

Federal Sex Discrimination Commissioner
Kate Jenkins
Online submission

Dear Commissioner

National Inquiry into Sexual Harassment in Australian Workplaces

Thank you for the opportunity to make a submission to the National Inquiry into Sexual Harassment in Australian Workplaces.

Background

The Northern Territory Anti-Discrimination Commission (NTADC) administers the Northern Territory *Anti-Discrimination Act 1992* (ADA). We are a very small office charged with eliminating sexual harassment, discrimination and promoting equal opportunity in the Northern Territory (NT). The objectives¹ specifically provide “to eliminate sexual harassment.”

This submission is from both an NT perspective and the role that Anti-Discrimination/Equal Opportunity Commissions can play in the suite of options that aim ultimately for prevention, but in the interim provide remedies, solutions and options for individuals and organisations seeking to address this issue.

Our submission is divided as follows:

- What works well
- Sexual harassment in NT
- Issues for further consideration

¹ Section 3 *Anti-Discrimination Act 1992*

What Works Well

Preventing sexual harassment in the workplace requires a suite of options. Below are options that in our experience can be effective options to prevent sexual harassment and should remain part of any comprehensive approach to preventing sexual harassment.

Organisation Fundamentals:

Organisations should have specific sexual harassment policies supported by relevant effective training. Policies should be visible, accessible and part of induction for all new employees. They should be live, not passive, documents that inform standards of acceptable behaviour, decision making and general approaches taken by organisations and individuals.

Policies should clearly support bystander intervention, provide alternatives to reporting to the human resources officer and set out a safe and appropriate grievance process for employees who need to complain. Employers should build confidence in their employees that complaining will result in concerns being taken seriously and will not result in adverse action against them – irrespective of the outcome.

Training needs to be effective training and be explicitly about sexual harassment, not general bullying and harassment training, or discrimination training. It should incorporate information about the law, the specific policy, what constitutes sexual harassment and how to be an effective by-stander. It should be accompanied by clear information about the organisation's stand on sexual harassment. Most importantly though, it should be focused on challenging behaviour and workplace culture. Training that is limited to process and information is likely to be of limited value.

While such structures don't guarantee sexual harassment will not occur, they will provide clear guidance to all employees about standards of behaviour and support employees in raising concerns if this standard of behaviour is not met. This is not currently a standard position in NT workplaces.

Confidentiality

Current statutory complaint processes in Australia, including in the NT, require that complaints, including resolution of those complaints, be handled confidentially. This approach has been criticised as protecting individual respondents² and organisations from public scrutiny and exposure, preventing broader public discussion on the issue and transparency around prevalence. Nothing in this submission is intended to detract from these views, but the NTADC is in a position to appreciate the alternative side of this issue.

In our experience confidentiality can and often does contribute positively to redressing sexual harassment for individual complainants, and may provide an opportunity for education and systemic change within organisations. Public exposure of individual complaints at the early stages may and can have adverse impacts for the person complaining and force parties into polarised positions rather than constructive discussion.

In regard to resolution of a complaint, it must be noted that confidentiality is a negotiable part of resolution, it is not required. In our experience however confidentiality is usually a desirable feature of settlement for all parties.

If public disclosure was required for sexual harassment complaints this would potentially create unsafe complaint processes, with the risk that the process could cause more damage than the incident(s) being complained of. We do not see this as being a useful catalyst for change. We believe such a requirement would raise the following risks:

- Reduced settlements. Confidentiality is often a critical leverage to negotiate for resolution. It can give some power back to the complainant in a situation where a power imbalance is likely to exist.

² Respondents are those individual against whom allegations of sexual harassment have been made.

- Create further barriers for individuals considering making a formal complaint. Given the current barriers faced in making individual complaints, particularly in the NT, we do not see this as a positive move.
- For those who do complain, prevent matters settling and require complainants to run their matters to a hearing; a step many complainants would be unlikely to take. Hearings may reinforce inequity as complainants are more likely to be unrepresented or have limited representation against legally represented, better resourced organisations. This is often compounded by the fact that individual respondents are almost always included in the respondent organisation's legal case and representation.³

While public discourse on sexual harassment is essential to change culture and values around prevalence, it is not essential that this occur at the expense of individuals who are courageous enough to bring their stories forward. Suggestions are made later in this submission about some alternative ways of gathering information.

Individual complaint process – conciliation model

The existence of an individual independent complaints model is critical. While not all people who experience sexual harassment will choose to use this model, for those who do it can be an effective option to resolve their concerns.

Many organisations have a human resource department or a complaint team that employees can report sexual harassment to. In our experience employees often do not want to use these mechanisms as they are seen as not independent but as representing employer's interests. What they want is an independent evaluation of the experiences they have had. Statutory discrimination and equal opportunity bodies provide this opportunity. In the NT a critical feature of the NTADC process is that a complaint can be made without the prerequisite that a person has followed an internal process first.

³ A different position maybe put forward if there were greater resources to support complainants through the lifecycle of a complaint. This is not the current landscape in which complaints operate. If a decision were made to remove confidentiality it would be essential that this resourcing issue were addressed, so further power imbalance did not occur.

It is critical that a conciliation option attaches to the complaint process. The value of this process is the opportunity for people to tell their story – either to their employer or to the offending individual. This can be a really powerful, insightful and educative experience for all parties. It is an important part of the complainant process which may restore some balance in the employment relationship. It is also an opportunity to seek systemic resolutions that may not as easily be obtained through litigation such as policy development, training and awareness raising strategies.

It is common that complainants choosing to use the NTADC process indicate their motivations as wanting to achieve remedies that contribute to organisational cultural change and to prevent others from having the same experience they have had. Conciliation, rather than litigation is better placed to provide a forum in which this can be discussed and these outcomes be achieved.

Human Resource alternatives

Employees who are experiencing or have experienced sexual harassment in their workplace may feel they cannot report incidents to human resources, for the reasons set out above. Having an alternative reporting avenue may be critical to create the environment of trust for safe reporting by employees about sexual harassment they experience or that they observe in regard to fellow employees.

Employees need to know that their allegations will be taken seriously and they won't be subjected to adverse conduct for raising their concerns. The NTADC has observed through complaints that frequently the greater grievance of employees is not the sexual harassment complained about but the way the organisation responded to their complaint.

Alternative reporting avenues for sexual harassment can be an effective option to redress or minimise this issue for organisation. Roles where key people, who are well regarded by all employees in the organisation are trained and made available to employees so they can raise their concerns. The employee may then support that person in resolving their issue, which may include being an intermediary with the employer or managers to help find a satisfactory resolution.

Federal Data

Due to the population of the NT, current collection of federal data is of significant value to the NT. It enables NT employees to participate anonymously in this collection to help get a picture of the extent of the issue. This has been a valuable advocacy tool.

Sexual Harassment in the Northern Territory

Fluctuation in complaints in this area

Sexual harassment complaints received by the NTADC fluctuate in number. Consistent over the years though is that the number of formal complaints received is low compared to the number of stories shared. Stories are shared with the NTADC through enquiries, training, public consultation, community engagements or other public events.

Also of note is that despite the prevalence of sexual harassment in the western world due to the #MeToo movement, no change in sexual harassment complaints was seen in the NT. We believe the reason for the low level of formal complaint is because of the small population size of the NT and the risks associated with speaking up in a small community. Common concerns raised by individuals include fear of repercussions such as job loss or not being able to continue working in the NT. It is not uncommon that formal complaints lodged are made after someone has left their role or after they have left the NT. This is particularly true for employees that work in specialised areas where there is no viable alternative work option in the NT. For many employees, especially those with cultural links, children and financial commitments in the NT, leaving is not a realistic option. This is likely to be particularly true for Aboriginal employees for whom the NT is their country and where they have familial ties.

Other observed reasons are:

1. Employees don't realise that what they are experiencing is sexual harassment.
2. A tolerance developed for sexualised behaviour in the workplace and a passive acceptance of this behaviour.

A further barrier to complaint in the NT is remoteness. Many Territorians reside outside the major centres. Access to regular information, advice and complaints processes can be difficult. Timely complaints processes can also be difficult from remote areas. In relation to sexual harassment, timely resolution of matters is of utmost importance due to the stress such complaints can have on all parties.

While we did not see an increase in formal complaints as a result of the #MeToo movement what we did see was an increased preparedness for people to tell us their story, including high school students, lawyers and public servants. This confirmed what we already suspected, that sexual harassment is a pervasive issue in the NT.

Stories we hear – the Themes

Due to confidentiality and the size of the NT we are unable to share specific stories but we can share themes that we hear. Of note is the prevalence of sexual harassment in traditional male industries or professions. Views in the NT persist of the NT being an outpost that celebrates a blokey culture. Unacceptable behaviour is often justified with humour and acceptance that this is the outback and people coming here should just accept this behaviour.

Also of concern in the NT is that in workplaces employees and employers often know who the problematic employees are. However nobody ever addresses the issue or calls out the behaviour, people choose to work around it. Stories have been shared with the NTADC that demonstrate female employees in small communities may have strong networks that seek to protect other female employees. This may include warning them not to socialise with certain individuals, suggesting other protective behaviour or warning them from working with a particular organisation to avoid an individual.

Another observation is that stories may reveal a history of what we have framed “try on” behaviour. This is where a complainant’s story indicates early behaviour that hinted at a problem but they felt it was not significant enough to raise. This behaviour then escalates to a point in which it is a problem that can no longer be ignored.

Anecdotally we observe that it is also common that once a complaint is made that the person complaining, if they have not left their place of employment will do so within the life of the complaint. The employee against whom the complaint is made, in our experience rarely leaves and in some instances we hear is promoted after a complaint.

We also see that some workplaces see sexual harassment complaints as a nuisance and employers will be quick to discredit the employee complaining. In contrast it is not uncommon that employers are quick to set out the virtues and values of the employee against whom the allegations are raised. Part of this behaviour is likely because of the inextricable link between employers and the employee against whom the allegation is made, as they are both made respondents to the complaint. Employers often assume that defending the employee against whom the allegations are made is in their best interest, rather than supporting the employee complaining. If an employer has in fact taken steps to discharge their vicarious liability, this would not be the case. Research from Harvard University also indicated that organisations who act swiftly, support complainants and take responsibility in a public way will often reverse adverse public opinion of their business to that of pre-complaint⁴.

In regard to formal complaints received, they are mostly from women, and in most cases they are in relation to an employee or manager in a more senior position. Women complainants are mostly younger women.

Legislative Reform in the Northern Territory

The NT Government is currently seeking to modernise the NT *Anti-Discrimination Act 1992*.

These reforms include changes to the sexual harassment laws. Relevant reforms proposed include:

- Removing the requirement to prove an “area.” In relation to complaints about sexual harassment in the workplace this will mean:

⁴ How Sexual Harassment Affects a Company’s Public Image by Margaret Shih, Serena Does and Seval Gundemir; 11 June 2018.

- No longer being required to prove that the sexual harassment happened in connection with work. This is particularly relevant where the incidents occurred outside the physical workplace but by a co-worker or employer.
- It will also assist where the workplace is unclear because of corporate structures or joint venture style working environments.
- Providing that protections in relation to service provision also apply to service providers, enabling those employed in service related areas the right to bring a complaint of sexual harassment against patrons and customers.
- Clarification that volunteer workers are protected.
- Vilification on the basis of sex.

Issues for Further Consideration

In addition to retaining existing options we acknowledge the following issues for further consideration.

Workplace investigations

As stated above, it is an observation of the NTADC that complainants are often more aggrieved by the workplace response to their allegation of sexual harassment than they are about the sexual harassment. A key factor in this is often how the matter was investigated. Examples are where an investigation is conducted internally. This can be viewed as lacking independence or indicating a lack of seriousness by the organisation in relation to the allegations.

It is clear to the NTADC that often investigations reveal a failure to understand the nature of sexual harassment. In particular that techniques applied are those that would be applied to any workplace investigations with no tailoring or consideration to the nuances of this issue. For example using a corroborative evidence framework, which results in an employee being advised by their workplace that no action can be taken because the investigation failed to show any proof that what they said occurred. Such an approach fails to take into

account that it is common that there is no corroborative evidence, due to the nature of the offending alleged. It is also noted that this standard of proof is higher than the standard that would be applied by the NTADC if a formal complaint were made to us.

Other issues observed include asking many staff about the incident, including staff who would have no reason to know anything. This approach discloses personal information about the complainant unnecessarily and may generate a hostile work environment for the person who complained, particularly if the allegations are against someone who is popular in the workplace. Seeking evidence from work colleagues, when an investigation has been requested by a workplace, also assumes that other employees will voluntarily give honest information when they may fear repercussions for doing so.

Investigations may also take into account information that may not ultimately be relevant if a matter was to go to a formal hearing, such as the credit or motives of the person complaining or the person against whom the allegations were made. For example that the person complaining is not well liked or is mentally unwell versus what a great person the respondent is.

Investigations badly handled may result in an employee feeling unsupported and not believed. This can be very distressing for the employee who made the complaint, and may ultimately result in mental health concerns and the employee leaving their place of work.

Consideration should be given to what supports or education is required to assist workplaces and investigators develop the specialised skills required for an investigation in this particular area.

Tools for business

Businesses need to be made aware of tools that exist or could exist to help them develop their organisations. Interactive policy development tools would assist organisations develop policies that work for their particular workplace

and that are framed by relevant laws in their jurisdiction. It is noted that in the NT it is not uncommon for the NTADC to see workplaces' policies being standard stock policies that have been picked up from interstate referencing the wrong law. Workplaces have often obtained this material from Human Resource consultants or as part of franchise, not appreciating its lack of relevance to the NT.

National database

In response to criticism about confidentiality in complaints processes, consideration should be given to developing a national de-identified database that captures settlement outcomes of all sexual harassment complaints. For the NT this would enable our stories and outcomes to be shared without disclosing individuals or entities.

Such a database would support advocates in their work, provide data for researchers and enable a platform for greater public discourse about this issue.

Sexual Harassment Training

The NTADC believes that well designed and targeted training, if provided alongside good workplace policies and leadership can be an effective tool in the suite of options to start changing culture. Further work and research should be undertaken to consider more deeply the effective forms this training should take, including what follow up steps might be required after training to strengthen its reach.

Community engagement with Northern Territory Aboriginal Communities

This submission has not touched on the reach of this issue for Aboriginal Territorians, and this is because we believe they should be approached for their own stories. We are of the view that as part of this inquiry consultation should occur with rural and remote Aboriginal communities to hear their stories and solutions if it has not already occurred.

Awareness raising

Consideration should be given to developing a national awareness raising campaign similar to that of OurWatch's "Doing Nothing Does Harm." Public education and information is a critical way to achieve cultural and attitudinal change in relation to this issue.

Responsibility

We are of the view that any recommendations made should emphasise the responsibility of workplaces to be proactive to prevent sexual harassment rather than a reliance on individual employees to come forward and always share their stories.

In this context NTADC would support reversing the onus of proof in sexual harassment complaints to shift greater responsibility to organisations and potential offenders and the imposition of a positive duty on workplaces. These changes would not only assist complainants in actioning their complaints but would also raise the bar for organisations on a day to day basis, increasing the likelihood that they would seek the cultural change required to address this issue.

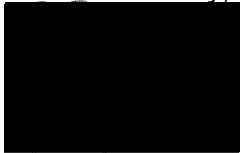
Closing comments

In considering recommendations for this inquiry we believe it is critical that any options are developed with an understanding that at the root of sexual harassment is gender inequality. While inequality between gender in relation to differential pay and career promotion is well understood, there is a developing understanding that inequality is also about the experiences you have while trying to get a job or stay in a job. Sexual harassment creates an unsafe environment, one that prevents employees from performing to their best. What flows from this is the risk that talent is not identified and promotion opportunities are lost or employees leave. Job change can have a fundamental impact on an employee's ability to grow and develop in their occupation of choice. Job change may mean starting over, time and time again, with

implications for promotion, reputation, salary, leave entitlements and superannuation in the long run.

Sexual harassment is about gender equality, it is about safety and it is about ensuring everyone gets a fair go. We appreciate the opportunity to comment on these important and critical issues and welcome any future opportunities for future contribution.

Yours sincerely,



Sally Sievers

Anti-Discrimination Commissioner

Northern Territory Anti-Discrimination Commission

27 February 2019