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SUBMISSION TO THE NATIONAL INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES

Submitted by:	Victorian Women Lawyers Association Inc (VWL)
Submitted online:	https://www.humanrights.gov.au/have-your-say-national-inquiry-sexual-harassment-australian-workplaces
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About us

Victorian Women Lawyers (**VWL**) is a voluntary association that promotes and protects the interests of women in the legal profession. Formed in 1996, VWL now has approximately 700 members. VWL provides a network for information exchange, social interaction and continuing education and reform within the legal profession and broader community. VWL has undertaken research into work practices affecting women in the legal profession, and provides protocol and training to effect change.

Details of our publications and submission are available at www.vwl.asn.au under the 'Publications' tab.

Terms of Reference

On 20 June 2018, Australia's Sex Discrimination Commissioner, Kate Jenkins, announced a national inquiry into sexual harassment in Australian workplaces (**National Inquiry**). As well as conducting a national survey of the prevalence, nature and reporting of sexual harassment in Australian workplaces (by sector), the National Inquiry will review and report on:

- 1) online workplace-related sexual and sex-based harassment and the use of technology and social media to perpetrate workplace-related sexual and sex-based harassment;
- 2) the use of technology and social media to identify both alleged victims and perpetrators of workplace-related sexual harassment;
- 3) the drivers of workplace sexual harassment, including whether:
 - a) some individuals are more likely to experience sexual harassment due to particular characteristics including gender, age, sexual orientation, culturally or linguistically diverse background, Aboriginal and/or Torres Strait Islander status or disability;
 - b) some workplace characteristics and practices are more likely to increase the risk of sexual harassment;
- 4) the current legal framework with respect to sexual harassment;
- 5) existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally
- 6) the impacts on individuals and business of sexual harassment, such as mental health, and the economic impacts such as workers compensation claims, employee turnover and absenteeism; and
- 7) recommendations to address sexual harassment in Australian workplaces.

Overview of sexual harassment in the workplace

In Australia, like many other countries, sexual harassment is far too common. In 2018, a National Survey conducted for the Australian Human Rights Commission (**AHRC**) (**AHRC 2018 Survey**) found that 85% of women and 56% of men have experienced sexual



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harassment in their lifetime.¹ 39% of women and 26% of men have experienced sexual harassment in the workplace in the last five years.² The survey also found that four out of five harassers in the workplace are men.³

The higher representation of women as victims of sexual harassment, and the significantly higher likelihood that a perpetrator will be a man, demonstrates that sexual harassment in the workplace is part of the broader issue of inequality between men and women in the workplace. According to the Workplace Gender Equality Agency (WGEA), Australia's gender pay gap is 21.3%. For women in professional, scientific and technical services (which includes the legal industry), there is a 23.7% gender pay gap.⁴ In regards to larger companies, just one quarter of executives and 10% of CEOs are women.⁵ At leading law firms in Australia, around 75% of partners are male.⁶ This is despite the fact that women have made up more than 50% of law graduates for quite some time.⁷

Sexual harassment in the workplace can involve power imbalances between the perpetrator and the victim, and an abuse of power (usually by men). High profile examples of this include the allegations against actor Craig McLachlan while starring in a stage production of *The Rocky Horror Show*, and the dismissal of a partner in a law firm as a result of sexual harassment and misconduct allegations. It is important to be aware that sexual harassment is usually perpetrated by a co-worker at the same level as the complainant.⁸

The majority of people who experience sexual harassment in the workplace do not formally report their experience or seek support or advice.⁹ Concerns for victims about speaking out can include fears about being seen to be over-reacting, fears about job security, fear of not being believed or being seen as a "trouble-maker", they may be younger than the perpetrator, and/or be less immediately financially valuable to an organisation. For some women in particular industries – for example surgeons, academics, or those employed in the police force – there may be no alternative employer, and consequently, a sexual harassment claim could even end their career in that industry.

VWL addresses these and further issues arising from the National Inquiry's terms of reference in this submission. VWL also outlines several areas for law reform that should be considered, including:

- 1) creating a positive obligation on employers to put in place measures to eliminate sexual harassment in the workplace;

¹ Australian Human Rights Commission, *Everyone's business: Fourth national survey on sexual harassment in Australian workplaces* (2018) available at: <https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_WORKPLACE_SH_2018.pdf>, p 7.

² Ibid, p 8.

³ Ibid.

⁴ Workplace Gender Equality Agency, *WGEA Data Explorer* available at <<http://data.wgea.gov.au/overview>>

⁵ Business Counsel of Australia, McKinsey & Company, *Workplace Gender Equality, Agency Women in leadership: Lessons from Australian companies leading the way* (November 2017), p 3.

⁶ Edmund Tadros, 'Interactive | Law Partnership Survey - July 2017', *Australian Financial Review* (30 June 2017) available at <<https://www.afr.com/news/glacial-pace-one-third-of-new-law-firm-partners-are-women-20170217-guf6y1>>.

⁷ Katie Walsh, 'Glacial pace: one third of new law firm partners are women' *Australian Financial Review* (20 June 2017) available at <<https://www.afr.com/news/glacial-pace-one-third-of-new-law-firm-partners-are-women-20170217-guf6y1>>.

⁸ Above n 1, p 8.

⁹ Above n 1, p 9.



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- 2) giving bodies such as Victorian Equal Opportunity and Human Rights Commission (**VEOHRC**) or the AHRC powers to investigate whether employers are meeting this obligation;
- 3) abolishing or extending time limits for a victim to make a complaint to VEOHRC and the AHRC;
- 4) enacting a standalone provision within the *Fair Work Act 2009* (Cth) (**the Act**), which relates specifically to sexual harassment within the workplace. This standalone provision could be modelled on the workplace bullying provision added to the Act in 2013; and
- 5) requiring companies to report sexual harassment statistics to an external body such as the AHRC or WGEA.

VWL submits that everyone deserves to be safe at work and in their community. It is time for government, employers and workplaces to firmly address sexual harassment with the aim of abolishing it. Sexual harassment causes significant harm to individuals, workplaces and society. Strong action is needed from government and employers to implement the necessary changes. VWL calls on State, Territory and Federal Governments across Australia to take urgent and coordinated action to implement change.

1. Online workplace-related sexual and sex-based harassment and the use of technology and social media to perpetrate workplace-related sexual and sex-based harassment

Technology has evolved in the workplace as a means of efficiency, productivity and environmental sustainability. However, a bi-product of this technological evolution in the workplace has also seen a new form of sexual harassment take form.

Social media communications, email, text messaging, internet access and mobile phones and phone applications are all forms of technology that can facilitate sexual harassment. Some behaviours determined by the courts to be valid forms of technology and social media sex-based harassment include sending colleagues sexually explicit and pornographic images;¹⁰ and making unwanted phone calls or sending unwanted text messages to colleagues outside of work hours.¹¹

2. The use of technology and social media to identify both alleged victims and perpetrators of workplace-related sexual harassment

While technology and social media are increasingly being used by perpetrators as a medium to carry out sexual harassment, these platforms also provide an opportunity for victims, employers and external dispute resolution bodies to identify and act on instances of workplace-related sexual harassment.

The conduct giving rise to sexual harassment may in some cases be difficult to recognise, due to complex inter-personal relationships as well as cultural, social and hierarchical dynamics existing within the workplace. This is compounded by uncertainties about what the law is and how it applies. For victims, technology can serve as an important source of information about how to identify when sexual harassment has occurred or is occurring and what to do about it. In addition to information readily available on the internet, new types of

¹⁰ *Jay Higgins v Coles Supermarkets Australia Pty Ltd T/A Coles* [2017] FWC 6137

¹¹ *KW v BG Limited, DP & DF* [2009] QADT 7 (21 April 2009)



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technology are being developed to provide more targeted information to potential victims. For example, in the United States and Canada, an app called 'Botler.ai' has been developed which uses artificial intelligence to provide advice and assistance to users. The software works by predicting whether a situation explained by a user qualifies as sexual harassment and which laws may have been violated.¹² This type of technology can help to provide the knowledge and validation a victim needs to make a formal complaint.

Social media is also being used to disseminate information and provide support and encouragement to victims to come forward with their own experiences of sexual harassment. As explained by Sex Discrimination Commissioner Kate Jenkins,

'Technology and online platforms can be powerful tools for women to increase their social connectedness, and improve their economic security and access to information....'

*The #MeToo movement for example, has shown us the power of a collective voice to spotlight the harm of sexual harassment. Social media also helps to amplify the voice of women who are often left behind in public debates.'*¹³

Victims of sexual harassment are also using social media as an alternative to traditional forms of justice, particularly where women are unable or unwilling to pursue other avenues.¹⁴ In these cases, social media is giving victims a voice to condemn their perpetrators, warn future potential victims or highlight deficiencies in the actions taken by their employers or external agencies. This type of 'cyber justice'¹⁵ can be effective in causing significant public embarrassment to the perpetrator and/or the employer and evoke a response from the individuals or organisations concerned. However, these actions can leave victims exposed to personal liability, for example for defamation. As a consequence, while social media can be a powerful method of retribution for victims of sexual harassment, traditional forms of justice must remain viable and accessible to ensure fairness for the victim, perpetrator and employer alike.

Technology can be used by employers to encourage and facilitate reporting of workplace-related sexual harassment and improve complaints handling and internal investigative procedures. New interfaces such as web or phone-based apps can be used to streamline the complaints process and maintain anonymity throughout an investigation, which can serve to encourage victims to come forward. An example of this technology is the 'STOPit' app founded by Australian Todd Schobel, which

'instantly and anonymously connects people with those individuals who can resolve issues. STOPit also equips administrators with a smart, easy backend system which

¹² Erin Winick, 'Victims of Sexual Harassment Have a New Resource: AI', *MIT Technology Review* (6 December 2017) available at <<https://www.technologyreview.com/the-download/609694/victims-of-sexual-harassment-have-a-new-resource-ai/>>.

¹³ Australian Human Rights Commission, 'Technology and workplace sexual harassment' (25 July 2018) available at <<https://www.humanrights.gov.au/news/stories/technology-and-workplace-sexual-harassment-0>>.

¹⁴ For example, as a consequence of a victim feeling as though she does not have enough evidence to make a complaint or pursue litigation, or where the alleged perpetrator has since left the workplace or a significant period of time has elapsed since the alleged misconduct.

¹⁵ Anastasia Powell and Tully O'Neill, 'Cyber justice: how technology is supporting victim-survivors of rape', available at <<http://theconversation.com/cyber-justice-how-technology-is-supporting-victim-survivors-of-rape-56022>>.



*supports anonymous two-way communication and a host of other tools to save time and conduct an effective, efficient investigation.*¹⁶

Language recognition technology can also be used to pick up inappropriate content in emails and other intra-workplace communication systems such as Skype for Business or Lync. These technologies can be effectively used to identify workplace-related sexual harassment, reduce its incidence and minimise the harm suffered by a victim following a complaint being made.

Finally, technology can assist in gathering and recording evidence of sexual harassment. Screenshots of inappropriate comments on social media, text messages, emails and recorded telephone conversations can be used by victims, employers and bystanders to identify perpetrators. Armed with this evidence, a victim may feel more comfortable reporting sexual harassment to his or her employer. This type of evidence is often considered more probative by employers, external bodies and courts in cases concerning sexual harassment compared with oral testimony, which may help to achieve better and fairer outcomes for all parties.

3. The drivers of workplace sexual harassment, including whether:

a) some individuals are more likely to experience sexual harassment due to particular characteristics including gender, age, sexual orientation, culturally or linguistically diverse background, Aboriginal and/or Torres Strait Islander status or disability

As identified in the AHRC 2018 Survey:

- people who identify as LGBTIQ+ are more likely to experience sexual harassment in the workplace compared to straight/heterosexual individuals, as identified in the AHRC 2018 Survey;¹⁷
- Aboriginal and Torres Strait Islander peoples are also more likely to experience workplace sexual harassment compared to all other Australians (53% as opposed to 32%);¹⁸ and
- People with a disability are also more likely to have been sexually harassed in the workplace (44%).¹⁹

With that said, VWL acknowledges that a diverse workforce facilitates innovation and inclusion, encouraging respectful relationships in the workplace.

b) some workplace characteristics and practices are more likely to increase the risk of sexual harassment

Courts have identified workplace practices that are likely to increase the risk of sexual harassment where they are paid for and sponsored by employers including:

- a) after work social events such as Friday night drinks;²⁰

¹⁶ For more information, visit <http://stopitsolutions.com/>. Other Australian examples of web and phone based apps which have been developed in the sexual assault and harassment and domestic violence space include 'iDecide', 'Daisy' and 'SARA'.

¹⁷ Above n 1, p 8.

¹⁸ Ibid.

¹⁹ Ibid.



- b) after parties following events such as end of financial year functions and Christmas events;²¹ and
- c) hotel rooms paid for by employers during conferences where co-workers may continue to socialise in private rooms.²²

The AHRC 2018 Survey found that 18% of sexual harassment in Australian workplaces occurs at work social events, and 26% occur at social areas for employees.²³

In some industries that are dominated by men (e.g. Information Media & Telecommunications (61.6% male), Electricity, Gas, Water and Waste Services (75.2% male) and Mining (83.3% male)²⁴, sexual harassment statistics are higher than average (81%, 47% and 40% respectively).²⁵

Employees are increasingly choosing to work remotely using work phones or laptops for private use as well. This increases access of co-workers to each other, which can lead to unwanted contact, stalking and harassment outside of work.

4. The current legal framework with respect to sexual harassment

Sexual harassment in the workplace is against the law in all Australian jurisdictions at both state/territory and federal levels. Sexual harassment provisions vary between states, the overarching Commonwealth legislation prohibits sexual harassment in the following circumstances:

- by employees, employers, job applicants, contract workers, partners of firms and commission agents;
- in the workplace, including in job selection processes, in volunteering and in unpaid work experience;
- in education, of staff and students by staff or by students aged 16 years or older;
- in granting qualifications (including renewing, conferring, extending, revoking or withdrawing a qualification for a particular occupation);
- in accommodation, including selection for accommodation;
- by the members of a committee of a club or association, against members of that club or association;
- in providing goods or services (harassment of customers by staff) and in receiving goods or services (harassment of staff by customers; and

²⁰ *Gregory v Qantas Airways Limited* [2015] FWC 1154 (27 February 2015); *Gregory v Qantas Ltd* [2015] FWCFB 2599 (24 April, 2015); *Gregory v Qantas Airways Ltd* [2016] FWCFB 2108 (3 May, 2016).

²¹ *Keenan v Leighton Boral Amey NSW Pty Ltd* [2015] FWC 3156.

²² *STU v JKL (Qld) Pty Ltd* [2016] QCAT 505 (6 December 2016); *STU v JKL (Qld) Pty Ltd and Ors* [2017] QCAT 505 (6 December, 2016).

²³ Above n 1, 47.

²⁴ Above n 4.

²⁵ Above n 1, p 58.



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- in services provided by State or Commonwealth government programs.²⁶

The following table outlines the various prohibitions under state and territory legislation:

Legislation	Prohibition	Key provisions
Victoria <i>Equal Opportunity Act 2010 (Vic)</i>	Sexual harassment is prohibited by employers, employees, partners in workplaces, within industrial organisations, adult students or members of staff at educational institutions, provision of goods, services and facilities in clubs and local government under this Act.	Part 6 – Prohibition of Sexual Harassment ss 92 – 102
New South Wales <i>Anti-Discrimination Act 1977 (NSW)</i>	Sexual harassment is prohibited by employees, employers, commission agents, contract workers, employment agencies and employees of employment agencies, adult students or members of staff at educational institutions, provision of goods, services and facilities, in clubs and local government under this Act.	Part 2A ss 22A – 22J
Australian Capital Territory <i>Discrimination Act 1991</i>	Sexual harassment is prohibited by employers, employees, commission agents, contract workers, partners in workplaces, within industrial organisations, adult students or members of staff at educational institutions, provision of goods, services and facilities, in clubs and local government under this Act.	Part 5 – Sexual Harassment ss 58 – 64
Northern Territory <i>Anti-Discrimination Act 1996</i>	Sexual harassment is also prohibited under this Act.	Part 3 – Discrimination Division 2--Prohibited conduct s 22
Queensland <i>Anti-Discrimination Act 1991 (Qld)</i>	Sexual harassment is prohibited under this Act.	Chapter 3 - Sexual Harassment Prohibited by this Act (Complaint) Part 1 - Act's Freedom

²⁶ *Sex Discrimination Act 1984 (Cth)*, see 'Division 3 – Sexual Harassment' and ss 28A – 28L. Please note, the above is not a full list of circumstances covered by Commonwealth legislation – see ss 28A – 28L of the Act.



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		from Sexual Harassment Purpose. ss 117–120
South Australia <i>Equal Opportunity Act 1984 (SA)</i>	Sexual harassment is prohibited by employers, employees, judicial officers, students or members of staff at educational institutions, provision of goods, services and facilities under this Act.	Part 6–Other unlawful acts ss 87 and 93AA
Tasmania <i>Anti-Discrimination Act 1998 (Tas)</i>	Sexual harassment and discrimination on the basis of race, disability, sexual orientation, lawful sexual activity, or religious belief, affiliation or activity are also prohibited under this Act.	Division 2 - Prohibited conduct ss 17, 16 (a) – (j).
Western Australia <i>Equal Opportunity Act 1984 (WA)</i>	Sexual harassment is prohibited by employees, employers, commission agents, contract workers, employment agencies and employees of employment agencies, students or members of staff at educational institutions under this Act.	Part II -- Discrimination on ground of sex, marital status, pregnancy or breast feeding Division 4– Discrimination involving sexual harassment ss 3(b), 25–26

5. Existing measures and good practice being undertaken by employers in preventing and responding to workplace sexual harassment, both domestically and internationally

The existence and effectiveness of measures being undertaken by Australian employers in preventing and responding to incidents of workplace sexual harassment leave room for improvement. They can best be gauged by looking at answers to the AHRC 2018 Survey. According to this survey, a concerning 30% of instances of sexual harassment in Australian workplaces have a duration of more than two years.²⁷ While 48% of women and 37% of men who made a formal report or complaint about workplace sexual harassment reported that the harassment stopped, nearly half reported that this did not result in any changes in the workplace.²⁸

Sex Discrimination Commissioner Kate Jenkins noted that the low rate of victims who made a formal report or complaint in the first place – a mere 17% – suggests that employers must

²⁷ Above n 1, 46.

²⁸ Ibid, 77.



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take steps to prevent and respond to sexual harassment.²⁹ This necessity has even, effectively, been recognised by employers themselves. The employer apologised for failing to prevent an instance of sexual harassment in 20% of cases where a formal complaint was made.³⁰

Recognising that industry-wide there is significant room for improvement, existing measures to prevent and respond to sexual harassment in the workplace should not be disregarded. Nor should the fact that some employers are engaging in good practice.

An example of existing measures and good practice undertaken by employers is the holding of a policy on the prevention and resolution of sexual harassment complaints. An example of such a policy, fittingly, that of the Anti-Discrimination Commission Queensland, which is titled *Discrimination & Sexual Harassment in the Workplace: Prevention & Resolution of Complaints (ADCQ Policy)*. As with many similar policies, this sets out definitions and expectations relating to sexual harassment (and its absence) at the relevant workplace. Importantly, it creates a role for an Equity Contact Officer, whose responsibilities include being a positive role model, raising awareness, advising on policy-related issues, and facilitating the complaints process. The ADCQ Policy then outlines informal and formal complaint resolution processes, possibilities for external redress, and the rights of complainants and respondents throughout these processes. This is one example of an organisational policy, but it is widely known that most government bodies and large private organisations now hold one. The question, in our view, lies in whether such policies are understood, followed, trusted and enforced on a practical level.

Recent reactive measures to sexual harassment allegations by some prominent professional services firms have very publicly illustrated a shift in measures being taken by such institutions, and suggest that organisational policies are being followed in practice. For example, after allegations were made against the managing partner of the Adelaide office of Ernst & Young, its CEO, Tony Johnson, emailed partners and staff outlining his expectations of their behaviour.³¹ Shortly after, the CEO of KPMG Australia issued a statement on his zero-tolerance policy on sexual harassment, following the departure from the firm of South Australian partner Adrian Lanzilli when he was the subject of allegations.³²

In terms of other practical developments, PwC requires employees and partners to disclose relationships between each other to a member of the firm's human capital team.³³ Further, Deloitte has run sessions such as compulsory ethics training on appropriate workplace behaviour, attended by staff and partners.³⁴ Without making a specific comment about Deloitte's ethics training program, VWL wishes to note our concern that ethics and similar training to address inappropriate workplace behaviour can often be conducted as a 'tick the box' exercise. This is particularly true of online training programs, particularly ones that are simple 'quizzes' or 'tests' with multiple choice answers that are very difficult to fail.

The increasing transparency and public recognition by businesses surrounding issues of sexual harassment in Australia is reflected, and perhaps anticipated, by international

²⁹ Ibid, 6.

³⁰ Ibid, 73.

³¹ Edmund Tadros, '#MeToo strikes at consulting firms KPMG, EY, Deloitte and PWC' *Australian Financial Review* (2 March 2018) available at <<https://www.afr.com/business/accounting/metoo-strikes-at-big-four-consulting-firms-20180228-h0ws1e>>.

³² Ibid.

³³ Edmund Tadros, 'CEOs of EY, KPMG forced to remind partners, staff to behave' *Australian Financial Review* (28 February 2018) available at: <<https://www.afr.com/business/accounting/ceos-of-ey-kpmg-forced-to-remind-partners-staff-to-behave-20180228-h0wskq>>.

³⁴ Ibid.

developments. In December 2018, the Financial Times reported the revelation by Deloitte (UK) that it had fired twenty partners for inappropriate behaviour, including bullying and sexual harassment, in the previous four years.³⁵ Deloitte subsequently released the background figures, and was quickly followed by its Big Four counterparts PwC, EY and KPMG.³⁶ These responses are clear and unambiguous signals that employees and markets are demanding change, and CEOs are responding. The existence of legal frameworks to guide and build the momentum for change will, in our submission, be key to ensuring it is systemic and lasting.

6. The impacts on individuals and business of sexual harassment, such as mental health, and the economic impacts such as workers compensation claims, employee turnover and absenteeism

Businesses suffer when their employees are sexually harassed at work. According to the World Economic Forum, one US survey from 1988 estimated the annual loss from sexual harassment of a typical Fortune 500 company with 23,650 employees to be \$US6.7 million.³⁷ It is unfortunate, and indicative of the continuing failure of governments to dedicate resources to this issue, that there is little current research on the equivalent loss (and its particular components and causes) suffered by Australian businesses.³⁸ However, it is almost certain that if a study on the negative impacts of sexual harassment for ASX-listed Australian businesses and their employees were to be conducted today, it would settle on a higher monetary cost than the US study found three decades ago – and that this figure would be compounded, exponentially perhaps, by less quantifiable costs to affected individuals.

Fees for lawyers and settlement payouts makes up an obvious part of the cost of workplace sexual harassment to a business. As an extreme example, American entertainment giant 21st Century Fox paid out \$US45 million in the first quarter of 2017 in settlement of sexual harassment allegations.³⁹

Victims of verbal sexual harassment have reported feeling vulnerable, fearful and powerless, possibly leading to anger, depression, humiliation and mistrust.⁴⁰ According to a report of the European Commission in 1997, which reviewed research on workplace sexual harassment in the 11 northern Member states of the European workplace from the previous decade (the **1997 European Commission Report**), 9% of female Luxembourg employees who were sexually harassed at work complained of resulting nervousness and depression; the same figure for depression in Sweden was 12%.⁴¹ 59% of surveyed harassed employees in the health care sector in the United Kingdom stated that sexual harassment adversely affected their relationship with family and friends.⁴² Given the cultural similarities between Australia and Europe, the 1997 European Commission Report should be taken as a significant guide to the state of affairs in Australia, even considering more than twenty years have passed since it was developed.

³⁵ 'Deloitte helps show the way on harassment', *Financial Times* (16 December 2018) available at <<https://www.ft.com/content/95252f5c-ffa2-11e8-ac00-57a2a826423e>>.

³⁶ *Ibid.*

³⁷ Adam Jezard, 'Why we need to calculate the economic costs of sexual harassment', World Economic Forum (online), 23 October 2017 <<https://www.weforum.org/agenda/2017/10/why-we-need-to-calculate-the-economic-costs-of-sexual-harassment/>>.

³⁸ *Ibid.*

³⁹ Above n 5.

⁴⁰ *Ibid.*

⁴¹ European Commission, *Sexual harassment in the workplace in the European Union*, 1998, 29.

⁴² *Ibid.*



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Sexual harassment frequently has negative consequences on an individual's career, with interrelated effects on the incidence of absenteeism and working conditions in a workplace generally. In the UK, 5% of sexually harassed employees surveyed reported absenteeism or sick leave as a result of their sexual harassment.⁴³ Another study from Norway found that employees who had been sexually harassed at work were ill twice as often as colleagues who had not been harassed.⁴⁴

Impacts extend to morale and an employee's motivation to work. One study in Germany showed that women felt more indifferent about their work as the result of sexual harassment.⁴⁵ This can only further negatively affect a business, and may explain the findings of a UK study that 11% of harassed employees indicated a decrease in productivity following sexual harassment at work.⁴⁶

Backing up these findings, a 2018 European Parliament Report found that the organisational costs of bullying and sexual harassment are 'very considerable', if hard to define.⁴⁷ The report cited studies from 2007, 2012 and 2016, showing that longitudinal research measuring the impact of sexual harassment over time has linked sexual harassment directly with negative outcomes, and that physical and mental ill health and job withdrawal are clear examples.⁴⁸

In the Australian context, the AHRC 2018 Survey found that 36% workers who were sexually harassed felt that the harassment negatively impacted on their mental health or caused them stress. 25% said that it negatively impacted on their employment, career or work.⁴⁹

7. Recommendations to address sexual harassment in Australian workplaces

Recommendation 1: Positive obligations on employers

VWL recommends that the National Inquiry consider creating strong and clearer positive legal duties on employers to prevent sexual harassment in the workplace.

Employers could be required to consider the drivers of sexual harassment and to put measures in place to address them. This includes recognising that some people are more vulnerable to sexual harassment and having specific measures in place to address this. The following steps may ensure positive obligations are met by employers in order to prevent sexual harassment including:

- Removing barriers - where additional barriers to reporting may exist such as for junior staff or those with less influence in the organisational culture. This may include putting in place transparent policies regarding how complaints will be treated;
- Bystander role – promoting bystander responses and developing workplace tools for intervention and reporting that include encouraging outside parties to speak up when they hear or see inappropriate sexual behaviour;

⁴³ Ibid, 30.

⁴⁴ Ibid, 30.

⁴⁵ Ibid, 31.

⁴⁶ Ibid, 30.

⁴⁷ 2018 study p 28

⁴⁸ Policy Department for Citizens' Rights and Constitutional Affairs, *Bullying and sexual harassment at the workplace, in public spaces, and in political life in the EU*, March 2018, 31-32.

⁴⁹ Ibid, 54.



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- Implementing zero policy strategies that does not allow or ignore behaviours that devalue the role of women in the workplace as well as setting expectations for appropriate workplace behaviour;
- Regularly conducting review of workplace policies to see how it is meeting its positive duty;
- Reviewing the makeup of the workplace including gender balance at certain levels within the organisation, staff turnover and the formal policies, programs and practices within the organisation; and
- Implementing clear action plans and communication to all staff to ensure employees are aware of the complaints process and its accessibility.

Recommendation 2: VEOHRC/AHRC given power to investigate organisations to determine whether this obligation has been breached

Currently, the Sex Discrimination Commissioner only has powers to investigate Australian workplaces when a complaint of sexual harassment has been made under the Sex Discrimination Act 1984 (Cth).⁵⁰ Similarly, VEOHRC may only investigate organisations where there are reasonable grounds to suspect a contravention of the *Equal Opportunity Act 2010* (Vic), and where various other criteria apply.⁵¹

In the EU some frameworks exist to require employers to prevent and respond to workplace sexual harassment. The OSH 'Framework Directive' (Council Directive 89/391/EEC) of 1989 requires employers to take steps such as evaluating all risks to its workers' safety and health, and 'implement measures which assure an improvement in the level of protection afforded' to them.⁵² Enforcement of the Framework Directive is undertaken at a higher level by the European Commission, which institutes infringement proceedings on Member States that have incorrectly transposed the Directive into their national law. At a workplace level, responsive enforcement of the obligation varies between Member States. Whether and how the relevant enforcement Occupational Health and Safety (OHS) enforcement agencies look into prevention and responses to workplace sexual harassment depends on the particular Member State.

In light of the low levels of workplace prevention and responsiveness in relation to sexual harassment in Australia as at August 2018, as outlined above, there is clear value in granting power to an independent body such as the VEOHRC or AHRC to investigate organisations and determine whether they have been meeting their positive obligations.

The huge cost of sexual harassment on an individual and business-wide level only highlights the importance of enforcing the positive obligations in a serious and effective way that sends a strong institutional and cultural message.

Granting VEOHRC, AHRC or another independent body the power to investigate whether organisations are adhering to their positive obligations will hasten the cultural shift necessary to ensure that employers take preventative and responsive measures as required.

⁵⁰ See, *Australian Human Rights Commission Act 1986* (Cth), s 11; *Sex Discrimination Act 1984* (Cth), s 48.

⁵¹ S 127.

⁵² Directive 89/391/EEC – OSH 'Framework Directive', 12 June 1989.

Recommendation 3: Abolish/extend time limits for victims to make complaints to VEOHRC and AHRC

While there is no specific time limit within which a complaint of sexual harassment must be made to the AHRC or VEOHRC, each has discretion to terminate a complaint or discontinue providing dispute resolution services where the complaint is made outside a certain timeframe.

The AHRC may terminate a complaint on the ground that it was lodged more than 6 months after the alleged acts, omissions or practices took place.⁵³ This timeframe was reduced from 12 months in 2017.⁵⁴ In Victoria, the VEOHRC may decline to provide dispute resolution on the basis that the alleged contravention occurred more than 12 months before the complaint was brought.⁵⁵ A 12-month timeframe is generally consistent with the position in other Australian states and territories, save for the Australian Capital Territory which allows 2 years from the circumstances giving rise to the complaint before the complaint may be closed.

According to the AHRC's statistics, in the 2017-2018 year no complaints made under the *Sex Discrimination Act 1984* (Cth) were terminated on the ground that they were more than 6 or 12 months old, compared with two complaints being terminated in the 2016-2017 year for that reason.⁵⁶ While this is a very small number of complaints overall, it is not clear how many complaints were actually made outside the 6 or 12 month timeframe, and therefore whether this number reflects the fact that very few complaints are terminated on this basis or that only a very small number of historical complaints are made

There are a number of reasons why the legislative regimes imposing timeframes for making a complaint to the AHRC or VEOHRC are unduly restrictive:

- First, cases of sexual harassment are often historical, as victims feel unable to come forward at the time of, or soon after, the alleged conduct occurs. Delays in making complaints stem from victims' fears about not being believed, ongoing trauma or harm, uncertainty as to whether the conduct qualifies as sexual harassment, embarrassment and/or the anxiety associated with the impact a complaint may have on employment or career prospects. It therefore takes time and often new and secure employment before a victim chooses to come forward. A 6 or 12 month timeframe is a very short period in which a victim must overcome these factors, investigate the options he or she has available and make a formal complaint.
- Second, the AHRC and VEOHRC's wide discretion in deciding whether to terminate or discontinue a complaint may deter victims of historical complaints coming forward. A victim is likely to be concerned about the possible adverse consequences on his or her employment if their complaint is terminated or discontinued, which may exacerbate anxieties about not being believed. This issue may be compounded by the lack of legislative guidance about what considerations the AHRC or VEOHRC will take into account when making a decision about whether to terminate or discontinue a complaint made outside the statutory timeframe.
- Third, the alternative to making a complaint to the AHRC or VEOHRC is to commence legal proceedings in the relevant Federal or State court. As with all litigation, pursuing a

⁵³ *Australian Human Rights Commission Act 1986* (Cth), s 46PH(1)(b)

⁵⁴ By the *Human Rights Legislation Amendment Bill 2017* (Cth). Decisions of the AHRC to terminate a complaint on this basis are reviewable by the Administrative Review Tribunal.

⁵⁵ *Equal Opportunity Act 2010* (Vic), s 116.

⁵⁶ AHRC 2017-2018 Complaint statistics, page 17; AHRC 2016-2017 Complaint statistics, page 18.



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claim through the courts is a long, costly, emotionally draining, public, complex and highly uncertain option, which may ultimately cause further harm to the victim. Initiating legal proceedings in the Federal jurisdiction has also become more difficult as a consequence of the 2017 amendments. Under the amended legislation, if a complaint has been terminated by the AHRC, an application to the Federal Court or Federal Circuit Court of Australia can now only be made if the court first grants leave for the complainant to do so, unless the complaint is terminated on one of two very limited grounds.⁵⁷

- Fourth, terminating or discontinuing a complaint on the basis that it is older than 6 or 12 months may mean that a perpetrator has an opportunity to continue harming the victim or harm new victims, because no action is taken to prevent this conduct from occurring. This outcome conflicts with the public interest in bringing perpetrators of sexual harassment to account and protecting the community.
- Fifth, the increased social and cultural awareness of workplace-related sexual harassment stemming from the #MeToo and #TimesUp movements may lead to more victims choosing to make complaints about historical cases of sexual harassment. There is a risk that because of the growing number of complaints, the AHRC and VEOHRC may be less likely to investigate these cases in an effort to control resources.

On the other hand, it must be acknowledged that the longer the duration of time between the alleged sexual harassment and the complaint, the more difficult it becomes to investigate and receive contemporaneous accounts of the circumstances giving rise to the conduct. This may unfairly prejudice either or both the victim and the perpetrator, and undermine the ability to obtain a fair and just outcome. Moreover, the ability of the AHRC and VEOHRC to efficiently and effectively deal with complaints, manage its case flows and protect its resources against unmeritorious complaints may support the imposition of a reasonable timeframe to encourage the making of timely complaints.

It is recommended that:

1. The timeframe for bringing a complaint to the AHRC and VEOHRC be extended to either 3 years, in line with statutory time limitations for personal injuries claims, or 6 years, in line with statutory time limitations for tortious claims.
2. In the alternative, the *Australian Human Rights Commission Act 1986* (Cth) and the *Equal Opportunity Act 2010* (Vic) be amended to provide a clear and definitive list of matters the AHRC and VEOHRC must take into account when deciding whether to terminate or discontinue a complaint on the basis that the complaint was made more than 6 or 12 months after the alleged conduct.
3. On application by a complainant, the decision of the AHRC or VEOHRC to terminate or discontinue a complaint be subject to internal review by another decision maker within the organisation.

Recommendation 4: A standalone provision in the Fair Work Act 2009 (Cth) that specifically addresses sexual harassment in the workplace

Some commentators have suggested that the Fair Work Act should be amended to include a sexual harassment jurisdiction, which would operate in a similar manner to the workplace

⁵⁷ *Australian Human Rights Commission Act 1986* (Cth) s 46PO. The grounds being that (1) the subject matter of the complaint involves an issue of public importance that should be considered by the courts or (2) there is no reasonable prospect of the matter being settled by conciliation.



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bullying provisions which were introduced in 2013.⁵⁸ VWL supports this proposition on the basis that there is a need for a swifter, more responsive mechanism to address workplace sexual harassment.

In summary, the workplace bullying provisions of the Fair Work Act were introduced to provide employees with an effective, responsive mechanism by which to resolve workplace bullying (**Workplace Bullying Provisions**). The provisions empowered the Fair Work Commission to make orders to stop bullying, either at a private conference or at a formal hearing. Mediation may also be used where the Commission considers this to be appropriate, sometimes resulting in a written agreement between the parties.

While it is presently possible to make a sexual harassment complaint to the AHRC (or state/territory equivalents) pursuant to anti-discrimination legislation, VWL considers that there are several advantages to introducing sexual harassment specific means of redress into the Fair Work Act.

Firstly, we consider that the workplace bullying provisions are superior to the AHRC dispute resolution process in that their primary focus is providing immediate protection to workers (rather than resolving the complaint through a more lengthy process). The Fair Work Commission is required to commence dealing with an application to stop bullying within 14 days of receipt.⁵⁹ In contrast, the AHRC must 'endeavour' to finish dealing with a complaint within 12 months.⁶⁰ The powers of the Fair Work Commission in determining an application to stop bullying are also much stronger in terms of the immediate relief that can be offered to complainants. The Commission has the power to make any order that it considers appropriate to prevent the worker being bullied,⁶¹ including not just orders that the responsible person stops the behaviour but extending also to orders requiring the employer to monitor the responsible person or provide training to other workers. A failure to comply with an order incurs a significant civil penalty. Conversely, the AHRC does not have the power to determine whether behaviour constitutes unlawful discrimination, and is largely conciliation focused.

VWL submits that this process could be adapted to also respond to sexual harassment complaints. While most employers do have internal complaints procedures, it is clear that, in many cases, employers are ill-equipped to effectively handle complaints of this kind. The AHRC 2018 Survey found that two in five complainants experienced negative consequences as a result of making a formal complaint.⁶² The harassment stopped in less than 50% of cases. It is also clear that there is a need for a swifter process than what the AHRC is presently able to provide – it is uncontroversial that workplace sexual harassment constitutes a significant health and safety risk as well as having negative effects on productivity and workplace culture.

VWL wishes to note the important role that bystanders can play in exacerbating sexual harassment behaviour in the workplace, and how important it is for more bystanders to take action to prevent and address sexual harassment in the workplace. VWL notes the findings in the AHRC survey that sexual harassment was witnessed by another person in 40% of cases but that the majority of bystanders did not take any action. A further advantage of including sexual harassment within the jurisdiction of the Fair Work Commission is that the

⁵⁸ Jenna Price, 'There's one quick way to stop sexual harassment in its tracks', *The Age* (online), 19 October 2018 <<https://www.smh.com.au/national/there-s-one-quick-way-to-stop-sexual-harassment-in-its-tracks-20181018-p50ahj.html>>.

⁵⁹ See *Fair Work Act 2009* (Cth) (**Fair Work Act**) s 789FE.

⁶⁰ *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**) s 46PF.

⁶¹ *Fair Work Act* s 789FF.

⁶² Above n 1, p 9.



Commission has the power to inform itself in any manner considered appropriate, including by ordering witnesses to attend and provide information.⁶³ This may help to address some common impediments to bystanders coming forward, such as a concern that doing so could affect their reputation or career. While broader cultural change is needed to remove the negative stigma attached to reporting the inappropriate behaviour of one's colleagues, it may be that a witness who is compelled to give evidence is less likely to face criticism (compared to one who voluntarily does so).

In the event that the Fair Work Commission is provided with jurisdiction to determine applications to stop sexual harassment, VWL submits that the following matters ought to be taken into account in drafting any legislative change.

a) Appropriately defining 'sexual harassment'

The definition of bullying for the purposes of the workplace bullying provisions may be summarised as 'repeated unreasonable behaviour which creates a risk to health and safety'.

VWL submits that the meaning of 'sexual harassment' should be interpreted broadly in the workplace context and, as appropriate, should capture behaviours that could be considered 'minor' or 'just a joke'. The results of an AHRC survey suggest that there is a lack of understanding as to what sorts of behaviours constitute sexual harassment and it is our submission that the widespread acceptance of low-level sexual or gender based harassment is contributing to a culture which normalises more serious forms. Nearly half of survey respondents who did not report instances of sexual harassment cited the reason as being that other people would think they were overreacting.

Notwithstanding our comments above, VWL supports limiting access to instances of sexual harassment that is 'repeated'. This is because the primary purpose of a sexual harassment jurisdiction would be to provide a mechanism by which complainants could seek immediate relief from ongoing behaviours. One-off instances of inappropriate behaviour that is not ongoing may be more suitable for resolution via the AHRC or state/territory equivalent.

b) Confidentiality

20% of survey respondents who did not report sexual harassment cited 'lack of confidentiality of the complaint process' as a reason for not reporting the behaviour. 16% cited being afraid for their career aspirations. Fair Work Commission decisions are generally public documents and hearings are held in public, except where the Commission resolves otherwise.⁶⁴

VWL submits that, in a culture where complainants (who are predominantly women) still face victimisation, discrimination and other forms of negative treatment as a result of making a complaint, it is necessary to ensure that the identity of the complainant is not published. This is usual in criminal and regulatory proceedings involving sexual misconduct.

In order to balance the rights of the complainant and the respondent, we do not consider it unreasonable to similarly suppress publication of the respondent's identity, except where an order is made as a result of the conduct being proved to the Commission's satisfaction.

c) Representative proceedings

⁶³ See Fair Work Act s 590.

⁶⁴ See s 593 of the Fair Work Act regarding confidential evidence in hearings.



62% of respondents to the AHRC survey who had experienced workplace sexual harassment were aware of others who had been harassed in the same way. Accordingly, VWL submits that consideration should be given as to whether it would be feasible to allow multiple complainants to make a joint application in respect of the same respondent, or at a minimum, to allow multiple proceedings to be joined together where they relate to the same or similar conduct.

Recommendation 5: Mandatory reporting on sexual harassment statistics to an external body such as AHRC or WGEA

VWL is aware that there is limited data publicly available on the issue of sexual harassment in the workplace. Such matters are rarely litigated in a public forum either, and instead, resolved on a without prejudice basis subject to a confidential deed or a non-disclosure agreement (**NDA**).

The pervasive use of confidentiality clauses or NDAs in the settlement of sexual harassment claims is often described as a practice which harms complainants in that it prevents them from speaking out against perpetrators and allows them to continue their behaviour.⁶⁵ The alternative argument, however, is that NDAs benefit complainants by protecting their privacy and providing a strong incentive for the early settlement of a claim, saving legal costs and preventing the complainant from having to publicly relive their experience through a trial.⁶⁶

It ought to be acknowledged that this is a delicate and nuanced issue, in respect of which reasonable minds may differ. However, VWL considers that any practice that assists in concealing the behaviour of repeat-perpetrators is problematic, notwithstanding that NDAs can benefit complainants in some respects.

In circumstances where it is arguable as to whether NDAs benefit or harm complainants and where it may be difficult (albeit not impossible) for the legislature to infringe on the rights of parties to freely agree upon the terms of a private agreement, VWL submits that consideration ought to be given to alternative means of protecting the public from repeat-perpetrators (rather than attempting to ban NDAs outright).

It is submitted that one potential method of addressing this issue is by way of a mandatory reporting regime, similar to those presently existing under anti-corruption legislation. Such a scheme could impose obligations on both public and private employers to report any sexual misconduct complaints to an overarching body, such as the AHRC, WGEA or a new statutory body. This could provide for complaints (subject to NDAs or not) to be reported using de-identified information, but with sufficient detail to allow a regulatory body to monitor the number and kind of complaints. This information could enable the identification of workplaces with an above average number of complaints, which may be indicative of an unaddressed cultural or management issue.

A regulator or overarching body would require the power to refer concerns to other appropriate agencies, such as the AHRC or relevant work health and safety authorities. It is not envisaged that such a body would be empowered to intervene in individual complaints, but that they would focus on identifying and addressing broader patterns and cultural problems where they arise. It is envisaged that this type of scheme would not receive complaints from individuals directly but only via a mandatory reporting process.

⁶⁵ John Manly, 'NDAs allow sexual abuse to fester', *Time* (online) 31 October 2017 < <http://time.com/5003827/non-disclosure-agreements-sexual-assault/>>.

⁶⁶ See, for example, Areva Martin 'How NDAs help some victims come forward against abuse', *Time* (online) 28 November 2017 < <http://time.com/5039246/sexual-harassment-nda/>>.



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Such a regime could go further. This information could also be used, for example, to identify workplaces with low rates of complaints and inform research into safe work practices. Employers would have access to data about their own workplaces, which may empower them to implement measures to improve the rate of complaints.

VWL submits that a scheme of the kind described above may address the disadvantages associated with NDAs while allowing complainants to continue to access the benefits, and that consideration ought to be given as to whether such a scheme would be effective and/or feasible. Finally, VWL submits that due deference should be given to the perspectives of complainants with lived experience of settling sexual harassment claims in relation to this issue.

Conclusion

Sexual harassment is a pervasive issue in Australian workplace that has directly impacted 32% of working Australians over the last 5 years. Sexual harassment is a problem that is deeply entrenched within our society and is inextricably linked to gender inequality, which is ingrained in our social and cultural norms, structures and practices. No industry or profession is immune, including the legal profession. Fortunately, there are important steps that can be taken by governments and employers that a large amount of organisations support (see the Joint Statement, 'Urgent Actions Needed to Stop Sexual Harassment at Work'). VWL supports the many voices calling for urgent, strong action to make Australian workplaces safe.