36%)
- 47% of those who reported an incident said the situation was not handled well and for half of these respondents the situation got worse.

²³ Sexual Harassment, Misconduct & Bullying in Australian live performance, Media Entertainment & Arts Alliance Survey, 2017

2.3 Nursing and Midwifery

A research collaboration between Dr Jacqui Pich of UTS and the New South Wales Nurses and Midwives' Association into Violence in Nursing and Midwifery²⁴ which surveyed 3,500 nurses and midwives about patient and visitor related violence²⁵ found that in the 6 months prior to the study:

- 25% reported experiencing sexually inappropriate behaviour;
- 13% reported inappropriate sexual conduct; and
- 2% reported that they had been sexually assaulted

2.4 Medicine

A survey conducted in February 2019 by the Australian Salaried Medical Officers' Federation (ASMOF) of their members in NSW regarding Sexual Harassment and Gender Equity in Medicine²⁶ found that of the 301 respondents:

- 35% had experienced sexual harassment working as a doctor, including 55% of female doctors and 6% of male doctors.
- Female doctors in training were more vulnerable, with 61% having experienced sexual harassment.
- 29% had witnessed sexual harassment in their workplace
- 70% identified the perpetrator as a fellow doctor, 43% identified a patient or service user as the perpetrator, and 35% identified another colleague as the perpetrator.
- The vast majority (84%) of those who experienced sexual harassment did not report it. For those who did report, most were not satisfied with the outcome.

2.5 Cabin Crew

- A recent Transport Workers Union survey²⁷ of more than 400 cabin crew working for major airlines including Qantas, Virgin, Jetstar, Tigerair and Alliance Airlines found that 65% of workers had been sexually harassed at work. Of these workers:
- Half said that it had happened more than four times, and 1 in 5 said it had happened more than 10 times;
- 4 in 5 were sexually harassed by colleagues, and 3 in 5 were sexually harassed by passengers;
- 69% said they had never reported an incident, with the primary reasons for not reporting being not feeling comfortable to report (57%), not believing it would be handled appropriately, (56%) and fear that reporting would make the situation worse (39%);
- 84% of people who did report an incident were not satisfied with how it was handled.

24 Pich, J (2018) Violence in Nursing and Midwifery in NSW: Study Report.

25 The study did not capture experiences of violence from co-workers. The study also only focused on the experiences of respondents in the 6 months prior to the study. Therefore, the overall prevalence of violence in this industry will be greater than what is represented in the study.

26 ASMOF- Sexual Harassment Survey (February 2019).

27 <http://www.twu.com.au/Cabin-Crew-Sexual-Harassment-Survey-Results/>

78% of all survey respondents said they didn't think their company was doing enough to prevent sexual harassment.

2.6 Public Sector

Data collected by the CPSU as part of the ACTU survey about sexual harassment in the workplace²⁸ found that, of its members in state government workplaces around the country who responded to the survey:

- 49% experienced sexual harassment at their most recent workplace or at a previous workplace.
- 66% had witnessed sexual harassment at their most recent workplace or a previous workplace.
- 71% of people who had experienced sexual harassment did not make a formal complaint. The main reasons were fear of negative consequences (64%); no faith in the complaints process (57%); and no confidence that the complaints process would be confidential (52%).
- Of those that complained, 38% said their complaint was ignored or not taken seriously and 29% said they were treated less favourably after making the complaint.

28 ACTU, 'Sexual Harassment in Australian Workplaces: Survey results' (Report 2018)

PART THREE REFORMS

This part of the submission will look at a suite of both legal and non-legal reforms which Unions NSW believes will help to prevent sexual harassment in the workplace, improve the complaints process, create access to justice for vulnerable and low income workers, and provide better protection and support to those who have experienced sexual harassment.

3.1 Prevention

Organisational and employer responses to sexual harassment have been hindered by the limitations of anti-discrimination legislation and the conceptual framing of sexual harassment as an individual issue.²⁹ The majority of responses to sexual harassment are informal, temporary and targeted to the immediate situation, and as such do not challenge the systemic problem.³⁰

Reliance on the current complaints system is deeply flawed. Only a small number of people make complaints, and the majority of those that do either face negative consequences for complaining, or experience nothing changing as a result. Concerningly, this trend appears to have worsened over time according to the AHRC data. A smaller number of people are making complaints and seeking support, and a larger number of people are reporting negative consequences or no change. Current processes are perceived as hostile, adversarial, lacking confidentiality, risky and as falling on deaf ears.³¹ The AHRC data and the union surveys discussed in Part Two indicate that the situation is getting worse rather than improving.

Sexual harassment in the workplace is a serious health and safety concern. Work Health and Safety (WHS) legislation covers sexual harassment as it covers all risks to health and safety. Therefore, employers currently have a general duty of care under WHS legislation to ensure the health and safety of workers in the workplace, as far as reasonably practicable. However, this duty is not currently being utilised or enforced in relation to workplace sexual harassment. The advantage of WHS legislation is that the focus is on systems and cultures rather than on individuals and isolated incidents of misbehaviour.

Apart from the (currently non-utilised) duty under WHS legislation, employers do not otherwise have a positive obligation to take steps to prevent sexual harassment of or by their employees. Under current legislation, all they are required to consider is how to prevent themselves from being made liable for sexual harassment. WHS legislation should be amended to make this positive duty clear, and this duty should be supported with informa-

29 McDonald, P, Charlesworth, S and Graham, T (2015), 'Developing a framework of effective prevention and response strategies in workplace sexual harassment', *Asia Pacific Journal of Human Resources*, vol. 53, no. 1, pp. 41-58.

30 McDonald, P, Charlesworth, S and Graham, T (2015), 'Developing a framework of effective prevention and response strategies in workplace sexual harassment', *Asia Pacific Journal of Human Resources*, vol. 53, no. 1, pp. 41-58; Good L, and Cooper R (2016) 'But It's Your Job To Be Friendly': Employees Coping With and Contesting Sexual Harassment from Customers in the Service Sector, *Gender, Work and Organization*, 23 (5), 447-469

31 McDonald, P, Charlesworth, S and Graham, T (2015), 'Developing a framework of effective prevention and response strategies in workplace sexual harassment', *Asia Pacific Journal of Human Resources*, vol. 53, no. 1, pp. 41-58.

tion on how employers can comply. A positive duty should also be inserted into federal and state anti-discrimination laws. Such a duty could extend to all duty holders (not just employers, but also providers of goods and services, educational institutions, and so on).

3.1.1 WORK HEALTH AND SAFETY LEGISLATION

A) CURRENT LEGISLATIVE FRAMEWORK

The WHS legislation requires that risks be identified, assessed and eliminated, or if elimination is not reasonably practicable, the risks should be minimised so far as is reasonably practicable (this is known as ‘risk management’). There can be no doubt that sexual harassment is a risk to health and safety and should be subject to risk management as required under the WHS legislation.

Health is defined to include both *physical* and *psychological* elements. Therefore, in the context of sexual harassment, the risk of psychological injury due to such harassment (as well as physical injury) is a risk employers need to manage.

The WHS legislation applies not just to “employees” - the controller of a workplace (called a Person Conducting a Business or Undertaking - PCBU) owes an obligation to all participants including paid workers, volunteers, contractors and those on-site as part of the supply chain. This is a significant advantage in relation to sexual harassment that might emanate from third parties and other workplace actors that are not co-workers.

When sexual harassment does occur, the failure of the PCBU to prevent or minimise it could be seen as a breach of their duty of care, for example, as outlined in section 19 of the *Work Health and Safety Act 2011* (NSW) (the WHS Act), or one of the other requirements to identify hazards and manage health and safety risks set out in the *Work Health & Safety Regulation 2017* (NSW) (the Regulation). This means an Inspector or trained Health and Safety Representative (HSR) could require an employer to take corrective action to prevent such injuries arising in the future. This also means the Regulator (SafeWork NSW) could prosecute the PCBU for failing to meet their obligations.

PCBUs could use the current framework to take action to eliminate and minimise risks once they are identified. This has significant advantages over the current way sexual harassment is dealt with – namely, a human resources approach where incidents are reported as part of a complaints process. Of course, a strong complaints process is also important (and ways to improve the current complaints processes are discussed in Part 3.2) – however if PCBUs addressed sexual harassment through the WHS framework, it could reasonably be expected that there would be far less reliance on individualised complaints.

In order for the employer to meet their duty of care to provide a safe workplace, including one free from sexual harassment, the employer’s implementation of risk management must be done in consultation with the workers. HSR’s and Health and Safety Committees (HSC’s) are mechanisms for that consultation to occur.

There are also legislative obligations on people in workplaces to act to prohibit sexual harassment. A person at a workplace must take reasonable care for their own health and safety and take reasonable care that their behaviour does not adversely affect the health and safety of others. They must comply with reasonable instructions that allow the PCBU to comply with the WHS Act and, if they are a worker, any reasonable WHS policy or

procedure from the PCBU.³² These legislative obligations could also require bystanders to step-up.

In addition, the WHS framework would be very beneficial for employees who wish to raise concerns but do not wish to be identified or participate in workplace investigations (problems with workplace investigations are discussed below at section 3.2.4). In these circumstances, an employer could conduct an anonymous review and survey about sexual harassment in the workplace, which would be consistent with their duty of care and provide a springboard for a range of preventative employer actions.

Despite the existence of this framework, and the obvious applicability of WHS legislation to sexual harassment, it is largely not utilised. This is likely due to the fact that there are no relevant regulations or codes of practice regarding sexual harassment. Therefore, there is very little guidance for employers about how they can prevent sexual harassment and little incentive for them to do so. In addition, the attitude of the WHS regulators seems to be that sexual harassment is largely the responsibility of anti-discrimination bodies and have not taken responsibility for ensuring that employers implement measures to address it.

B) CURRENT APPROACH OF WHS REGULATORS

WHS Regulators appear to have a hands-off view when it comes to sexual harassment. This is not inconsistent with their approach generally, which has been to adopt a policy approach to “work with” employers rather than issue improvement notices and take prosecutions. All enforcement mechanisms available to WHS Regulators have fallen alarmingly in recent years.

In relation to sexual harassment, a spokesperson for SafeWork NSW recently told OHS Alert that workplace harassment has a specific meaning under the *Anti-Discrimination Act 1977* (NSW) (AD Act) and the *Sex Discrimination Act 1984* (Cth) (SD Act), making it different from bullying within the meaning of WHS laws.³³ The spokesperson said: “Under anti-discrimination legislation, harassment in the workplace is any form of behaviour that is not wanted that offends, humiliates or intimidates, and creates a hostile environment. Sexual harassment in the workplace is a type of sex discrimination and is against the law. Complaints for harassment and sexual harassment in the workplace can be taken up with supervisors or managers, unions, equal employment opportunity officers or alternatively the NSW Anti-Discrimination Board.”

The spokesperson also noted that if SafeWork does receive a complaint of workplace sexual harassment, customer care staff discuss the issues with the caller and, once it has been determined that harassment is occurring, direct the caller to the NSW Anti-Discrimination Board (ADB). A SafeWork inspector “might attend the workplace to identify any ongoing risks to workers and review the employer’s policies and systems for dealing with workplace harassment and bullying.”

The spokesperson also noted that workers unable to work as a result of harassment in the workplace can make a claim for workers compensation with their employer’s workers compensation insurer, and that other agencies may also be able to assist, such as the AHRC, community justice centres and the National Association of Community Legal Centres.

³² Sections 28 and 29 of the Work Health & Safety Regulation 2017 (NSW).

³³ ‘Harassment must be treated as major OHS issue: inquiry’, OHS Alert, 30 July 2018.

These comments made by SafeWork NSW are very concerning as they reveal an attitude and approach that sees sexual harassment as a matter to be dealt with under anti-discrimination laws or in the workers compensation system if there has been an injury preventing the person from working. The approach of SafeWork NSW seems to be to refer sexual harassment matters to other bodies, and to not take any action beyond a possible inspection at the workplace. Although SafeWork NSW clearly acknowledges the impact of sexual harassment on worker health and safety risks, through their reference to workers compensation, they refuse to take responsibility for sexual harassment as a health and safety risk. SafeWork NSW does not appear to contemplate the possibility that it could require employers to take corrective action or prosecute the PCBU for failing to meet their obligations.

These comments are confirmed by guidance issued by SafeWork Australia about Workplace Bullying, which clearly excludes sexual harassment from the definition of bullying,³⁴ and positions it as a matter which is not covered by the WHS legislation, but rather under anti-discrimination laws, and recommends contacting the AHRC, the Fair Work Commission (FWC) and state/territory anti-discrimination bodies.³⁵ This is especially concerning as there is currently no action a person can bring in the FWC in relation to sexual harassment.

The indifference shown by WHS regulators is not unique to Australia. A recent report of the UK House of Commons published after a 6 month parliamentary inquiry into sexual harassment in the workplace (UK Report)³⁶, expressed “astonishment” at the approach of the UK WHS Regulator, Health and Safety Executive (HSE), which did not see tackling or investigating sexual harassment as part of its remit. The HSE’s view was that there is no specific duty under health and safety legislation regarding sexual harassment, and that it was for the UK Equality and Human Rights Commission (EHRC) and the police to enforce the law on sexual harassment. The HSE agreed that it “had a role in making sure that workplaces have practices that keep people safe from violence at work,” but did not agree that this included responsibility for sexual harassment – the most common form of violence against women. The UK report concluded that “*HSE’s analysis of the potential for harm caused by sexual harassment appears to be cursory and ill-informed. We suspect that this issue has simply been ignored, as it has been by employers themselves, but we are perplexed that it continues to reject the suggestion that it should now be taking action.*”³⁷

WHS Regulators in Australia are also failing to treat sexual harassment as a serious health and safety issue and are therefore failing in their responsibility. This will continue to occur without reform to the WHS legislation and a change in the attitude by the Regulator in relation to their enforcement role.

C) REFORMS TO WHS LEGISLATION

The work health and safety framework must make it clear that the general duty on employers to provide a safe working environment includes an obligation to provide a work environment that is free from violence and harassment, including sexual harassment. WHS legislation (in-

34 Guide for Preventing and Responding to Workplace Bullying, SafeWork Australia, May 2016

35 Ibid, page 7.

36 House of Commons, Women and Equalities Committee, Sexual Harassment in the Workplace, Fifth Report of Session 2017-19, 25 July 2018

37 Ibid, pp19-20.

cluding the model laws and the legislation in jurisdictions which have not adopted the model laws, ie Victoria and Western Australia) should be amended to explicitly include workplace violence and harassment (including sexual harassment) as a health and safety risk that employers have an obligation to prevent and manage, and which WHS Regulators are required to enforce. The definitions and minimum requirements can be inserted into the Work Health and Safety Regulations 2006 (Cth), and be supported by comprehensive codes of practice to assist employers in understanding what they need to do to comply. These codes of practice should include evidence based measures that employers are required to implement, such as best practice policies and training. Whether employers have taken the steps outlined in the code of practice should be taken into account in determining whether they have breached their duty.

There are examples of this approach in several jurisdictions in Canada, including Ontario and New Brunswick. The Occupational Health and Safety Act in Ontario³⁸ now includes a definition of workplace harassment and sexual harassment. The Act provides that employers must:

- Prepare and review a policy on workplace harassment at least annually, regardless of the size of the workplace or the number of workers;
 - * If six or more workers are regularly employed at the workplace, the policy must be in writing and it must be posted in a conspicuous place in the workplace;
 - * The policy must consider workplace harassment from all sources such as customers, clients, employers, supervisors, workers, strangers and domestic/intimate partners, and should encourage workers to bring forward workplace harassment concerns, whether their own, or information about workplace harassment that they have witnessed (ie bystanders);
- Develop and maintain a program to implement the workplace harassment policy. The program must be in writing, and must be developed and maintained in consultation with the joint health and safety committee or health and safety representative;
- Review the workplace harassment program as often as necessary, but at least annually, to ensure that it adequately implements the workplace harassment policy; and
- Provide appropriate information and instruction to workers on the contents of the workplace harassment policy and program.

In September 2018 in New Brunswick, new obligations were inserted into the General Regulations under the Occupational Health and Safety Act.³⁹ These new obligations aim to identify and prevent workplace violence and harassment, including sexual harassment and require all employers to:

- Establish a written code of practice with respect to workplace harassment (eg., a policy);
- Review the harassment policy on an annual basis in consultation with the joint health and safety committee;
- Provide training to all employees regarding the harassment policy, and keep and provide training records to the regulator on request.

38 Occupational Health and Safety Act, R.S.O. 1990, c. O.1

39 Occupational Health and Safety Act, SNB 1983, c O-0.2.

Introduction of new regulations and a code of practice in Australia would assist employers to comply, and would also assist the WHS Regulators in enforcement. WHS Regulators will need a significant increase in resources to allow more Inspectors to visit more workplaces to ensure compliance with the law. WHS Regulators will likely also require the skills and expertise to enforce this new area of the law. To this end, a new Directorate could be set up within WHS agencies to focus on this area, including developing codes of practice and guidance materials and investigating and prosecuting breaches. The Directorate could also ensure that training given to HSR's and HSC's includes training regarding sexual harassment. Finally, unions should be allowed to take prosecutions for a failure to meet WHS duties and claim a moiety for costs.⁴⁰ This would greatly improve enforcement by allowing other actors other than the Regulator to enforce the law, especially in small-medium workplaces and in mobile workforces where a dedicated HSR is unlikely to exist.

▣ **Recommendation 1:** Amend the Model Work Health and Safety Regulations and Codes of Practice to include an obligation to provide a work environment free from violence and harassment, including sexual harassment. These amendments should be adopted by all jurisdictions that use the model laws, and Victoria and Western Australia should incorporate the amendments into their own WHS legislation.

▣ **Recommendation 2:** Resource WHS Regulators (Commonwealth, State and Territory) so that they have the appropriate skills and expertise and can enforce the law. This could be done through the establishment of a new Directorate which would develop codes of practice and guidance materials, investigate and prosecute breaches, and ensure that training given to HSR's and HSC's includes training regarding sexual harassment.

▣ **Recommendation 3:** Empower unions to take prosecutions for a failure to meet WHS duties and claim a moiety for costs to assist with the enforcement of WHS laws.

3.1.2 POSITIVE DUTY IN ANTI-DISCRIMINATION LAW

A) CURRENT LEGISLATIVE FRAMEWORK

There is currently no positive duty under anti-discrimination law for employers (or other entities covered by anti-discrimination legislation such as providers of goods and services and educational institutions) to prevent sexual harassment.

State and federal anti-discrimination laws provide that an employer is not liable for unlawful sexual harassment by its employees if they have taken “all reasonable steps” to prevent those employees from contravening the legislation. Therefore, the “all reasonable steps” test only becomes relevant when employers are defending sexual harassment matters, rather than being a positive obligation on employers to prevent it from occurring in the first place. The AD Act is even worse as NSW employers are only vicariously liable if they ex-

⁴⁰ The ability for unions to take prosecutions was removed in 2011.

pressly or impliedly “authorise” the act.⁴¹ Therefore, employers have an incentive to prevent themselves being held liable for sexual harassment in the workplace, but no incentive to actually prevent sexual harassment. An Australian study found that grievance procedures are often ineffective because of the focus on risk management and managers trying to protect the employer from reputational risk and vicarious liability.⁴² This obviously does not create a culture of prevention; but rather a culture of protection for the employer from potential legal action.

Taking all reasonable steps is generally considered to involve having appropriate policies, procedures and training that discourage and minimise the risk of sexual harassment in the workplace, and that deal with instances of sexual harassment in an appropriate manner. Policies should include details of sanctions which may be imposed and the procedure to make complaints about breaches of the policy. It is therefore relatively easy for employers to show they have taken all reasonable steps in order to escape liability in sexual harassment claims – they just need to have the right policies, procedures and training in place, but they are not required to do anything to prevent future complaints, shift the culture or take positive steps to reduce the incidence of sexual harassment in their workplace. Unions report in recent years they have seen a decline in the quality of sexual harassment policies with employers increasingly taking a compliance (tick and flick) mentality.

Anti-discrimination legislation is also not available to workers performing work in any capacity. For example, section 28B of the SD Act only gives protection to employees, contract workers and partners in a partnership. It therefore excludes many categories of people who may be exposed to sexual harassment in the workplace, including volunteers, trainees and interns, apprentices and students. Anti-discrimination legislation should be amended to bring it into line with the broader concept of worker used in the WHS legislation and in the anti-bullying provisions of the *Fair Work Act 2009* (Cth) (FW Act).

Finally, the prohibition on sexual harassment is limited to certain areas of public life, and can leave people without protection in particular circumstances (for example, where they are harassed at work by someone who isn't a workplace participant, or on the street or on public transport.)

Queensland has extended protection from sexual harassment to all areas of public life, making it unlawful for any person to sexually harass another person.⁴³ France announced measures in August 2018 to outlaw and address gender based harassment on the street and on public transport. These measures capture behaviour such as cat-calling, insulting, intimidating, threatening and following women in public spaces, and incidents are now subject to fines of up to 750 euros.

Anti-discrimination legislation should be amended to extend the prohibition on sexual harassment to all areas of public life to address gaps in employment coverage and give protection where there is currently none.

41 See section 53 of the Anti-Discrimination Act 1977 (NSW).

42 McDonald, P, Charlesworth, S and Graham, T (2015), 'Developing a framework of effective prevention and response strategies in workplace sexual harassment', *Asia Pacific Journal of Human Resources*, vol. 53, no. 1, pp. 41-58.

43 Anti-Discrimination Act 1991 (Qld) section 118.

B) THE PROBLEM OF THIRD-PARTY SEXUAL HARASSMENT

Hospitality, retail, teaching, health, community and public services are some of the industries most affected by third party sexual harassment – that is sexual harassment perpetrated by third parties such as customers, patrons, clients, students, parents, visitors, service users and patients.

The SD Act (section 28G) and the AD Act (section 22F) both cover third party harassment and make it unlawful for a person receiving goods or services to sexually harass another person in the course of receiving those goods or services. However, these protections are in separate sections of the Acts to the protections that apply to employment and there is no requirement of employers to consider third party sexual harassment.

The Equality Act 2010 (UK) originally contained provisions which made employers liable for failing to protect workers from third party harassment if they were aware that harassment had previously occurred on two occasions and had failed to take reasonable steps to prevent it from happening again. In 2012, those provisions were repealed. The UK Report noted that there was widespread support in the inquiry for introduction of measures that were similar to those that were repealed, with many arguing that the ‘three strikes’ element of the original provision should be discarded, and that a single instance of harassment should be sufficient for action. Many also recommended that the government should prepare guidance to help employers and employees understand this duty.

Anti-discrimination legislation should be amended to make it clear that employers are also liable for third party harassment of their employees, and provide guidance and resources about how to prevent and respond to third party harassment.

C) A POSITIVE OBLIGATION TO PREVENT SEXUAL HARASSMENT

Having a positive obligation under anti-discrimination law would introduce a preventative approach, and require employers to take active and positive steps to prevent and reduce the risk of sexual harassment, and therefore begin to shift workplace cultures. Having the positive duty extend to directors would ensure that organisations are accountable at the highest level. It would lift the unreasonable burden that has been placed on workers and individuals, and could also shift the focus away from whether conduct strictly falls inside or outside the employer’s area of responsibility. Unions report that there remain many disputes such as whether events where sexual harassment has taken place were “work events” and where to draw the line in relation to online sexual harassment.

The UK Report recommended imposing a legal obligation to protect workers from sexual harassment, with breaches of the duty being an unlawful act subject to enforcement action and resulting in substantial financial penalties. The UK Report embraced a proposed solution from a 2018 EHRC report⁴⁴ that a mandatory duty be placed on employers to take reasonable steps to protect workers from harassment and victimisation in the workplace. The EHRC argued that there should be a clear expectation that employers must put in place protective measures, with the intention that those measures would ultimately remove the need for individuals to seek their own remedy or use whistle-blowing procedures. The EHRC therefore, would not necessarily need to be concerned with whether individual acts

44 Equality and Human Rights Commission, *Turning the Tables: Ending Sexual Harassment at Work*, March 2018.

of harassment had occurred – their focus would be on whether the organisation was taking steps to protect their employees or not.

In an interesting comparison, the UK Report noted that incentives for employers to comply are much stronger in other areas of corporate governance, such as data protection and preventing money laundering, because there are stringent regimes which place explicit obligations on organisations, with criminal and civil sanctions for non-compliance, including heavy fines. In order for a business to be able to show reasonable steps defences, they have to have undertaken proactive risk management and risk assessments in the workplace to identify low, medium and high risks, and then tailor their training and policies to those risks. The UK Report argued that equal importance should be placed on protecting people's safety and wellbeing at work as on these corporate governance issues.

The positive duty could be supported by a statutory code of practice setting out what employers (and other duty holders) need to do to meet the duty, including steps to prevent and respond to sexual harassment. This could then be considered when determining whether the duty had been breached. Other ways to incentivise compliance could also be considered, such as courts and tribunals having discretion to apply an uplift in compensation of up to 25% in harassment claims where there had been a breach of mandatory elements of the statutory code.⁴⁵

The statutory code of practice could set out guidance on matters including:

- reporting systems and procedures and what employers should provide as a minimum, including guidance on anonymous reporting;
- How to implement a risk management approach to prevent sexual harassment, including third party sexual harassment;
- support for victims, including access to specialist support and steps that should be taken to prevent victimisation of complainants;
- how to respond to complaints in a way that gives complainants options other than immediate investigation, and accurate information about what the investigation process entails;⁴⁶
- what the different options for resolution are, including informal avenues and alternative dispute resolution including mediation, conciliation and restorative justice approaches;
- how to investigate and record complaints;
- how to identify when sexual harassment allegations may include criminal offences and how to conduct any investigation in a manner which does not prejudice any potential police investigation and criminal prosecution; and
- training, induction, risk assessments and other policies and practices.

The Australian Human Rights Commission published a Code of Practice for Employers on Sexual Harassment in 2008; it does not appear to have been updated since then despite sev-

45 This was suggested in the UK report.

46 A common experience is that people who report sexual harassment often feel that the process is taken out of their hands and out of their control by the investigation process, and they often suffer very negative consequences, and if they had known that would happen, they would never have complained. Therefore, there should be some ability for complainants to state what they want out of the complaint, to be able to receive accurate information about what the investigation process entails and how long it will take, and to be given some options.

eral substantial amendments to the law in 2011 (including changes to the definition of sexual harassment, and the extension of coverage in several areas).⁴⁷

Currently, anti-discrimination bodies are not able to enforce or compel compliance with anti-discrimination law. They generally have education and dispute resolution functions and some ability to conduct enquiries. In regards to the latter function however, if the AHRC finds that there has been a breach of human rights or that workplace discrimination has occurred, their power is limited to preparing a report on the complaint and recommendations for action for the Attorney General. The report may then be tabled in Parliament. There are no penalties for breaches of anti-discrimination legislation except for penalties payable for victimisation – but these are small.

This can be compared with WHS regulators, and the Fair Work Ombudsman (FWO), which can investigate breaches of the legislation they oversee, prosecute breaches, and issue fines for non-compliance. The inability of anti-discrimination bodies to enforce anti-discrimination legislation severely hampers its efficacy.

In Canada, the union Unifor has promoted a system of embedding Women's Advocates in workplaces.⁴⁸ A Women's Advocate is a specially trained workplace representative who assists women with concerns such as workplace harassment, intimate violence and abuse. The Women's Advocate is not a counsellor but rather provides support for women seeking workplace and community resources. The Program is a joint union/management workplace initiative focussed on creating healthy, respectful and safe workplaces. Such a program could be considered in Australia and be implemented as part of the positive duty.

❖ **Recommendation 4:** Amend anti-discrimination laws across Australia (Commonwealth, State and Territory) to impose a positive duty on employers and directors (and other entities with obligations under the Act) to prevent discrimination and sexual harassment by or of their employees as far as is possible (including third party sexual harassment). Breach of this duty should be subject to enforcement by the relevant anti-discrimination bodies and should attract substantial financial penalties. The duty should be supported by a code of practice that would set out the steps required to be taken by employers to meet the duty and this should be reviewed and updated on a regular basis.

❖ **Recommendation 5:** Give anti-discrimination bodies (Commonwealth, State and Territory) increased powers and resources to enforce anti-discrimination legislation and codes of practice. This should include stronger investigation powers, such as the ability to conduct own motion inquiries, the ability to issue compliance notices, and the ability to impose fines for non-compliance.

47 Australian Human Rights Commission, *Effectively preventing and responding to sexual harassment: A code of practice for employers* (2008).

48 Unifor, 'What if we had a Women's Advocate in all Unifor workplaces', available at: https://www.unifor.org/sites/default/files/documents/document/unifor-wa-broch-eng_final_web.pdf

- **Recommendation 6:** Amend anti-discrimination legislation to include a prohibition on sexual harassment in all areas of public life and to expand the definition of workplace participant to match definitions used in WHS and anti-bullying laws to capture anyone who performs work in any capacity, including volunteers, trainees, interns, students, and those on site as part of the supply chain.

3.2 Better Complaints Processes

3.2.1 A RIGHT OF ACTION UNDER THE FAIR WORK ACT 2009 (CTh)

Sexual harassment is prohibited by anti-discrimination legislation such as the SD Act and the AD Act. Conciliation processes in these jurisdictions, particularly the AHRC, can be very lengthy and stretch for months. AHRC figures show that the average time for finalisation of complaints in 2017-2018 was about 4.6 months, an increase on previous figures.⁴⁹ Many victims quit their jobs during this time due to the stress, the amount of time spent with no result, and/or ongoing conduct. The UK Report noted that for many women, leaving their job was a more rational response than making a complaint, because what they want is for the behaviour to stop, and the way to make it stop is to leave the organisation. There is a lack of options in Australia for urgent intervention that would stop the conduct, resolve the issue and allow people to stay in their jobs. There is also a lack of options for people on low incomes or which don't expose people to costs orders against them. The remedies available under anti-discrimination law also provide limited deterrence. There are no civil penalties for the employers or the individuals involved in the contraventions (except for breach of victimisation provisions, and these penalties are small) and no ability to apply for an injunction.

Sexual harassment is not currently explicitly prohibited by the FW Act. The general protections under Section 351 of the FW Act prohibits an employer from taking adverse action against an employee/prospective employee for a discriminatory reason i.e. because of a protected attribute, including their sex.⁵⁰ Whether this amounts to a prohibition on sexual harassment has been considered but not decided (in *Wroughton v Catholic Education Office Diocese of Parramatta*);⁵¹ but based on the comments in that case it seems unlikely. An adverse action claim can currently be made under the general protections provisions if there has been adverse treatment as a result of making a sexual harassment complaint or claim.⁵²

Provisions should be introduced into the FW Act to give it the power to deal specifically with sexual harassment matters in the workplace. Given the vast majority (68%) of sexual

49 AHRC figures show the average time for conciliations increased from 3.8 months to 4.3 months in the 12 months to June 2017.

50 Section 351 of the FW Act.

51 *Wroughton v Catholic Education Office Diocese of Parramatta* (2015) 255 IR 2841 [2015] FCA 1236. Justice Flick observed at [77] that "...it may be noted that s 351(1) of the Fair Work Act does not itself employ the term "discrimination". Nor does s 351 contain any prohibition upon (in the present case) "sex discrimination", including "sexual harassment". The prohibition in s 351(1) is a prohibition upon an employer taking "adverse action against a person..."

52 Sections 340 and 341 of the FW Act prohibit the taking of adverse action (eg demotion, dismissal, alteration of position or conditions to their detriment) against an employee who makes complaints in relation to their employment.

harassment complaints relate to conduct in the workplace,⁵³ giving the FWC powers to deal with these matters can clearly be justified.

This is the approach taken in New Zealand, where complainants have a choice of two different avenues: they can make a complaint under anti-discrimination laws contained in their Human Rights Act 1993 (NZ) or they can lodge a grievance against their employer under industrial laws contained in their *Employment Relations Act 2000* (NZ). Remedies include orders restraining the defendant from continuing or repeating the conduct, or from permitting others to engage in the conduct. The *Employment Relations Act* includes specific provisions on sexual harassment by employers and managers, harassment by people other than employers and managers, and provisions when steps are not taken to prevent a repetition of harassment.

There are several different ways the Fair Work Commission could be given the power to hear sexual harassment matters. One option would be to include sexual harassment in the anti-bullying jurisdiction. However, whilst there are positive elements of this regime that would work well for sexual harassment complaints (such as the broad definition of worker, the requirement that FWC deal with the application within 14 days, the ability for FWC to make any orders to prevent future conduct, and breach of orders resulting in civil penalties being payable), this is not recommended due to its serious limitations, which largely arise from its focus on stopping and preventing future bullying rather than on providing redress for past conduct.⁵⁴

Another option would be to amend s351 of the FW Act to allow workers to bring a general protections claim under s351 if they experience sexual harassment in the workplace. This would have some advantages, such as giving people access to injunctive relief, a remedy which does not currently exist in relation to sexual harassment. However, including sexual harassment in section 351 is an unnecessarily complex way to prohibit sexual harassment, as it would require the applicant to argue that they were sexually harassed because of their sex and that the conduct fits into the meaning of adverse action as defined in section 342. Section 351 also prohibits conduct by employers, not by individuals; it does not make sense (and again is unnecessarily complex) to argue that an employer has engaged in conduct that amounts to sexual harassment of a worker.

Therefore, sexual harassment should be prohibited by a new and separate part of the Fair Work Act which could take the best elements of anti-bullying and general protections provisions. The new provisions should contain the following features:

- The prohibition of sexual harassment should be a civil remedy provision.
- The FWC should have broad powers to deal with complaints, including: the ability to make urgent orders that sexual harassment stop and prevent future conduct (including requiring employers to take proactive steps to prevent harassment); to resolve matters by conciliation or arbitration;; and to order reinstatement, payment of compensation

53 Australian Human Rights Commission, Working without fear: Results of the Sexual Harassment National Telephone Survey (2012).

54 Limitations of the jurisdiction include: a worker must still be employed to make an application; conduct must be repeated; conduct must create a risk to health and safety and there must be a risk the worker will continue to be bullied; the FWC is prohibited from awarding compensation or damages; and it applies only to workers in constitutionally covered businesses, meaning some workers miss out on the protection - for example public sector workers in NSW, and workers working for unincorporated employers and corporations which are not "trading or financial" corporations.

and payment for lost remuneration. The ability to make stop orders will help keep workers in their jobs and prevent further conduct from occurring; and the ability to award compensation will help to provide redress for past conduct.

- The FWC should be required to deal with urgent applications promptly, for example within 14 days as required by the anti-bullying provisions.
- Matters which cannot be resolved through the FWC process should be able to be progressed through the courts (in a similar way to general protections matters), and the court should have the same powers as it does in those matters, including to issue injunctions; order payment of penalties (including penalties for breach of any orders made by the FWC); order payment of compensation and other remedial orders (eg reinstatement).
- The new provisions should be available to any person who has experienced sexual harassment in the workplace, whether they are current or former workers, and whether the conduct is ongoing or not, a one-off incident or repeated conduct. It should also use a broad definition of ‘worker’, like that used in WHS legislation and the anti-bullying provisions which define worker as “an individual who performs work in any capacity”, and includes employees, contractors, subcontractors, outworkers, those on site as part of the supply chain, apprentices, interns, trainees, students and volunteers.
- There should be a time limit of at least 6 years for people to bring complaints, whether or not they have been dismissed from their employment.
- Complaints should attract a reverse onus of proof whereby once a worker has established a prima facie case that they were sexually harassed, the burden of proof shifts to the employer to prove that it did not occur. This would be similar to the reverse onus in the general protections and unlawful termination provisions. This would mean that the burden of proving that sexual harassment has occurred does not rest solely with the applicant, an often impossible task where there are no witnesses or documentary evidence. It will help to shift the focus to what evidence the employer has that the conduct did not occur, rather than the applicant having to prove that it did occur.
- Unions and other interested parties should have the capacity to bring representative complaints on behalf of groups of workers.
- A new jurisdiction could potentially be made accessible to all workers in Australia, and not limited to those working for constitutionally covered businesses or national system employers. This could be done by giving effect or further effect to ILO Convention 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities.⁵⁵ This would help to provide protection to NSW government sector and local government employees.

Alternatively, the proposed reforms to the FW Act could also be incorporated into the *Industrial Relations Act 1996* (NSW) (IR Act), which would provide coverage to NSW public sector and local government employees, and other state based industrial legislation in states which still retain coverage of certain groups of employees (Queensland, Western Australia, South Australia and Tasmania.)

New provisions in the FW Act would allow workers to bring claims quickly, resolve

55 Done at Geneva on 23 June 1981 [1991] ATS 7. This is the basis under which Part 6-4, Division 2 of the FW Act dealing with Termination of Employment was enacted.

issues before they escalated further, prevent future conduct, and assist people to stay in jobs rather than having to leave to get a resolution. The no costs jurisdiction would be an advantage for some workers who do not want to be exposed to adverse costs orders and giving the FWC broad powers to deal with matters and to arbitrate could potentially address one of the big barriers of pursuing sexual harassment claims to and beyond the conciliation stage, namely cost and the use of deep pocket litigation to outspend complainants. This may assist in more complaints being heard to completion, and prevent complainants from having to settle with remedies they are not happy with, or that don't reflect anything near the true nature of their loss.

 **Recommendation 7:** Amend the *Fair Work Act 2009* to explicitly prohibit sexual harassment in a standalone civil remedy provision, and enable workers to bring sexual harassment and discrimination claims to the Fair Work Commission. The Fair Work Commission should be given broad powers to deal with these matters, including to make urgent orders that conduct stop, to conciliate, arbitrate, to order reinstatement and award compensation. Unions and other interested parties should be given the ability to bring representative complaints on behalf of groups of workers. The jurisdiction should be made available to all workers.

In order to ensure that the FWC has the right expertise to deal with these matters, an expert gender equality panel should be established, and training provided to Commission members about sexual harassment matters, including how discrimination based on other protected attributes makes certain people particularly vulnerable to sexual harassment, and the significant amount of damages that have been awarded under recent anti-discrimination case law. This will help to ensure that the Fair Work jurisdiction doesn't drag down awards of damages for sexual harassment matters and that it has the expertise to deal with issues of intersectional discrimination.

 **Recommendation 8:** Resource the Fair Work Commission so that it has the necessary expertise to deal effectively with these matters, including by establishing an expert Gender Equality panel and providing training to Commission members.

Finally, unions should be given increased powers under right of entry provisions to enter workplaces in relation to suspected cases of sexual harassment, as well as contraventions of all workplace laws. Current right of entry provisions are very restrictive in relation to notice requirements and the requirement for the contravention to affect at least one member of the union (rather than potential members), which can be problematic in cases of systemic exploitation of vulnerable workers. Unions should also be given the ability to enforce laws and prosecute worker exploitation. Given the FWO has about 250 inspectors for 12 million workers across the country, and cannot respond to individual complaints but can only undertake strategic enforcement action, this would greatly assist in enforcement of the FW Act.

 **Recommendation 9:** Give unions enhanced right of entry powers to enable union representatives to enter workplaces in relation to suspected cases of sexual harassment and other workplace exploitation. Empower unions to enforce laws and prosecute all forms of worker exploitation.

3.2.2 IMPROVE COMPLAINTS PROCESSES UNDER ANTI-DISCRIMINATION LAWS

A) REMOVING TIME LIMITS

Both the SD Act and the AD Act contain restrictive time limits in which to make a complaint of sexual harassment. These time limits are a significant and unnecessary barrier for reporting sexual harassment, and removing them would allow more people to come forward.

Many people who experience sexual harassment do not report their harassment straight away, as is common with all types of sexual offences.⁵⁶ Like other traumatic events, it can take months or even years to report sexual harassment, if it is reported at all. This is due to many factors, including trauma, embarrassment and shame, fear of not being believed, fear of being blamed, fear of retaliation or losing their job, or not knowing where to turn. The #MeToo movement has shown that it can often take people a long time to make a complaint. Time limits will also have a disproportionate impact on people who have been psychologically damaged by the sexual harassment they have experienced.⁵⁷

Reports indicate that the majority of complainants are no longer in the workplace where the harassment took place when they make a complaint.⁵⁸ This indicates that the sexual harassment may have caused them to leave, and that it is unlikely people will complain while still in the same workplace. Therefore, it is important to ensure that people will have the option to complain after they leave. In addition, extending time limits would mean that complaints could be made when circumstances change, for example, the harasser moves on or changes teams.

In addition, the time limits may not allow enough time for people to try and resolve the matter within the workplace first, and then seek advice and guidance about whether to make a complaint to the AHRC or ADB. Investigations and complaints processes can occur over a long period of time.

Currently, time limits for the AHRC and ADB are as follows:

- When making a complaint to the AHRC, complainants must generally bring a complaint of sexual harassment within 6 months. Section 46PH of the Australian Human Rights Commission Act 1986 (Cth) provides that the President of the AHRC may terminate a complaint if it was lodged more than 6 months after the conduct took place.
- When making a complaint to the ADB, complainants must generally bring a complaint of sexual harassment within 12 months. Section 89B of the AD Act provides that the President of the ADB may decline a complaint if the conduct occurred more than 12 months prior to the complaint being made.

The AHRC also used to allow 12 months for all complaints to be made, including sexual harassment complaints, but this was reduced to 6 months in 2017 by the Turnbull Government. Attorney General Christian Porter stated that it would lead to a more efficient complaints process and ensure unmeritorious or improper complaints were dismissed at the earliest opportunity.

56 UK House of Commons, Women and Equalities Committee, *Sexual harassment in the Workplace*, Fifth Report of Session 2017–19 (July 2018).

57 *Ibid.*

58 McDonald, P and Charlesworth, S (2013), 'Settlement outcomes in sexual harassment complaints', *Australasian Dispute Resolution Journal*, vol. 24, no. 4, pp. 259-269.

Although the ADB and AHRC may not terminate all complaints which fall outside the time limit, the reality is that the older a claim the less likely it is to be accepted and dealt with, and employers will use the fact that it is older than 6 or 12 months to argue against the complaint proceeding. The existence of a time limit of 6 or 12 months will also discourage people from making complaints outside those limits, as it is another hurdle in an already very difficult process.

If the AHRC terminates or declines a complaint on the basis that it is out of time, the only option complainants have left is to take their case to the Federal Court or Federal Circuit Court. However, this can only happen if the court first grants leave to deal with the application due to it being made out of time, which creates an extra legal hurdle for complainants to get through. This is a step that most people will not take due to the stress, trauma, money and time associated with litigation (and with the Federal Court and Federal Circuit Courts being costs jurisdictions). If the ADB declines a complaint, complainants cannot go to the NSW Civil and Administrative Tribunal (NCAT) at all to challenge the ADB's decision. This means that complainants who are out of time will often lose their opportunity to have access to alternative dispute resolution through confidential mediation and other processes, as well as access to court or tribunal proceedings. By extending or abolishing existing time frames, people would be able to seek justice when they are ready and strong enough to do so. Longer and more reasonable time frames already exist for other breaches of employment law (eg 6 years for a breach of contract or underpayment cases).

❖ **Recommendation 10:** Amend anti-discrimination laws across Australia to abolish time limits for bringing a complaint, or extend the timeframe to at least 6 years to align with other employment related claims.

B) IMPROVING COMPLAINTS PROCEDURES

As discussed above, conciliation processes in anti-discrimination bodies can be very lengthy. There are no mandated timeframes during which certain steps should be taken, and also no requirement for an employer or respondent to file a reply. This can leave people in uncertainty for a long time. It can be contrasted to the Fair Work Commission where there are set timeframes for certain things to occur, and requirements that certain documents are filed.

❖ **Recommendation 11:** Resource anti-discrimination bodies to reduce wait times for conciliations, mandate statutory timeframes for having complaints dealt with and require filing of replies by employers and respondents.

C) REMOVING STATE BASED CAPS ON COMPENSATION

In NSW, there is a cap on damages for discrimination and harassment cases of \$100,000 if a claim is brought to the ADB.⁵⁹ There is no such limit under the SD Act. Caps also exist in Tasmania (where the cap is as low as \$25,000), Western Australia and the Northern Territory.

⁵⁹ Section 108 of the AD Act caps the compensation payable for discrimination or harassment complaints at \$100,000.

ry. All victims of sexual harassment should have the same opportunities to access financial compensation regardless of where they live or work to help them recover.

Courts in recent years have acknowledged that higher compensation for sexual harassment is needed, given the harm that it can cause to physical and mental health and capacity to work. For example in *Vargara v Ewin* [2014] FCAFC 100, Ms Ewin was awarded \$476,163 to compensate for economic loss and pain and suffering. In the landmark case of *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82, Ms Richardson was awarded \$100,000 in general damages for pain and suffering alone. The damages caps in NSW and other states and territories are clearly outdated and have not kept up with developments in the common law and higher community standards that now recognise the damage that can be caused by sexual harassment.

The cap also functions as a significant disincentive to bring a claim with the ADB and other state/territory based anti-discrimination bodies and therefore precludes workers from accessing the benefits of these jurisdictions – for example, NSW is a no costs jurisdiction.

Caps should be removed for all discrimination and harassment complaints, as all forms of discrimination can have significant adverse impacts on a victim's health and capacity to work.

 **Recommendation 12:** Amend state based anti-discrimination laws in NSW, Tasmania, WA and NT to abolish caps on damages in sexual harassment and discrimination matters.

D) PROHIBITION ON MULTIPLE ACTIONS

It is common for legislation to disallow multiple actions – for example section 10(4) of the SD Act provides that where a person has made a complaint, instituted a proceeding or taken any other action under the law of a State or Territory regarding the same matter, they cannot bring a complaint to the AHRC.⁶⁰

This could mean that raising a complaint or concerns about sexual harassment under WHS legislation might prevent a claim in relation to that incident of sexual harassment being made under discrimination or industrial relations laws. These are separate claims that should not be caught by a prohibition on multiple actions. Workers should have the ability to utilise WHS legislation to force employers to take action to deal with sexual harassment matters, and also retain their ability to later bring a claim under anti-discrimination or industrial laws for compensation, damages, penalties, reinstatement or other remedies. The focus of WHS legislation is not on individuals, but rather on systems and cultures; and the primary focus of anti-discrimination legislation has been on personal remedies. People who have suf-

60 Section 10(4) provides in full: Where: (a) a law of a State or Territory deals with a matter dealt with by this Act; and (b) a person has made a complaint, instituted a proceeding or taken any other action under that law in respect of an act or omission in respect of which the person would, but for this subsection, have been entitled to make a complaint under the Australian Human Rights Commission Act 1986 alleging that the act or omission is unlawful under a provision of Part II of this Act; the person is not entitled to make a complaint or institute a proceeding under the Australian Human Rights Commission Act 1986 alleging that the act or omission is unlawful under a provision of Part II of this Act.

ferred sexual harassment should be able to access both frameworks in order to address both the systemic and personal impacts of sexual harassment in a holistic way.

- ▣ **Recommendation 13:** Amend anti-discrimination laws across Australia to allow people to bring sexual harassment and discrimination complaints to anti-discrimination bodies where they have also raised these matters as a work health and safety issue.

3.2.3 – NSW GOVERNMENT SECTOR WORKERS

NSW government sector workers are excluded from coverage of the SD Act (pursuant to section 13), and there are currently no provisions in the IR Act that cover sexual harassment. They do have access to the ADB but due to the current limitations of the NSW anti-discrimination legislation and jurisdiction, as well as the lack of enforcement of that legislation, outcomes are often unsatisfactory. Government sector workers are also often subject to lengthy investigations (often conducted internally) that do not result in satisfactory outcomes. Parliamentary staff also do not have access to the NSW Industrial Relations Commission. NSW government sector workers should be given more options to make sexual harassment complaints.

Some of those options could include: amending s13 of the SD Act to allow NSW government sector workers to bring complaints to the AHRC; making the Fair Work provision accessible to all workers in Australia by giving effect to a relevant ILO Convention; requiring state government agencies to use external complaint and investigation processes in certain circumstances; amending the IR Act to include provisions in relation to sexual harassment (in similar terms as those proposed to be included in the FW Act); and ensuring Parliamentary staff have access to the Industrial Relations Commission.

- ▣ **Recommendation 14:** Consider how to give better protection to government sector workers in NSW. Options include amending the *Sex Discrimination Act* to give them access to the AHRC; making the Fair Work provision accessible to all workers in Australia by giving effect to a relevant ILO Convention; requiring state government agencies to use external complaint and investigation processes; amending the *NSW Industrial Relations Act* to include provisions regarding sexual harassment; and ensuring Parliamentary staff have access to the Industrial Relations Commission.

3.2.4 – IMPROVING INVESTIGATIONS

Investigations are a standard and recommended element of an employers' sexual harassment complaint procedure. The Australian Human Rights Commission employer guide⁶¹ states:

“There are a number of steps that employers can take to enhance the effectiveness of their responses to workplace sexual harassment. These steps include:

- *establishing and implementing an internal complaint procedure*
- *investigating sexual harassment complaints and taking appropriate remedial action*

61 Australian Human Rights Commission, *Ending workplace sexual harassment: A resource for small, medium and large employers* (2014)

- *keeping confidential records of complaints.*” [emphasis added]

Only 17% of people make a formal report or complaint of sexual harassment and the second most common reason for not reporting workplace sexual harassment is that people felt it was easier to keep quiet (45%). Further, almost half of people who reported sexual harassment said no changes occurred as a result of their complaint.⁶² Given these facts, the adequacy of complaint procedures, including investigations, must be questioned.

The quality of investigations varies considerably. One reason for this is because there is no requirement in Australia for those who conduct investigations to have any particular qualifications or training (although credible training courses exist). In contrast, in the United States there is an accreditation program.

Increasingly, employers are (at significant cost) looking to external investigators to run investigations into sexual harassment complaints. Presumably this is due to a lack of internal expertise, actual or perceived conflict or a desire to add veracity to the investigation process. However, this trend does not guarantee an investigation will be handled more expertly or without explicit bias or unconscious bias.

In the United States and in Australia, there are moves to improve the professional standards of workplace investigators. The (American) Association of Workplace Investigators (AWI) has established ten principles to guide ethical investigations. These include: “*the investigator should be impartial, objective, and possess the necessary skills and time to conduct the investigation*”.⁶³ This principle demonstrates recognition of the potential conflict of interest by an investigator (internal or external), not least because they are earning an income from the employer. The Australian Association of Workplaces Investigators (AAWI) is yet to establish its own principles but has held two conferences, published webinars and set up ‘local circles’ in each State to facilitate idea sharing and best practice.

Our affiliated unions report that employers continually engage the same so-called independent investigators, with no systematic process to ensure impartiality. They report that those investigators consistently fail to make any significant recommendations even when there is a weight of evidence against the accused. Another difficulty with investigations reported by affiliates is that often the report of the investigator is kept confidential to the employer and is not shared with the complainant or the accused.

In New Zealand, investigator reports must be provided to the accused for comment before being finalised and may need to be provided to the complainant if the terms of reference require it.⁶⁴ The terms of reference of the investigation are provided to both parties for comment prior to the investigation commencing. The NZ Regulator also provides significant guidance to the employer on conducting investigations, which is absent in the Australian context and should be considered. Introducing transparency of the investigation reports and the number of engagements by the same employer would also arguably improve the quality of investigations.

62 Australian Human Rights Commission, *Everyone’s business: Fourth national survey on sexual harassment in Australian workplaces* (2018).

63 https://cdn.ymaws.com/www.awi.org/resource/resmgr/files/Publications/Guiding_Principles_.pdf

64 <https://www.employment.govt.nz/resolving-problems/steps-to-resolve/disciplinary-action/investigation/>

- **Recommendation 15:** Improve the quality of investigations by requiring investigators to disclose who they have previously conducted investigations for, requiring investigators to make their report available to both the complainant and the accused, developing a Code of Practice regarding the conduct of internal and external investigations, and requiring investigators to be trained and accredited.

3.2.5 ALTERNATIVE DISPUTE RESOLUTION/RESTORATIVE JUSTICE APPROACHES

While improving investigation procedures is absolutely necessary (as discussed at section 3.2.4), there are many flaws with the investigation paradigm, including that they are modelled on adversarial and litigious processes, placing reliance on concepts such as the balance of probabilities and the standard of proof. A common finding of investigations is that allegations “cannot be substantiated.” This does nothing to solve the problem and can leave complainants feeling exposed and traumatised by the process. In the experience of our affiliates, investigations often have a divisive impact on workplace relationships, rarely solve the problem and set employees up in an adversarial framework. They also come at a substantial cost to employers.

Effective alternatives to the current system of adversarial and individualised sexual harassment processes must be prioritised. The positive duty to prevent and the WHS solutions discussed in section 3.1 above are examples of such alternatives.

However, there should also be more options made available to people bringing sexual harassment complaints, both by employers, as well as by courts, tribunals or other agencies dealing with sexual harassment complaints. What is often missing from the current framework is the ability for a genuine dialogue between a complainant and an accused, including an opportunity for the complainant to speak about their experience, the impact of the behaviour on them, and the opportunity for the accused to listen, understand, learn and perhaps offer an apology. Drawing on restorative justice concepts would be a useful alternative to workplace investigations which can often be drawn out and ultimately unhelpful.

The alternative dispute resolution processes currently available in various jurisdictions (such as mediations, conciliations and compulsory conferences) are inconsistent in many ways, including in terms of waiting times and the approach taken. For example, some jurisdictions are more oriented towards getting a financial result, which will not satisfy people who would like to feel heard, and therefore may be unwilling to settle a dispute until they do. Other jurisdictions emphasise face to face conciliations and encourage complainants to talk about their experience, which can provide some level of catharsis and vindication, and may mean a resolution is more likely to occur. Obviously, the approach taken will also be heavily influenced by the style of the individual mediator or tribunal member, with some being far more ‘hands on’ than others in terms of offering views on the matter and referring to relevant legislation, whilst others will be ‘hands off’ and allow the process to be driven by the parties and their legal representatives (often meaning an adversarial approach is adopted).

A framework and structure for alternative dispute resolution should be developed that helps to set expectations of what the process will involve, and reduce inconsistencies between jurisdictions. Part of the framework should include giving parties the opportunity to speak about their experiences and include the opportunity for it to be a restorative process.

- ❖ **Recommendation 16:** Develop an alternative dispute resolution framework which can be used by any employer, court, tribunal or agency that deals with sexual harassment complaints that includes effective alternatives to adversarial processes and draws on restorative justice concepts.

3.2.6 USE OF CONFIDENTIALITY CLAUSES IN SETTLEMENT AGREEMENTS

Employers and employees entering into separation or settlement agreements have traditionally agreed to clauses that prohibit disclosure of the agreement or the circumstances leading up to it. Settlements of sexual harassment claims are no different and are almost always subject to a confidentiality clause. Often, confidentiality clauses apply to the negotiations leading up to a settlement, the terms of the agreement, and any conduct that led to the entering into of the settlement agreement. While the terms of these agreements can vary in strictness, at the very least they will usually mean that the matters cannot be talked about and that the identity of the perpetrator and the settlement amount cannot be disclosed.⁶⁵ These kinds of settlements usually also involve a non-disparagement clause, which prevents the parties from saying anything negative about each other.

There are potential benefits to confidentiality/non-disparagement clauses for both parties. The perpetrator protects their reputation by avoiding proceedings being brought against them, and the complainant avoids having to take legal action and re-living traumatic experiences in a public setting. Complainants may also fear that their future career prospects may be damaged if they are seen to have a reputation for complaining and suing. This is especially true in rural and remote areas where there are not many job opportunities.

While these clauses can provide valuable closure for both the employer and employee, their use in the sexual harassment context leads to situations where serial offenders are able to pay money, silence their victims, and engage in unlawful conduct repeatedly. Their victims are unable to speak out publicly to identify them, meaning the perpetrators remain protected and the unlawful conduct is able to continue. Confidentiality clauses allow perpetrators to conceal and continue longstanding patterns of sexual misconduct, and prevent discussion of the accusations among complainants, co-workers and the public. This is especially true of cases involving the most serious abusers, as employers have a big incentive to settle the most egregious claims to avoid high damages and negative publicity. This means the worst cases will never see the light of day. As such, the #MeToo movement has generated criticism of the use of confidentiality clauses in relation to sexual harassment matters. This criticism has led to new trends in the law that discourage confidentiality clauses in this context. In the US, multiple state legislatures are proposing new laws prohibiting employers from including non-disclosure agreements and confidentiality clauses in the settlement of sexual harassment claims.

This is a complex area, as confidentiality agreements are one of the biggest incen-

⁶⁵ Standalone non-disclosure agreements, whilst rare in Australia, could also potentially be used to keep such conduct out of the public domain.

tives for people accused of sexual harassment to settle a case before it goes to court. Most complaints of sexual harassment are settled before court proceedings commence, due to the difficulties associated with litigation. Removing confidentiality may mean that far less cases are settled and therefore that far fewer complainants receive any type of justice. Any move to discourage confidentiality clauses could have unintended consequences, such as dis-incentivising employers and individuals to settle sexual harassment cases if they have no prospect of keeping the allegations confidential. Another possible outcome might be a reduction in the amount employers are willing to pay for a settlement that does not include confidentiality. Another possible outcome may be that any public airing of the allegations against the harasser may be met by a public attack on the veracity of the complainant, or other “undesirable” facts or circumstances about them.

However, the lack of any accountability and the ability to silence complainants (potentially for life) is a huge concern and a contributing factor to the ongoing concealment of the extent of the problem. The systemic and widespread nature of sexual harassment (both at particular workplaces and in workplaces generally) makes it a matter that is of genuine concern to the broader community and a valid subject of public interest.

Harassers in the workplace pose a threat to the safety and well-being of others, both inside and outside of that workplace, making it an issue of public importance. This is of particular concern where, as is often the case in sexual harassment matters, the complainant exits the workplace after agreeing to settlement terms and the perpetrator stays on, potentially putting other employees at risk. This is potentially in breach of the employer’s obligation under WHS legislation to provide a safe workplace and the implied contractual term that employers have an obligation to provide their employees with a safe place of work.

Confidentiality and non-disparagement clauses, while allowing the complainant to have closure, privacy, and protection from any reputational harm, do nothing to protect other people from becoming targeted, and allow serial offenders (such as Harvey Weinstein) to continue to avoid facing scrutiny or consequences. Harvey Weinstein avoided widespread public knowledge of his unlawful conduct for over 30 years, and had settlement agreements with at least 8 victims.

The UK Report considered the use of non-disclosure agreements (NDAs). Evidence given to the inquiry from employment lawyers were that NDAs were important to enable victims of sexual harassment to get a settlement, and that in many cases no settlement would be agreed without an NDA. The report acknowledged there was a place for NDAs in settlement agreements – a complainant may feel it is in their own best interests, because they can avoid the trauma of going to court, or because they value the guarantee of privacy.

However, the report expressed serious concerns about the unethical use of NDAs, and found that they are used unfairly by some employers and members of the legal profession to threaten, bully and silence sexual harassment targets,⁶⁶ and that some are designed to prevent workers from making disclosures in the public interest under UK whistle-blowing laws.⁶⁷ The report found there was insufficient oversight and regulation of their use, and stated that

66 For example, victims being told they must sign an NDA in exchange for no money to avoid being bad-mouthed (including to new employers) and in order to obtain a reference; victims fearing (incorrectly) they would go to jail if they broke the agreement; victims being too fearful of the potential repercussions of breaking an NDA to give even anonymous evidence to the UK inquiry.

67 Under these laws, protected disclosures include disclosures about malpractice, breaches of the law, miscarriages of justice, dangers to health, safety and the environment, or the cover up of any such behaviour.

it is unacceptable that some NDAs are used to prevent or dissuade people from reporting sexual harassment to the police, regulators or other appropriate bodies or individuals.

The report recommended cleaning up the use of NDAs by:

- Enacting legislation requiring the use of standard, approved, plain English confidentiality clauses, which set out the meaning, limit and effect of such clauses, including a clear explanation of what disclosures are protected under whistle-blowing laws, and making it an offence to misuse such clauses; and
- Extending whistle-blowing protections so that disclosures of sexual harassment matters to the police, regulators such as the EHRC and HSE, and any court or tribunal are protected.
- These are sensible solutions which could be adopted in an Australian context. It is essential to maintain the ability of parties to use confidentiality clauses. However, by protecting certain disclosures from being prohibited under these clauses, a measure of balance can be found to combat the problem of serial offenders being able to conceal ongoing conduct over long periods of time.

❖ **Recommendation 17:** Require the use of standard, approved plain English confidentiality clauses which ensure that disclosures made under whistleblowing laws, to police and to regulators are protected and cannot be prohibited by confidentiality or non-disclosure clauses.

3.2.7 IMPROVED ACCESS TO COMPLAINTS DATA

Academics in Australia have raised concerns with the current reporting of sexual harassment complaints.⁶⁸ There is no systematic reporting of de-identified settlement data, and they are rarely evaluated and/or published. This prevents those experiencing sexual harassment from acquiring relevant information that could be used to guide their expectations of claims, evaluate the fairness of their settlement amounts, or provide a deterrent to individuals and workplaces. Practitioners have reported that often complainants have very little knowledge of what settlement terms they want, and that it changes throughout the process. Complainants who are vulnerable (such as those who are young, Indigenous, migrants or in precarious work) have a particularly poor knowledge of their rights, and little capacity or means to assert them, and so are likely to take smaller settlements. All of this points to the capacity of publicly available information and data on settlement outcomes to assist complainants in the process.

One of the findings of the UK Report found that better data is required in relation to sexual harassment claims so that the extent of harassment and effectiveness of remedies can be more easily measured.

Anti-discrimination bodies such as the AHRC and the ADB publish data on settlement outcomes on an ad hoc and sporadic basis. As of 2013, the AHRC website had published 67 sexual harassment complaints that had a mean settlement sum of \$5,087.⁶⁹ The website hasn't been updated since 2016.

68 McDonald, P and Charlesworth, S (2013), 'Settlement outcomes in sexual harassment complaints', *Australasian Dispute Resolution Journal*, vol. 24, no. 4, pp. 259-269.

69 Ibid.

The overwhelmingly small settlement sums that are published on the websites are likely to shape the expectations of victims in terms of financial compensation and possible redress.

Anti-discrimination bodies (and the FWC under any new power it has to deal with sexual harassment complaints) should be required to aggregate and report de-identified conciliation/settlement outcomes from sexual harassment claims in a consistent and timely way so that people can access data about other matters and the outcomes in them, including financial and non-financial remedies.

In addition, complaints which are negotiated privately with lawyers, outside of AHRC/ADB processes, are often settled for much higher amounts.⁷⁰ However, these outcomes are not reported. It is worth considering whether law firms and other legal services who deal with sexual harassment matters and settle them outside of conciliation/court/tribunal/processes would be willing to agree to report de-identified settlement data being published in a centralised forum.

- **Recommendation 18:** Create a centralised forum for the reporting and publication of de-identified settlement data that includes data from the AHRC, state based anti-discrimination bodies, the Fair Work Commission and private settlements.

3.3 Protecting Low Income and Vulnerable Workers

3.3.1 FUNDING AND RESOURCES

The current system is really only accessible for people who can afford to pay legal fees, and who have the strength and energy to pursue a complaint through adversarial processes. Even for this group access remains a problem, with only 17% of people making a formal complaint.⁷¹ In addition, and as noted above, wait times are often too long and can be a disincentive to making a complaint, and by the time a conciliation is scheduled, many will have moved on from the workplace where the harassment occurred. Giving workers access to the FWC will go some way towards improving access to justice through quicker and cheaper processes, but the reality is that many of the most vulnerable workers will still be unable to access justice.

Resources and funding should be given to specialist legal services, Legal Aid, Community Legal Centres (CLCs), and Working Women's Centres so that they are able to provide specialist legal and other support services to people who have experienced sexual harassment.

Working Women's Centres currently operate in Queensland, South Australia and the Northern Territory. The service used to exist in NSW. They are not for profit community organisations that provide information, advocacy, support and advice to women on work related issues, including discrimination and sexual harassment. As well as providing legal assistance, such as helping women make a complaint, and advocating for women up to the conciliation stage, they also provide information and informal support and advice, and therefore seem to have a broader remit than a CLC. Therefore, they are appealing options

⁷⁰ Ibid.

⁷¹ Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (2018).

for many women who do not wish to make a complaint or take an adversarial approach, but wish to speak to someone with experience about how to handle the situation. An Australian study found that vulnerable workers are more likely to try and solve workplace issues informally,⁷² and another Australian article noted the importance of organisations such as Working Women Queensland in providing pro bono assistance to vulnerable workers such as young temporary migrant workers.⁷³

The centres give particular attention to vulnerable and low income women (eg., ATSI women, women from CALD communities, migrants/visa holders/international students, women with disabilities, women in regional/remote/rural areas, women with family responsibilities, women of mature age and young women, women in insecure work, women experiencing domestic/family violence and women experiencing mental health issues).

In 2008 the Department of Employment, Education and Workplace Relations conducted a review of Working Women's Centres. They concluded:

"The Centres are robust community service providers whose strength lies in their specialist workplace relations expertise and holistic client-centred approach to service delivery. They provide high quality, ethical services to women in vulnerable employment, covering issues across state and federal jurisdictions, by delivering specialist advice, information and casework services to women and valuable policy and advocacy services to government on issues for women in the workplace.

*The Centres are highly valued by unions, government and non-government agencies for supporting women whom no one else can support. They are very well regarded for their application of a holistic approach to assisting women with workplace relations difficulties, and for the linking and capacity-building role they play in the sector, that builds social capital in the community."*⁷⁴

States and territories currently without Working Women's Centres should be given funding to set them up, and states and territories with them should be given increased resources to ensure they are able to deal effectively with sexual harassment complaints.

Counselling services should also be made available to victims of sexual harassment. Seeking legal advice and going through any kinds of complaints process can be deeply triggering, retraumatising, lengthy, and exhausting. It can be very difficult for people to access affordable counselling, and without such support, taking any kind of action is often very difficult if not impossible. Such support should be made widely available and accessible so that people are supported through the process and are more able to take action.

❖ **Recommendation 19:** Resource and fund legal services such as Legal Aid, Community Legal Centres, and Working Women's Centres, as well as specialist support and counselling services to properly support people who have experienced sexual harassment.

72 Good L, and Cooper R, (2016) 'But It's Your Job To Be Friendly': Employees Coping With and Contesting Sexual Harassment from Customers in the Service Sector Gender, Work and Organization, 23 (5), 447-469.

73 Howe, J. (2016) 'Examining a temporary migrant worker's ability to make a complaint of sexual harassment', Alternative Law Journal, vol 41, 12, pp 102-104.

74 Booth, A. (2009) Report of a Review of Community-Based Employment Advice Services, Prepared for the Fair Work Ombudsman

3.3.2 TEMPORARY MIGRANT WORKERS

A) RELEVANT WORK OF UNIONS NSW

Unions NSW has undertaken two audits of job advertisements in various languages in 2016-2017 and 2018. The 2016-2017 audit found that 78% of jobs advertised on Chinese, Korean and Spanish websites were advertised at below award rates.⁷⁵ The 2018 audit found that 70% of jobs advertised in Chinese, Korean, Spanish, Nepalese and Punjabi were offering rates of pay below those in the relevant award.⁷⁶

Unions NSW has also partnered with the Immigration Advice and Rights Centre (IARC) with the intent of offering confidential immigration advice to union members who are working in Australia on a visa. The experience of our affiliates is that migrant workers are very reluctant to speak up about workplace issues and exploitation because their right to remain in Australia is not secure, and the fear of visa cancellation and deportation. In order to ensure people feel able to address their employment issues, they need advice about the potential risks to their visa status. Therefore the partnership aims to fill an unmet need for migrant workers who are union members by providing advice regarding their immigration status. The reality is that without advice in both areas of law, workers are reluctant to do anything about employment entitlements that they believe might jeopardise their immigration status, and therefore remain vulnerable to workplace exploitation.

B) GENERAL OBSERVATIONS

Temporary migrant workers are some of the most vulnerable to exploitation and the least able to seek help or redress due to their reliance on employers for the maintenance of their visa and therefore their continued legal status in the country. This creates a large power imbalance that many employers are taking advantage of. Employers can effectively deter visa holders from reporting exploitation by threatening to report them to government agencies for being in breach of their visa restrictions. Certain visa restrictions placed on different categories of visa holders are a key driver of the exploitation of temporary migrant workers. Workers on temporary visas who experience workplace exploitation (including sexual harassment) where reporting it could result in their visa being cancelled should be granted an amnesty from deportation.

Factors that make it particularly difficult for some temporary migrant workers to make a complaint or seek help are that they are young, unaware of their rights under Australian law, possess limited English language skills and have little wealth or income. The promise of permanent residency has a significant impact on migrant workers' unlikelihood to report poor wages and conditions.⁷⁷

The impact of sponsorship arrangements on the power relationship between Temporary Skill Shortage (TSS) visa holders and their sponsors can also be substantial and make it very unlikely that an employee would report sexual harassment or other exploitation. TSS visa

75 Unions NSW, *Lighting Up the Black Market: Enforcing Minimum Wages*, July 2017.

76 Unions NSW, *Wage Thieves: Enforcing Minimum Wages*, December 2018.

77 Howe, J. (2016) 'Examining a temporary migrant worker's ability to make a complaint of sexual harassment', *Alternative Law Journal*, vol 41, 12, pp 102-104.

holders who have been subject to workplace exploitation⁷⁸ should be given a grace period for the life of their visa to find new employment and sponsorship arrangements.

In addition, lengthy court processes create a disincentive for migrant workers to report workplace exploitation and enforce their rights. Workers who are exploited should not have their claims limited by their ability to remain in the country. Workers pursuing workplace entitlements should be granted a temporary visa which allows them to remain and work in Australia until their claim has been settled. A similar safeguard already exists for witnesses or complainants in criminal law cases,⁷⁹ providing them with the right to temporarily remain in the country on a criminal justice visa, for the period needed to assist with the case. No equivalent alternative is available for victims of workplace rights violations.

C) WORKING HOLIDAY MAKERS

The requirement for working holiday makers (WHMs) to undertake 88 days of regional work to receive a second-year visa intensifies the vulnerability of temporary migrant workers. An additional visa condition that prevents WHMs from working for one employer for longer than six months, severely limits employment opportunities and creates another barrier for reporting exploitation.

In 2016, a FWO inquiry into the 417 Working Holiday Visa Program acknowledged the 88 day requirement had facilitated the extensive exploitation of workers.⁸⁰ The FWO Inquiry found a large number of 417 visa holders experienced exploitation, particularly while completing the requirement to undertake the mandatory 88 days of farm work to obtain a second year visa. The report identified sexual harassment as a problem and noted that “the desire for a second year visa extension can drive vulnerable workers to agree to work for below minimum entitlements and in some circumstance, enter into potentially unsafe situations.” The FWO Report identified underpayment, non-payment, unlawful deductions, sexual harassment and unsafe working conditions as forms of exploitation commonly experienced by 417 visa holders. The FWO report found that 59% of visa holders who were applying for the second year visa said they would be too concerned to speak up against exploitation, harassment, or conditions for fear their employers would not sign off on their 88 days of work.

These findings were echoed in the results of a Senate Inquiry into the Exploitation of Temporary Work Visa Holders in 2016, which also highlighted hazardous work environments, discrimination and sexual harassment as big issues.⁸¹

In November 2018, another FWO inquiry confirmed there had been no improvement to the situation.⁸²

Factors which make WHMs particularly vulnerable are that, whilst working the 88 days, many are working in extremely remote and isolated areas, where they cannot easily seek help or assistance. The FWO Inquiry found that “safety concerns are raised particularly where

78 Ibid.

79 Migration Act 1958 (Cth) s 155 - 161.

80 Fair Work Ombudsman, Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program (October 2016).

81 Senate Education and Employment References Committee, A National Disgrace: The Exploitation of Temporary Work Visa Holders (March 2016).

82 Fair Work Ombudsman, Harvest Trail Inquiry (November 2018).



18 May 2018

*** DANGER ***

Hi Everyone,

Since yesterday, a farmer called [redacted] phone number [redacted] posted an add on Gumtree for some farm work.

The farm is called [redacted] and has at least 6 cases of sexual aggression reported to me by women backpackers. He is right now living there and sleeping with a 19 yo German girl.

He contacted some women already for the job and asked for pictures and sometimes ask straight for some more privates service.

If you get called by this farm, just avoid, the [redacted] is also sometimes called [redacted] or on [redacted]

Here is one of the pic he sent yesterday to a woman who answered to him.

Figure 1: Post from Facebook backpacker forum

young workers – especially females with limited English travelling alone – are encouraged through the 417 second year visa requirements to travel to remote areas to undertake specified [88 days farm] work.⁸³

An online search of backpacker forums revealed a number of Facebook posts by backpackers who had been victims of sexual harassment during their farm work. It was apparent that there was a fear to report such incidences due to the perceived negative impact on their visa if the 88 days requirement was not satisfied. Examples of posts from these forums are included at Figures 1 and 2.

There is a proliferation of Facebook groups created by backpackers to provide community support to people who have experienced abuse,⁸⁴ which reflects the inadequacy of the current system in providing a complaint process that is appropriate and safe for temporary migrant workers to use. The forums show that WHMs in remote areas are constantly seeking help, although confused about the correct avenues and available assistance. There are also reports of police in regional and remote areas not dealing with complaints of sexual assault or harassment, and responding to complaints by asking about the person's visa status, or calling immigration.

The 88-day regional work placement requirement for WHMs should be removed and the

83 Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (October 2016)

84 See Facebook groups; Backpackers 88 days and counting Australia, Australia Backpackers, Backpacker Jobs in Australia, 2nd Year Visa Farm Work Australia, Backpackers Sydney, Backpacker Jobs in Australia, Australia Backpackers 2018, Australia Farm Jobs for Backpackers.

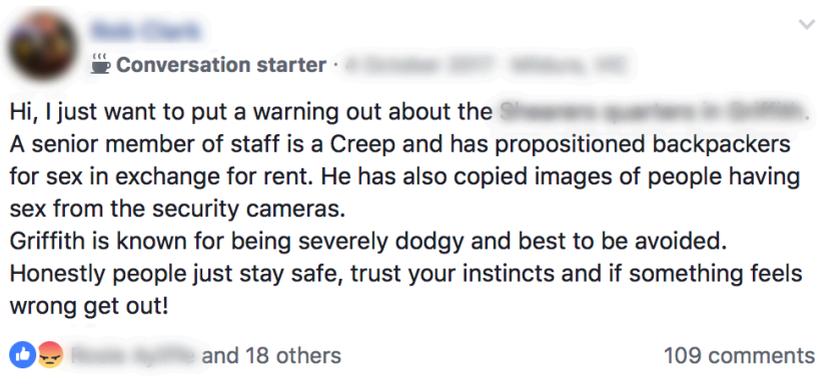


Figure 2: Post from Facebook backpacker forum

period that they can remain with the same employer should be extended from six to twelve months across all industries.

On 5 November 2018, the federal government announced proposed changes to the Working Holiday Visa Program,⁸⁵ including the introduction of a third-year visa option for WHMs who undertake six months of specified work in regional Australia. No measures were announced to combat wage theft or the exploitation of temporary migrant workers, despite the extensive documentation of these matters in FWO and Senate inquiries. Despite the FWO’s knowledge of the abuse and exploitation of WHMs, few proactive actions have been undertaken to effectively protect these workers or to reduce exploitation. The introduction of a 6-month requirement for a 3rd year visa would only increase dependence on employers and intensify the vulnerability of visa holders to workplace exploitation, including sexual harassment.

85 Scott Morrison, Prime Minister of Australia, ‘Door Stop with the Member for Forde’ (Media Release, 5 November 2018)

D) INTERNATIONAL STUDENTS

Visa restrictions on international students include that they can only work 40 hours per fortnight whilst their course is in session. In reality, large numbers of international students work hours above that restriction,⁸⁶ largely because they are often paid below minimum award rates which drive them to work additional hours in order to earn a living wage. The 40-hour restriction also drives international students to the cash economy and further exploitation. Many international students also work under contracting arrangements in the gig economy or as taxi drivers where, although they are only paid per job, time spent waiting between jobs is likely still counted as ‘work’.⁸⁷

International students who are working outside their visa restrictions are reluctant to report workplace exploitation, due to fear of alerting authorities to their additional working hours and hence risking the loss of their visa and deportation.

The aim of the 40-hour work restriction is to ensure that international students are genuinely studying in Australia. However, it is instead contributing to systemic exploitation and underpayment of workers. The 40-hour restriction should be removed and visa conditions for international students should instead focus on attendance and academic performance as a way to ensure students are genuinely studying and making progress in their chosen course. International students already have to comply with mandatory visa condition 8202, which states that students must maintain satisfactory attendance in the course and course progress for each study period.

E) REFERRALS FROM FAIR WORK OMBUDSMAN TO THE DEPARTMENT OF HOME AFFAIRS

The FWO has attempted to counter some of the concerns raised by temporary migrant workers about reporting workplace exploitation by claiming that since February 2017, there is an agreement with the Department of Home Affairs (DHA) protecting temporary migrant workers from having their visa cancelled if they assist the FWO with their investigation, even if they have worked in breach of their visa restrictions.⁸⁸

However, Freedom of Information Requests (FOI) made by Unions NSW to FWO and DHA in January 2017 have found no such agreement with DHA exists. Instead there is a referral protocol, which provides a guide for FWO officers to use in determining whether a worker who approaches them with an underpayment matter should be referred to DHA because of a breach of their visa. Further, the FWO claims once a referral has been made, they have no control over the actions taken by DHA in relation to the worker’s visa.⁸⁹ The FWO refused to provide information on what factors its inspectors consider when deciding whether to refer a temporary migrant worker to DHA. The FWO would not release this information as it argued it would affect ‘law enforcement and protection of public safety’

86 Laurie Berg and Bassina Farbenblum, ‘Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey’ (20 November 2017) 17.

87 *Verma v Minister for Immigration & Anor* [2017] FCCA 69.

88 Fair Work Ombudsman 2018, *Visa Holders and Migrants, Visa Protections* <https://www.fairwork.gov.au/find-help-for/visa-holders-and-migrants>

89 Senate Standing Committee on Education and Employment, *Questions on Notice, additional estimates 2017-17, Department of Employment Questions no. EMSQ17- 001520.*

because the release of this information would influence the type of information workers provide to the FWO. It appears the FWO is refusing to provide this information over concerns exploited migrant workers may use the information to avoid the immediate cancellation of their visa.

The FWO referral form for processing personal details of migrant workers, provides DHA with information on: the visa the worker holds; the assistance the worker is providing the FWO; the likelihood of the case leading to an enforcement outcome against an employer; and if the worker's expectations have been managed regarding the referral process. At 24 March 2017, the FWO had made 13 referrals to DHA including 11 individuals in matters related to 7-Eleven franchises. This scenario causes a significant issue whereby migrant workers exposed to workplace exploitation are seeking assistance from the FWO who is potentially at the same time reporting them to DHA for visa breaches and possible deportation. An immediate firewall should be established between FWO and DHA to prohibit the sharing of personal data of temporary migrant workers and to prevent deportation of workers prior to their complaints being dealt with. In circumstances where DHA has independent information about the worker's visa status and is considering visa cancellation and/or deportation, the FWO should be able to, with the worker's knowledge and permission, make representations to DHA on their behalf about their circumstances and why they should be able to remain in the country.

 **Recommendation 20:** Reform the visa system to address the systemic exploitation of workers on temporary visas, including the following measures: a deportation amnesty for visa holders who experience workplace exploitation where reporting it could result in cancellation of their visa; remove the requirement for 417 (working holiday) visa holders to undertake 88 days farm work to obtain a second year visa and extend the period they can remain with the same employer to 12 months; remove the 40 hour a fortnight working restriction for international students; establish a complete firewall between the Fair Work Ombudsman and the Department of Home Affairs regarding visa status and prohibit sharing the personal data of temporary migrant workers; allow a grace period for the life of the visa for Temporary Skill Shortage visa holders who have been subject to workplace exploitation to find a new sponsor; and create a new category of visa that allows victims of workplace exploitation to stay in Australia whilst they are cooperating with investigations or court cases.

3.3.3 PEOPLE IN INSECURE WORK

An Australian study noted that the vulnerability of employees is particularly linked to the lack of security in a job, as well as being influenced by their age, sector and background.⁹⁰ Insecure work arrangements, such as casual work, labour hire and contracting arrangements and the gig economy, are associated with higher levels of workplace exploitation, including

⁹⁰ Good L, and Cooper R (2016) 'But It's Your Job To Be Friendly': Employees Coping With and Contesting Sexual Harassment from Customers in the Service Sector Gender, Work and Organization, 23 (5), 447-469.

sexual harassment. People who raise complaints under such arrangements are vulnerable to losing their jobs and/or not receiving any more shifts or further contracts, and in the case of gig economy workers, being removed from the app and therefore restricted from performing work.

Over 40% of the Australian workforce is employed in precarious or insecure employment.⁹¹ Women are overrepresented in insecure and casual work.⁹² Casual employment is particularly widespread in retail and hospitality, where the majority of employees are young women. AHRC data shows that the group most at risk of sexual harassment at work are young people aged between 18-29.

The rise of the gig economy is of considerable concern and creates new sexual harassment risks. These workers are classed as independent contractors which means they are governed by commercial rather than employment law, thus missing out on entitlements to minimum payments and employment safety nets⁹³ such as workers compensation. This is despite the fact that most gig economy workers are highly dependent on the companies running the app for how their work is performed. For example, workers are dependent on ratings within the app for work; the company maintains the right to remove workers and thus restrict their ability to work (including for low ratings, cancelling jobs or speaking out against the company); and some companies provide equipment, interview and screen workers, provide training, arrange a roster of shifts and place time limits on the completion of work.⁹⁴

In 2018 the Transport Workers Union of Australia (TWU) surveyed over 1,100 rideshare drivers about their experiences at work. It was found that 6% of the 969 cases of harassment and/or assaults reported were sexual assault.⁹⁵

Many of the workers surveyed were from culturally and linguistically diverse backgrounds and working under student and working holiday visas. When workers are engaged in the gig-economy as independent contractors they have limited bargaining power and no rights under employment law. The additional challenges of temporary visa status and language barriers only further exacerbates the potential for exploitation.

Reforms are needed to industrial laws in order to provide greater job security. Casual workers who have been working on a regular and systematic basis for six consecutive months should have the right to convert to permanent work if they choose. Workers employed under successive rolling fixed term contracts (often over long periods of time) should also have the right to convert to permanent employment. Gig economy workers should be considered to be employees with rights to basic entitlements such as minimum wages, workers' compensation, unfair dismissal and dispute resolution. In addition, the strengthening of work health and safety provisions in relation to sexual harassment as discussed in section

91 ACTU, Australia's Insecure Work Crisis: Fixing it for the Future, 21 May 2018; Report of the Independent Inquiry into Insecure Work in Australia, *Lives on Hold: Unlocking the Potential of the Australian Workforce*, 16 May 2012

92 Annual Wage Review 2016-17 [2017] FWCFB 3500 at [55], [78], [99]

93 House of Representative Standing Committee on Employment, Workplace Relations and Workforce Participation, (2015), 'Making it work: Inquiry into independent contracting and labour hire arrangements', Canberra

94 Unions NSW Submission to the Senate Inquiry into the Future of Work and Workers (20 February 2018).

95 Rideshare Driver Co-Operative ride-share drivers and Transport Workers Union of Australia, *Ride share drivers survey*, 24 October 2018.

3.1.1 would help provide protection to gig economy workers, as companies are obligated to provide a safe and hazard-free workplace.

- **Recommendation 21:** Reform industrial laws to provide greater job security and employment entitlements for people in insecure work, including the option of conversion to permanent work for workers on rolling fixed-term contracts and casual workers who have been working on a regular and systematic basis for six consecutive months; and gig economy workers should be considered to be employees with rights to basic entitlements.

3.4 Protection and Support for People Who Have Experienced Sexual Harassment

3.4.1 WHISTLE-BLOWER PROTECTIONS

Whistle-blower legislation in Australia is very fragmented. Significant inconsistencies exist not only between various pieces of Commonwealth public and private sector whistle-blower legislation, but also across the various pieces of legislation that apply to different parts of the private sector. Therefore, whistle-blowers have very different protections depending on whether they work in the public or private sector, and which piece of legislation they are covered by. These different regimes are very difficult for whistle-blowers to navigate, with differences and gaps in the protections available. As such, the private sector whistle-blower laws have rarely been utilised by whistle-blowers to seek protection or compensation, or by regulators to prosecute offences under them.

The strongest protections are available to workers in the public sector under the Public Interest Disclosure Act 2013 (Cth) (PID Act). These protections are comprehensive and were developed in a unified way and are more widely used than private sector protections. The PID Act protects disclosures regarding Commonwealth criminal and civil offences, contraventions of a Commonwealth, state or territory law, breaches of registered or mandatory professional standards and codes of conduct and a broad range of other matters including maladministration, corruption, abuse of public trust, wastage, or danger to health, safety or the environment.

For workers in the private sector, there has been some protection provided under the Corporations Act 2001 (Cth) (Corps Act) and the Fair Work (Registered Organisations) Act 2009 (Cth) (FWRO Act).

The Corps Act makes it a criminal offence to victimise a whistle-blower or terminate their employment based on the disclosure of certain information. However, the protection offered by the Corps Act is very narrow:

- The protection only applies to contraventions of the Corps Act.
- It protects only current officers, employees, contractors and employees of contractors, and not people who may have had their employment recently terminated.
- Relevant disclosures can only be made to ASIC or the company's auditor, director, secretary or senior manager or a person authorised to receive whistle-blower disclosures.

The FWRO Act gives protection for disclosures regarding Commonwealth criminal and civil offences, and contraventions of the FWRO Act, FW Act or the Competition and Consumer Act 2010 (Cth).

Workers in the private sector can only make protected disclosures about contraventions of particular Acts, none of which include anti-discrimination legislation, and therefore currently have very limited ability to make protected disclosures about sexual harassment.

The Federal Government has just passed new legislation to provide further whistle-blower protections, designed to boost protections for people who speak out about misconduct in the private sector.⁹⁶ The Bill aims to create a single whistleblower protection regime in the Corps Act extending to the corporate, financial and credit sector and introduces a specific whistleblower protection regime for people who expose misconduct in tax affairs. The reforms aim to help protect people who make disclosures about corporate, financial or tax misconduct. There are many positive elements to the bill, including that anonymous disclosures will be allowed, an expansion of the protections and redress available to whistle-blowers who suffer reprisals, and improved access to compensation.

However, the Bill did not implement many of the recommendations made by the Parliamentary Joint Committee on Corporations and Financial Services in September 2017.⁹⁷ These recommendations included:

- Expanding the private sector definition of disclosable conduct to include a breach of any Commonwealth, state or territory law (therefore, workers still have very little ability to make protected disclosures about sexual harassment);
- The introduction of a Whistleblower Protection Authority which would be ‘one stop shop’ to cover both public and private sectors. The Authority would have investigative and oversight powers, and the power to take non-criminal matters to workplace tribunals or courts on behalf of whistleblowers or on its own motion. It would also be able to approve the payment of a wage replacement commensurate to the Whistleblowers salary where they suffered reprisals;
- Protected disclosures would override confidentiality clauses in employment contracts and settlement agreements reached with employers.

Extending whistleblower protections for people who have experienced sexual harassment is essential to protect people who are speaking out, and would have the following benefits:

- Would give people making disclosures (whether victims or bystanders) protection from reprisals and being disadvantaged by making the complaint. This would help to address the all too familiar problem of people who complain of sexual harassment being asked to change shifts, work from home, use their leave entitlements to be absent from work, or being forced out of employment altogether;
- Would enable anonymous disclosures to be made, and provide an alternative to flawed investigation and complaints processes in workplaces;
- Would provide access to compensation where people suffered reprisals, helping to alleviate the often significant financial disadvantage that comes with making a complaint about sexual harassment;
- Would give protection to people making complaints of sexual harassment from being sued for defamation;

96 The Treasury laws Amendment (Enhancing Whistleblower Protections) Bill 2018 passed the House of Representatives on 19 February 2019.

97 Report of the Parliamentary Joint Committee on Corporations and Financial Services on Whistleblower Protections, September 2017.

- Would allow repeat offenders who have used private settlements and confidentiality clauses to silence their victims to be identified.

 **Recommendation 22:** Expand whistleblower protections for workers in the private sector to include a breach of any Commonwealth, State or Territory law; ensure protected disclosures override confidentiality clauses in employment contracts and settlement agreements; develop a single private sector Whistleblower Act, and establish an independent whistleblower protection authority.

3.4.2 AVAILABILITY OF ANONYMOUS REPORTING TOOLS

In addition to the extension of whistleblower protections as outlined above, there should be other avenues for people who have experienced sexual harassment to come forward. With only 17% of people currently making a complaint, it is clear that alternatives to current avenues are required. Online reporting tools are likely the most accessible and non-threatening if they are independent, confidential and allow anonymous reports. Such a tool could allow people to make complaints; provide information about legal and other options; link people to support services; and enable the identification of trends.

Sexual Assault Report Anonymously (SARA) is an example of such a tool that has been developed by South Eastern CASA in Victoria. Their website allows people to report incidents and choose if they would like to be contacted by a sexual assault counsellor. They can also choose to remain anonymous. Anonymous data is provided to police to help identify trends; and people are given the option to make a supported report to the police.

SARA has grown substantially since its inception and is able to provide a safe and supportive space through the use of user-centred and sensitive questions. There are only 21 questions, including a very broad question that asks the person to “tell us what happened” in as much or as little detail as they want. The set up of the survey means that people are often very candid, narratives are immediate and personal, and people tend to disclose things that they haven’t told anyone previously. The questions give the person making the report control as they decide how much and what to disclose.

In contrast, the NSW based option, the Sexual Assault Reporting Option (SARO), is administered by the NSW Police and has 68 questions, some which have up to 30 sub questions. Some of the questions are very invasive and potentially triggering/retraumatising.⁹⁸ The information provided to SARO is kept on the NSW Police database.

A similar reporting tool based on the SARA model should be developed in relation to complaints of sexual harassment. The tool should be independent, confidential and with the ability for the person to remain anonymous if they choose. The tool could serve three broad purposes: as a service to provide advice and support to victims; as evidence that can be used to substantiate complaints in the workplace (thus overcoming some of the evidentiary difficulties associated with proving sexual harassment occurred); and as a way to get statistical information on which organisations have problems and what those problems are. The tool could be made available in multiple languages, via a website and an app, which could make use of artificial intelligence and chat-bots. It could also be made accessible to visually

98 For example, see questions 16-18 and 56-63 on the SARO questionnaire: https://www.police.nsw.gov.au/_data/assets/pdf_file/0009/475794/SARO_Form_200213.pdf

impaired people and people who have limited literacy (for example by providing an ability to record an audio complaint).

Careful consideration would need to be given about where the report would go, what steps could be taken, the confidentiality and privacy of information provided, the ownership and use of data collected; and protocols for referrals to different services and agencies.

 **Recommendation 23:** Establish and fund a national independent and confidential reporting tool for reporting incidents of sexual harassment, available both online and through an app.

3.4.3 – REFORM TO DEFAMATION LAWS

Australia’s restrictive defamation laws have been a prominent and unfortunate feature of the #MeToo movement in Australia. Geoffrey Rush’s defamation action against the Daily Telegraph dragged Australian actor Eryn Jean Norvill into legal proceedings which she had nothing to gain from and after she had made a confidential and informal complaint to Sydney Theatre Company.

Another Australian actor, Yael Stone, was too scared to speak about Geoffrey Rush’s conduct towards her due to Australia’s defamation laws, so chose to be interviewed about the matter in New York.

Craig McLachlan is suing Australian actor Christie Whelan Browne and two media outlets after allegations about his conduct appeared in news stories. Despite the fact that he has been charged by Victoria Police with 10 criminal charges, including 8 counts of indecent assault, he was recently successful in delaying the defamation trial to fight the criminal charges. This means the defendants in the defamation matter will have to wait for a significant period of time before the matter is resolved.

Australia’s defamation laws are some of the most restrictive in the world and are having a chilling effect on people coming forward with sexual harassment complaints. This is an area that many have argued requires reform, including the Senate Select Committee on the Future of Public Interest Journalism. A report published by the Committee in February 2017 noted that Australia’s defamation and libel laws play a significant part in curtailing the efforts of journalists to pursue public interest stories. The report recommended that *“the Commonwealth work with state and territory jurisdictions through the Council of Australian Governments to complete a review of Australian defamation laws, and subsequently develop and implement any recommendations for harmonisation and reform, with a view to promoting appropriate balance between public interest journalism and protection of individuals from reputational harm.”*⁹⁹

A key difference between libel laws in the US and defamation laws in Australia is that in the US the burden of proof is with the person claiming to have been defamed – they must prove that what has been published is false. In addition, public figures who sue for defamation must prove that the publisher acted with reckless disregard of the truth, even if the statements prove false.

However under Australia’s defamation laws, a person only has to complain they have been defamed, and then the onus of proof is on the publisher to prove that what they pub-

⁹⁹ Report of the Senate Select Committee into the Future of Public Interest Journalism, February 2018.

lished is true. This is very difficult in the context of sexual harassment matters, where there is often little supporting evidence and a lack of witnesses.

In the United Kingdom, changes to defamation laws in 2013 included the introduction of a public interest defence for serious journalism. This can be used by publishers as a defence to a defamation action if they can prove that the statement was on a matter of public interest and that they reasonably believed that publishing the statement was in the public interest. They also have to establish that thorough steps were taken to verify the facts. Canada and New Zealand also have a public interest defence.

❖ **Recommendation 24:** Consider reforms to defamation laws across Australia such as placing the legal burden on the person who claims to have been defamed to prove that the allegations are false, rather than the burden being on the publisher to prove that the allegations are true; or introducing a public interest defence for serious journalism.

3.5 Enhanced Requirements and Oversight for Employers

3.5.1 – USING SETTLEMENTS TO DRIVE ORGANISATIONAL CHANGE

Terms of settlement should include measures that require employers to undertake organisational change aimed at preventing future sexual harassment in the workplace – such as adoption or review of policies, and training of staff.¹⁰⁰ This would place greater obligations on employers to change workplace culture and processes and go some way towards generating systemic change out of an individualised complaints process. While this is already occurring in some instances, it should be further encouraged. A model clause could be developed and inserted into standard form settlement agreements used by the FWC, anti-discrimination bodies and courts that deal with sexual harassment complaints, which would lead to these terms becoming more common, but still leave it to the discretion of the parties to choose them. However, whilst employers may agree to policies and organisational change in deeds of settlement, these are not enforceable or monitored by anti-discrimination bodies.¹⁰¹

Therefore, in order for this to be as successful as possible, anti-discrimination bodies such as the AHRC and ADB could be given statutory powers to monitor compliance with settlement terms¹⁰² that seek to change the culture and processes in workplaces. However, it would not necessarily be in the best interest of complainants for these statutory bodies to have powers to monitor compliance with all terms of settlement, particularly confidentiality or non-disclosure terms. An alternative could be to make this a requirement for companies reporting to the Workplace Gender Equality Agency (WGEA) – as part of reporting sexual harassment complaints, they must also report compliance with terms of settlement requiring them to undertake policy changes, education and training.

100 McDonald, P and Charlesworth, S (2013), 'Settlement outcomes in sexual harassment complaints', *Australasian Dispute Resolution Journal*, vol. 24, no. 4, pp. 259-269.

101 *Ibid*.

102 The Advisory, Conciliation and Arbitration Service in the UK has this function, and the Equal Employment Opportunity Commission in the USA also has this function.

- **Recommendation 25:** Template settlement agreements used for sexual harassment complaints should include certain requirements of employers, such as training and education of staff, and development or review of policies.

3.5.2 – ENHANCED REPORTING FOR EMPLOYERS

Requiring companies to formally report sexual harassment complaints and statistics to both their boards and to an external organisation could increase company awareness of sexual harassment and shift workplace cultures.

There is a lack of data regarding sexual harassment and a requirement to report complaints would give a much better idea of how widespread the problem is, and which industries or employers are the most affected by sexual harassment. It would also identify organisations and individuals who are repeat offenders. This transparency would give companies and employers a real incentive to change culture and practice, make their workplaces safer, and give them useful data to act on and guide workplace change.

Current reporting requirements to WGEA (under the Workplace Gender Equality Act 2012) could easily be expanded to include the reporting of sexual harassment complaints and statistics (as well as the existence of any Deeds of settlement), as well as compliance with terms of settlement requiring employers to implement organisational change.

- **Recommendation 26:** Require employers to formally report sexual harassment complaints and statistics, as well as compliance with terms of settlement requiring organisational change, to both their boards and to the Workplace Gender Equality Agency. The reporting requirements should include the existence of any Deeds of settlement.

CONCLUSION

The #MeToo movement has been a powerful wake up call that, despite 30 years of anti-discrimination legislation, sexual harassment remains rife in Australian workplaces. This is largely because the current regulatory framework does nothing to address the underlying causes and drivers of sexual harassment, does not generate systemic solutions, does not require employers to take proactive or preventative action to ensure that sexual harassment does not occur in their workplaces, and does not empower regulators to enforce the law.

The National Inquiry is a rare opportunity to create fundamental change and end sexual harassment in our workplaces. The reforms discussed in this submission will help bring about a paradigm shift in how we view and deal with sexual harassment – from seeing it as a private, interpersonal dispute to be resolved through an individualised complaints process where the worker bears all of the risk, to being understood and recognised as a cultural problem that warrants systemic solutions, positive obligations on employers, strong and effective regulators, and public scrutiny.

